Lugo v Director of Public Prosecutions (Petition 62 of 2020) [2022] KEHC 10574 (KLR) (27 May 2022) (Judgment)

Neutral citation: [2022] KEHC 10574 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

PETITION 62 OF 2020

JM MATIVO, J

MAY 27, 2022

BETWEEN

MWAVUO LUGO .... PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS .... RESPONDENT

JUDGMENT

1. In his amended grounds of Petition filed in court on 25th March 2022, the Petitioner states that he was charged with the offence of causing grievous harm contrary to section 234 of the Penal Code and disobeying a lawful order contrary to section 131 of the *Penal Code*. He states that he pleaded guilty to count one but the second count was withdrawn under section 87(a) of the *Criminal Procedure Code*. He avers that he entered a plea of guilty after attending court 7 times for mention (between 11th December 2017 and 8th February 2018) and he was sentenced to serve 30 years imprisonment on 26th February 2018

2. The Petitioner has approached this court citing breach of Article 50(2) (h) (q) of *the Constitution*. These provisions guarantee the right to be provided with an advocate and the right to appeal to or for review by a higher court. He also claims that his plea of guilty was unequivocal. He argues that the plea was not taken as laid down in *Adan v Republic*[1] and *Kimani v Republic*.[2] He also challenges the manner the proceedings were recorded. He urges this court to find that hi rights to a fair trial were violatesd, that the conviction ws un-procedural and illegal.

3. The Respondents submissions filed on 27th July 2020 addressed the original Petition which was amended on 21st March 2022. They do not relate to the amended Petition, so, it will add no value to consider them here.

1 [1973} E. A.

2 Criminal Appeal No. 151 of 2004, Nakuru.

4. It's not clear whether the Petitioner appealed and if he did, he did not disclose it in this Petition. But two things are clear from his Petition. One, he has not brought his Petition under Article 50 (6) of *the Constitution* which permits the court to entertain a Petition subject to the limitations prescribed under the said Article. The mere invocation of Article 50 (h) (k) does not confer this court with power to re-open the trial. On this ground alone, this Petition collapses because none of the ground cited under the said Article has been invoked to confer this court with power to re-open his trial.

5. Two, and more significantly, the Petitioners arguments are simply grounds of appeal as opposed to constitutional questions. The question whether or not the plea of guilty was equivocal or unequivocal is not a constitutional question. As suggested by the authorities cited by the Petitioner, the manner in which the plea was taken is an issue which can be determined without invoking *the Constitution*. It's essentially ground of appeal. It can be determined by way of an appeal as opposed to converting it into a constitutional question.

6. Additionally, whether or not he was not provided by an advocate or he was not afforded a right to appeal or review brings into view a critical issue. The right to appeal is a creation of a statute. He has not shown he desired to appeal and he was prevented from appealing by the court and in any event, this can also be a ground of appeal.

7. The foregoing brings into focus the doctrine of constitutional avoidance. Constitutional avoidance has been defined as a preference of deciding a case on any other basis other than one which involves a constitutional issue being resolved.[3] As a principle, constitutional avoidance has been linked to the doctrine of justiciability.[4] In broad terms, justiciability governs the limitations on the constitutional arguments that the courts will entertain. It encompasses three main principles which are standing, ripeness and mootness.[5] The doctrine of avoidance was fortified in *Sports and Recreation Commission v Sagittarius Wrestling Club and Anor*[6] in which Ebrahim JA said the following: -

> " ...Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights.."

8. The Constitutional Court of Zimbabwe in *Chawira & Ors v Minister of Justice Legal and Parliamentary Affairs & Ors*[7] held: -

> " As we have already seen, in the normal run of things courts are generally loathe to determine a constitutional issue in the face of alternative remedies. In that event they would rather skirt and avoid the constitutional issue and resort to the available alternative remedies."

3 *S Woolman & M Bishop, Constitutional Law of South Africa (2013) 3-21.*

4 *I Currie & J De Waal The Bill of Rights Handbook* (2013) 72.

5 Ibid, Page 72.

6 2001 (2) ZLR 501 (S)

7 CCZ 3/17

9. The court in *S v Mhlungu*[8] laid out constitutional avoidance as a general principle in the following terms: -

> "I would lay it down as a general principle that where it is possible to decide any case, criminal or civil, without reaching a constitutional issue, that is the course which should be followed."

10. The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved. In that regard, the Supreme Court stated in *Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others* (at para 256) that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis. In the South African case of S v Mhlungu (supra) Kentridge AJ, stated in the dissenting opinion respecting the principle of avoidance (at paragraph 59), that he would lay down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed. And in *Ashwander v Tennessee Valley Authority*[9] the U.S. Supreme Court held that it would not decide a constitutional question which was properly before it if there was also some other basis upon which the case could have been disposed of. Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of rights.[10]Currie and de Waal[11] opine that the principle of constitutional avoidance is of crucial importance in the application of the Bill of Rights. The author's state: -

> "When applying the Bill of Rights in a legal dispute, the principle of avoidance is of crucial importance. As we have seen, the Bill of Rights always applies in a legal dispute. It is usually capable of direct or indirect application and, in a limited number of cases, of indirect application only. The availability of direct application is qualified by the principle that the Bill of Rights should not be applied directly in a legal dispute unless it is necessary to do so."

11. An important and critical issue arises from the above statements by Currie and de Waal. It is the fact that every legal dispute is capable of either direct or indirect application of the Bill of Rights. Every dispute is essentially a constitutional issue when one looks at it. This arises necessarily because of the principle of constitutional supremacy.[12] One needs to be aware however of the singleness of the legal system. This is embodied in the fact that the supremacy of *the Constitution* does not detract from the usefulness of the rest of the body of law. Inessence all other laws give full expression to the ideals of *the Constitution* until found to be inconsistent to it.

12. The doctrine of ripeness and constitutional avoidance gives credence to the concept that *the Constitution* does not operate in a vacuum or isolation. It has to be interpreted and applied in conjunction with applicable legislation together with other available legal remedies. Where there are

8 1995 (3) SA 867 (CC) 59.

9 297 U.S. 288, 347 (1936).

10 See also *Zantsi v Council of State, Ciskei & Ors* 1995 (4) SA 615 (CC).

11 I Currie & J De Waal The Bill of Rights Handbook (2013) 72.

12 See Article 2 (4) of *the Constitution*.

alternative remedies the preferred route is to apply such remedies before resorting to *the Constitution*. The possibility of the elevation of any dispute to a constitutional issue is what is sought to be averted by the doctrines of ripeness and constitutional avoidance. It is borne out of a realisation that all legislative or common-law remedies are part of the legal system.

13. In summation, the doctrines of ripeness and constitutional avoidance shun to deal with a constitutional issue where there exists another legal course which can give the litigant the relief he seeks. In other words, a constitutional issue is not ripe for determination until the determination of the constitutional issue is the only course that can give the litigant the remedy he seeks. Both constitutional avoidance and ripeness avert the determination of the constitutional issues until it becomes very necessary to the extent that it is the only course available to assist the litigant's cause. The exceptions to the application of the doctrine of constitutional avoidance are: -

    i. where the constitutional violation is so clear and of direct relevance to the matter,

    ii. in the absence of an apparent alternative form of ordinary relief and

    iii. where it is found that it would be a waste of effort to seek a non-constitutional resolution of the dispute.[13]

14. As stated above, the argument that the plea was not taken in accordance with the law and authorities cited reading of the issues presented in this Petition leave no doubt that the Petitioner's grievance if any could have been effectively be addressed by way of appeal (if he has not appealed). To me, the said ground does not raise a constitutional question at all and this is a proper and fit case for this court to invoke the doctrine of constitutional avoidance and decline to entertain the said argument. Similarly, the argument that his rights under Articles 50 (h) (q) of *the Constitution* were violated can be addressed by way of appeal. Not each and every issue should be converted into a constitutional question just because an article has been cited. One will require the trial record (which I do no have0 to appreciate the manner in which the trial was undertaken and whether or not the accused was ostracised or prejudiced in any manner to the extent of vitiating the trial process and the resultant conviction.

15. Flowing from the above discussion, the conclusion becomes inevitable that this Petition fails. Accordingly, I dismiss this Petition.

DATED, SIGNED AND DELIVERED AT MOMBASA VIRTUALLY THIS 27TH DAY OF MAY 2022

JOHN M. MATIVO

JUDGE

[13] Currie & De Waal above.