



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL PETITION NO E001 OF 2021

LYDIA KWAMBOKA MOINDI.....PETITIONER

VERSUS

DPP NYAMIRA COUNTY.....1ST RESPONDENT

SOCIO-NYAMIRA NORTH SUB-COUNTY.....2ND RESPONDENT

THE PRINCIPAL NYAMIRANGA SDA SECONDARY SCHOOL.....3RD RESPONDENT

THE CHAIRMAN BOARD OF MANAGEMENT

NYAMIRANGA SDA SEC SCHOOL.....4TH RESPONDENT

JUDGMENT

1. On 28th August 2021 the Petitioner herein filed a Notice of Motion application dated 16th August 2021 in which she sought that the proceedings in **Nyamira CMCC No 494 of 2020 Republic vs Thomas Ogetti Anunda & Another** be stayed pending the hearing and determination of the Petition herein. She also filed a Petition dated 16th August 2021 on even date.
2. On 13th January 2022, she filed a Supplementary Affidavit that she swore on 23rd December 2021. This was in response to the Respondents' Replying Affidavit of David Mursoy that was sworn on 1st November 2021 and filed on 2nd November 2021 in opposition to the said application. David Mursoy was the Sub-County Criminal Investigations Officer Nyamira North Sub-County.
3. Her contention was that on or about 7th January 2015, she applied and got a job in the accountancy Department of Nyamiranga SDA Secondary School. She underwent training at Menyenya High School where the 3rd Respondent had been a Principal and was trained on how to keep records and prepare the payroll. She averred that during discharge of her duties, the 3rd Respondent directed her to make certain entries which were irregular and/or unlawful causing the books not to tally. She stated that she also brought several anomalies and irregularities to the attention of the 3rd Respondent which eventually culminated in her being accused of improprieties.
4. She added that upon her arrest on 1st June 2020, she was taken to Ekerenyo police station where she recorded her statement. She was later charged with nine (9) counts of offences relating to stealing by clerk, making a document without authority, making a false document, forgery, uttering of false documents and conspiracy to defraud.
5. She averred that at the time she took plea on 2nd June 2020, she was not supplied with either the witness statements or any other document the Prosecution intended to rely on during hearing on 28th October 2020, the Prosecution amended the charge sheet to read ten (10) counts of offences and furnished her with documents.
6. She contended that after going through the documents, she realised that she had not been furnished with crucial documents and the statement that she had recorded at the police station to enable her adequately prepare for the hearing and her defence. She submitted that the 3rd Respondent never gave her access to those crucial and necessary documents while at work.
7. It was her averment that on 15th December 2020, she listed the documents she wanted to be supplied with, and copied to the 1st Respondent herein and the Investigator but that despite reminders and arrangements to get copies of the documents at her expense, she had not been supplied with the same.

8. She added that she filed **Petition No 11 of 2021** before the Chief Magistrate's Court but that on 11th May 2021, the 3rd Respondent herein prepared an inventory of documents which he was supposed to supply to her but again failed to supply her with the same. She was categorical that her rights were protected by the Constitution of Kenya and that this court was under a constitutional obligation to uphold and enforce the said rights.

9. She sought an order of declaration that she was entitled to be supplied with the afore-listed documents, an order that she was entitled to a fair hearing in **Nyamira Chief Magistrate's Court Criminal Case number 494 of 2020** by getting ample and sufficient time to go through the supplied documents to prepare for hearing, an order compelling the 3rd Respondent to supply her with copies of all the requested documents either at the 3rd Respondent's costs or her cost within a period of fourteen (14) days after delivery of the ruling/ judgment herein.

10. In the alternative, she sought an order directing the 3rd and 4th Respondents to bring to this honourable court the requested original documents and the same to be photocopied at her cost by this Court's administrator in her and their presence.

11. In its aforementioned Replying Affidavit, the 2nd Respondent argued that before preferring the charges against the Petitioner, thorough investigation of the documents to support its case was undertaken and that she was supplied with all the documents she had demanded. It added that it did not intend to rely on any other document apart from the ones on record and had already supplied to the Petitioner.

12. The 2nd Respondent stated that she was issued with receipts which she selected a few and returned the rest. It was emphatic that her intention was to delay the criminal case before the Trial Court.

13. It also stated that the Petition herein lacked merit as it did not state or specify the unsupplied documents. It contended that the Petitioner's Supporting Affidavit was a smear and slander on the person of the 3rd Respondent.

LEGAL ANALYSIS

14. Taking into consideration the Petition, the Supplementary Affidavit filed in support of the Petition, the Replying Affidavit and the Petitioner's submissions, this court found that the question that had been placed before it for determination was whether or not the Petitioner's right to fair hearing had been violated by the Respondents herein.

15. Right out at the outset, this court observed that the Petition did not meet the threshold set out in the case of **Anarita Karimi Njeru v Republic [1979] eKLR** where it was held that a petitioner alleging violation of constitutional rights must set out with precision the particulars of the alleged violation. Notably, this issue was not raised by the Respondents.

16. This court perused the Petition herein and noted that save for citing *Articles 25 (c) and 50 (1) (2) (a) to (q), 3 and (4) of the Constitution of Kenya 2010*, Section 12 of the Criminal Procedure Code and Section 3(1) of the Judicature Act, the Petitioner did not explicitly indicate how those provisions were violated.

17. In the case of **County Government of Garissa & another v Idriss Aden Mukhtar & 2 others [2020] eKLR**, the Court of Appeal reiterated the holding in the case of **Anarita Karimi Njeru vs Republic [1979] eKLR** that it was imperative that a person seeking redress on a matter of reference to the Constitution set out the constitutional provisions said to be infringed and the manner in which they are alleged to be infringed.

18. Having said so, this court had due regard to the case of **Grace Wambui Gichuhi vs County Government of Kirinyaga & 2 others [2018] eKLR** where it was held that no prejudice had been occasioned to the respondents therein by the lack of precise pleadings as they had responded to the said petition therein.

19. This court also had due regard to the provision of Article 22 (3) (b) of the Constitution of Kenya, 2010 which provides that:

“Formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the Court shall, if necessary, entertain proceedings on the basis of informal documentation”

20. Reading the said provision together with Article 159 (2) (d) of the Constitution of Kenya which mandates courts to administer justice without undue regard to procedural technicalities and noting that the overriding objectives of the court is to do justice to the parties, this court, while reminding parties and their counsel about the need to adhere to set out procedures, nonetheless proceeded to consider this Petition on its merits as to do otherwise would result in an injustice to the Petitioner who had been pursuing her rights both in the Trial Court and before this court.

21. Article 50 (2) (j) of the Constitution of Kenya provides for the right of the accused person to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence while sub-article (c) provides for the right of the accused to have adequate time and facilities to prepare his defence.

22. The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person. It is guaranteed under Article 14 of the International Covenant on Civil and Political Rights (ICCPR). The fundamental importance of this right is illustrated by the fact that under Article 25 (c) of the Constitution of Kenya, it is among the fundamental rights and freedoms that may not be limited.

23. While court must be careful not to assist a party that is on a fishing expedition, it must be ready to ensure that all parties are given the full

opportunity to present their cases. The Petitioner herein contended that there were several irregularities that occurred in the books which she wished to rely upon to demonstrate that she was not guilty of the charges that had been preferred against her.

24. This court agreed with her that fair trial was a non-derogable right and that it was the duty of the court to ensure that fairness was not hampered or threatened in any manner as was decreed in the Dakar Declaration and Recommendation on the Right to a fair trial in Africa and the Indian case of Natasha Singh vs CBI(2013)5 SCC 741 as cited in Machakos High Court Petition No, 8, the Indian case of Rattiram vs State of MP(2012) 4SCC 516 and Zahara Habibullah Sheikh & Another vs State of Gujarat & Others AIR 2006 SC 1367.

25. In the case of Director of Public Prosecutions vs Samuel Obudo Otieno & 6 others [2017] eKLR, it was held that it was the duty of the prosecution to disclose evidence which was not favourable to it in a case. In the case of Thomas Patrick Gilbert Cholmondeley v Republic Criminal Appeal No 116 of 2007 [2008] eKLR, the Court of Appeal held that if for any reason the prosecution thought it ought not to disclose any piece of evidence in its possession such as on the basis of public interest immunity, it had to put its case before the trial court which who would then decide whether the claim by the prosecution not to disclose was or was not justified.

26. This court noted that the issue of the unavailability of the subject documents was not raised at all during the criminal proceedings before the Trial Court. Further, the Respondents did not plead that some or all of the subject documents could not be availed.

27. Notably, the Petitioner outlined documents which she wanted to be furnished with by the 1st Respondent herein. In her Petition, a perusal of the Trial Court's proceedings annexed in her Supplementary Affidavit showed that on 2nd June 2020, the Prosecution promised to avail to her, witness statements and documents. This was not done as at the next mention date of 29th July 2020 and/or even after the matter was mentioned in court several times. The Prosecution did not also explain why her request for supply of specific documents could not be met.

28. As the Prosecution had not demonstrated that the documentation the Petitioner wanted could not be traced to enable her prove her case, it was important that the same be furnished to her to enable her prepare her defence.

DISPOSITION

29. For the foregoing reasons, the upshot of this Court's decision was that the Petitioner's Petition filed on 28th August 2021 and dated 16th August 2021 was merited and was hereby allowed in the following terms:-

- a. That the Petitioner be and is hereby entitled to be supplied with the documents listed in Prayer No (a) (1) (i)-(iv) – (14) in the Petition herein**
- b. The Respondents do supply the Petitioner with the documents listed in Prayer No (a) (1) (i)-(iv) – (14) in the Petition herein within fourteen (14) days from the date of this Judgment and the same to be supplied at her own cost.**
- c. Each party will bear its own costs of this Petition.**

30. It is so ordered.

DATED AND DELIVERED AT NYAMIRA THIS 4TH DAY OF APRIL 2022

J. KAMAU

JUDGE