



Asirwa v National Police Service & 3 others (Constitutional Petition E013 of 2021) [2022] KEHC 13120 (KLR) (20 September 2022) (Judgment)

Neutral citation: [2022] KEHC 13120 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CONSTITUTIONAL PETITION E013 OF 2021**

EKO OGOLA, J

SEPTEMBER 20, 2022

IN THE MATTER OF ARTICLES 2, 10, 19, 20, 21, 22, 23, 27, 28, 29, 31, 47(2), 50, 159, 165(3) AND 244 OF THE CONSTITUTION OF KENYA AND IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013 AND IN THE MATTER OF THE NATIONAL POLICE SERVICE ACT CHAPTER 84 LAWS OF KENYA AND IN THE MATTER OF THE CRIMINAL PROCEDURE CODE CHAPTER 75 LAWS OF KENYA AND IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT

BETWEEN

FREDRICK CHITE ASIRWA APPLICANT

AND

NATIONAL POLICE SERVICE 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT

MOI TEACHING AND REFERRAL HOSPITAL 3RD RESPONDENT

SAMUEL MBUNYA 4TH RESPONDENT

JUDGMENT

1. The Petitioner Professor Fredrick Chite Asirwa, filed a petition dated July 1, 2021 against the National Police Service, the Director of Public Prosecutions, Moi Teaching & Referral Hospital (MTRH) and Samuel Mbunya seeking the following prayers: -

- 1) A declaration that the entry, search and seizure of the Haematology Machine from the Petitioner’s premises on the June 7, 2021 and on the June 8, 2021 is unlawful, illegal and in breach of the Petitioner’s rights under Article 31 of *the Constitution*.



- 2) A declaration that the evidence underpinning the investigations of the Petitioner that may be used to make a decision to charge the petitioner or any other member of his staff was obtained illegally and in manner that was detrimental to the administration of justice.
- 3) An order of prohibition do issue against the use of the illegally obtained evidence to charge the Petitioner or any member of his staff.
- 4) A declaration that the illegal raids of the Petitioner's premises, the intimidation, harassment and arrest of staff amounts to subjecting the petitioner and his employees to inhuman and degrading treatment and it violates the right to dignity enshrined in Article 28 and the right to freedom and security under Article 29 of the Constitution.
- 5) A declaration that the failure by the 1st Respondent to inform the Petitioner the reasons of the search and seizure of the Haematology machine constitutes an infringement of the Petitioner's right under Article 47(2) of the Constitution.
- 6) An order of permanent injunction against the Respondents by themselves, their, agents, servants or assigns restraining them from further visiting (ICI), searching and or/ seizing any equipment.
- 7) An award of general damages for the myriad breaches of the Petitioner's rights under the Constitution.
- 8) Any other order or writ that this Court may deem just and appropriate.
- 9) Cost of the petition with interest.

Petitioner's Case

2. The grounds upon which this petition is brought are that the Petitioner is an Executive Director of the International Cancer Institute (ICI), a Non-governmental and Not-for-profit organization based in Eldoret Kenya, whose main objective is to expand educational and training opportunities in cancer care and research across Sub-Saharan Africa through multi-sectoral collaborations and partnerships with relevant organizations both governmental and non-governmental. The organization (ICI) was founded in the year 2018 but began its operations in 2019.
3. The Petitioner's case is that on June 7, 2021 while he was away, two officers of the 1st Respondent namely Chief Inspector Caleb Natha and Daniel Polo together with the 4th Respondent visited the (ICI) premises and demanded to see the Executive Director. Upon being informed that the Executive Director was away they demanded to see the person in-charge at the time and were referred to Dr. David Muyodi the Head of the Office of Community Outreach who was informed that a complaint had been filed by the 4th Respondent regarding a Haematology Analyser Machine Serial No. 803YOXH04119. The officers then demanded to conduct a search in the hospital laboratory and without consent proceeded to the lab where they did not find the aforesaid machine and thereafter left.
4. The Petitioner deposed that on June 8, 2021 the two aforementioned officers returned to (ICI) premises in company of other unidentified persons and without a search warrant proceeded to impound a Haematology Machine with Serial No. 803YOXH01419.
5. According to the Petitioner when impounding the machine, the officers roughed up (ICI) staff. The Petitioner deposed that the said officers were rude intimidating and used condescending language. He further deposed that the said officers roughed up lab employees who were on duty at the time while one George Gitau, who was using the said machine, was forced to sign the inventory after being threatened



- with arrest. The Petitioner further deposed that when the security guard at (ICI) requested the officers to produce a gate pass for the said machine as part of the standard procedure, they instead rained on the guard with blows, arrested and handcuffed him and took him to Naiberi Police Station where he was locked up for two hours and was later on released without preferring any charges.
6. The Petitioner contends that the police in question have never summoned him nor sought to interview him regarding the machine in question. Further the Petitioner contends that during the raid the officers did not produce any OB Number or state the nature of the offence under investigation to warrant the search and seizure of the machine.
 7. The Petitioner further deposed that vide the application dated June 9, 2021 in Eldoret High Court Misc. Criminal Application No. E111 of 2021 he sought for anticipatory bail which orders were granted on 10th June, 2021.
 8. The Petitioner maintains that from the year 2012 to the 2019 he was the Principal Investigator with the Ampath Oncology & Haematology and Oncology Programs at AMPATH, fully in-charge of the aforementioned programs. The Petitioner's case is that he had a grant, an agreement, with the sponsoring/supporting organization under which he had full discretion and autonomy to manage all the assets donated by the sponsor/supporting organization for use in the program. The Petitioner further maintains that Indiana University had a separate Memorandum of Understanding with Moi Teaching and Referral Hospital (MTRH) and Moi University to be the sub-recipient of the donations under which the Petitioner had the autonomy to advise on what needed to be purchased for the program. The Petitioner further contends that under the agreement, in the event that he resigned from the program or the program came to an end, then he was to inform Indiana University and the donor would advise on where the donations under the program were to continue being used and or were to be returned.
 9. The Petitioner deposed that in 2018 he resigned from the said program and begun (ICI) which was a continuation of the said program but now under his full control. The Petitioner's case is that under a gentleman's agreement, MTRH agreed that he could use some of the medical equipment and other items under the program to set up (ICI) before the donor could give directions on the fate of the donations under the said program. The Petitioner further deposed that on or about August, 2019 MTRH demanded that the Petitioner returns the assets under the said program and in absence of the Petitioner, MTRH dispatched its staff to collect all the assets that they needed from (ICI). The Petitioner maintains that the said assets were collected by MTRH on 13/8/2019 and an inventory of the same was duly signed by MTRH staff including Samuel Mbunya.
 10. The Petitioner contends that MTRH has never written to him demanding any assets that were left to (ICI) neither has it furnished him with the status for all the programs and grants over the last two years and how the assets that he brought through his grants have been used so far.
 11. In light of the foregoing, the Petitioner's case is that his rights and fundamental freedoms under *the Constitution* have been violated, infringed and or threatened to be infringed. The Petitioner contends that 1st Respondent breached his right to privacy under Article 31 when it conducted a search in the (ICI) lab without a warrant and seized a Haematology Machine Serial No. 803 YOX0H01419. The Petitioner further contends the manner in which the police officers conducted the said search violated his rights and that of his members of staff to human dignity under Article 28. Further, by assaulting and arresting the security guard without any justifiable course, the Respondents breached the right to freedom and security under Article 29. The Petitioner further contends that the failure to inform him of the reasons for the search and seizure by the police constitutes a violation of his rights under Article 47 (2) of *the Constitution* and, lastly, the Petitioner maintains that the 1st Respondent violated his



rights under Article 50 (4) when it unlawfully confiscated the Haematology Machine from (ICI). The Petitioner argues that evidence obtained in a manner that violates any right or fundamental freedom in the bill of rights shall be excluded if the evidence would render the trial unfair or would otherwise be detrimental to the administration of justice.

1st & 2nd Respondents' Case

12. The petition was opposed by 1st Respondent vide the Replying Affidavit dated July 21, 2021 sworn by Caleb Natha, Chief Inspector of Service Number 235013 who deposed that sometime around May, 2021 they had received a report of theft of Haematology Machine Serial No.8030YOX01419, Printer Pro CM1415color MFPX2 Serial Number CNCHG65079 and laptop Core i5 Serial No. CND7078ITI which were the property of Moi Teaching and Referral Hospital Eldoret.
13. Consequently, he immediately commenced investigations into the said complaint and made the following findings:
 - a) That MTRH and Moi University had entered into a tripartite partnership referred to as Academic Model Providing Access to Healthcare (AMPATH) with a conglomerate of medical schools in the United States.
 - b) That AMPAH was used as a tool to source for additional funding for Moi University and MTRH to supplement funds allocated in the national budget.
 - c) That all funding and grants to Moi University and MTRH through AMPATH were to be utilized in strict compliance with the Grants Manual.
 - d) That for there to be smooth management of the funds/grants, through a Memorandum of Understanding, all parties agreed and formed the Research and Sponsored Projects Office (RSO)
 - e) That the Grants Manual specifies that a Principal Investigator is tasked with the duty of presenting proposals, on behalf of the tripartite partnership, to donors. Once a grant is awarded, the Principal Investigator administers that grant, on behalf of the tripartite partnership specifically, the Principal investigator's principal affiliate, in accordance with the Grants Manual.
 - f) That once the Principal Investigator successfully obtains donor funding/grants AMPATH is tasked with the mandate of ensuring that it receives and manages the grants from donors on behalf of its principal, which are to be channelled towards the following three core areas: patient care, education and research.
 - g) That because at all material times, the Principal Investigator acts as an agent of his principal who must be one of the three parties in the tripartite partnership, and any property obtained from such donor funding/grants becomes the property of the receiver of the donation who is a party to the tripartite partnership. The Principal Investigator remains in the role of management and administering the grant.
 - h) That the Petitioner, was retained as Principal Investigator by Indiana University, one of the universities in the conglomerate of medical schools from the United States of America.
 - i) That by virtue of the tripartite partnership, the Petitioner became an administrator of grants issued by Indiana University, to MTRH and Moi University.



- j) That the Petitioner, acting as an agent and representative of Indiana university, made a successful proposal for funds geared towards the oncology. To ease the implementation of the project, he was made a director in Hematology and Oncology program.
 - k) That due to the fact that the Petitioner was an administrator of the oncology grant on behalf of Indiana University, and given that Indiana University thereafter gave MTRH and Moi University the grant for management, MTRH procured assets for administration of grant, with the Petitioner being the Principal Investigator.
 - l) That the Haematology machine was obtained from Science Scope Ltd by the Hospital, in strict compliance with the procurement rules put in place for state corporations.
 - m) That the machine was physically installed at AMPATH Haematology Lab in Chandaria Cancer Centre located within MTRH premises situated along Nandi Road, Eldoret. The machine was entrusted to the custody of Samuel Mbunya, the 4th Respondent.
 - n) That the 4th Respondent who was affiliated to AMPATH was tasked with the use of the machine, resigned from his job, while he was abroad and was required to hand over any property that was entrusted in his custody.
 - o) That it was during this process of handing over that it was discovered that the Haematology Machine Serial Number 8030YOX0H01419 was missing and could be traced within MTRH's precincts.
 - p) That a report was made to Eldoret Central Police Station vide OB No. 123/31/5/2021 together with a letter referenced 2/433/001.
14. The 1st Respondent's case is that it was upon interrogations that the 4th Respondent conceded that indeed the machine was no longer within the precincts of MTRH and that according to his sources and private investigations the same was being used at a medical facility identified as (ICI) in which the Petitioner was one of the directors.
15. On June 8, 2021 the 1st Respondent's officers acting on a tip off visited (ICI) with the view of establishing the accuracy of the information and were able to find Haematology machine Serial Number 8030YOX0H01419 in one of the laboratories at the said centre. Being apprehensive that the machine, being an object and evidence of a crime, may be hidden, destroyed or otherwise kept away to cover up the crime, they impounded it and took it to Central Police Station.
16. The 1st Respondent contends that considering that the Petitioner was a former administrator and Director of Oncology and Haematology at MTRH, it was imperative that he gives an account on how the stolen Haematology Machine Serial Number 8030YOX0H01419 was found in a medical facility run by him without knowledge or authority of MTRH.
17. The 1st Respondent contends that even before the investigations were concluded, the Petitioner rushed to Court and obtained interim orders of anticipatory bail. The 1st Respondent deposed that on June 21, 2021 when its officers attempted to summon the Petitioner through his known mobile number he blatantly refused. On 22/6/2021 when the 1st Respondent yet again attempted to summon the Petitioner through his Advocate he didn't avail himself. The 1st Respondent maintains that because all diplomatic means of summoning the Petitioner bore no fruits, its officers visited (ICI) on July 1, 2021 with a view of serving him summons. The Petitioner refused to accept the said summons and directed that the same be served upon his Advocate. The 1st Respondent deposed that on July 5, 2021 when the Petitioner was scheduled to appear in its office for purposes of recording a statement, it received a letter



from the Petitioner's Advocate seeking that the date be deferred and that unknown to it the petitioner was at the time of serving it with that letter, filing this instant suit on July 1, 2021.

18. The 1st Respondent contends that because the Petitioner had shown obvious signs of frustrating the conclusion of the investigations in utter disregard of the Court orders that had been issued on June 14, 2021, the 1st Respondent prepared a further affidavit seeking to compel him to comply with the previous orders.
19. The 1st Respondent contends that under section 24 of the *National Police Service Act*, police officers are required to investigate crimes where there is reasonable basis of commission of an offence and therefore it was legal to investigate how the stolen Haematology machine was found to be in an institution where the Petitioner worked as a director.
20. The 1st Respondent's case is that investigations into suspect criminal culpability are concluded after a suspect has recorded a statement and the averments therein verified. According to the 1st Respondent, as at now the investigations on the theft of the Haematology Machine Serial Number 8030YOX0H01419 are still open and decision to charge has not yet been made by the 2nd Respondent because the investigation file is still incomplete due to the numerous frustrations by the Petitioner and his refusal to record a statement. In light of the above the 1st Respondent contends that it is pre-emptive to say that the Petitioner will be charged in Court for the theft of the Haematology machine.
21. The 1st Respondent maintains that the Petitioner is deliberately abusing Court process to frustrate a lawful process. According to the 1st Respondent Courts are reluctant to interfere with the mandate of other Constitutional bodies unless the same is tainted with illegality or irrationality.
22. The 1st Respondent maintains that this is a Constitutional Court and therefore cannot determine issues of ownership of the Haematology machine. Further that questions as to the legality of the recovery of the stolen machine should be left to the trial Court as the same cannot be determined by this Court at this juncture.
23. The 1st Respondent contends that this instant petition is not only misconceived but also frivolous, vexatious and an abuse of Court process and should be dismissed in its entirety.

3rd Respondent's Case

24. On September 23, 2021 the Petitioner and the 3rd Respondent recorded a consent order wherein it was agreed that the Haematology machine should be surrendered to the 3rd Respondent in return for a promise that the Petitioner will no longer be pursued in any future claims regarding things done during the period he worked with MTRH.

4th Respondent's Case

25. In response to the petition the 4th Respondent, Samuel Mbunya filed his Replying Affidavit dated July 26, 2021. The 4th Respondent's case is that he worked as a program administrator at AMPATH until his resignation on June 7, 2020 due to the Covid – 19 pandemic as he was locked in Malmo, Sweden. He deposed that at the time he was responsible for the security of the program's assets, including their use within the MTRH premises. The 4th Respondent maintains that during his tenure, the Petitioner was his supervisor and that all purchases of assets made in program were controlled and distributed by Petitioner.
26. The 4th Respondent deposed that on March 29, 2019 the Petitioner had informed him that he had sent an email and letter to the 3rd Respondent's Chief Executive Officer, seeking to relocate the



Haematology Research Lab from Chandaria Cancer and Chronic Disease Centre (CCCDC), MTRH to (ICI) due to lack of funding. The 4th Respondent further deposed that on July 31, 2019 he acted on an order from the CEO of the 3rd Respondent seeking to transfer the Haematology Research Lab equipment and furniture from (ICI) to MTRH. At the time the 4th Respondent maintains that he then provided a report to the AMPATH Consortium partners clearly expressing and indicating the absence of the Haematology machine of serial number 8030YOX0H01419 at ICI during the relocation of the lab to CCCDC.

27. The 4th Respondent deposed that after his resignation on 7/6/2020 he requested to be cleared from AMPATH and was referred to the CEO of the 3rd Respondent for approval. On September 14, 2020 the 4th Respondent wrote an email and letter to the 3rd Respondent's CEO regarding a number of assets pending clearance including the subject Haematology machine serial number 8030YOX0H01419 whose whereabouts was at ICI, the Petitioner's custody. The email also offered an explanation on how the said assets were moved from (CCCDC) to (ICI). The 4th Respondent deposed that on 24/9/2020 he had humbly requested the Petitioner to inform the 3rd Respondent's CEO of the whereabouts of the three assets inclusive of the Haematology machine in question but the Petitioner denied having any of the said assets.
28. Following the said events, the 4th Respondent on May 31, 2021 filed a report at Eldoret Central Police Station regarding the Haematology Machine Serial No.8030YOX01419, Printer Pro CM1415color MFPX2 Serial Number CNCHG65079 and laptop Core Serial No. CND7078ITI which he claimed to be in possession of the Petitioner. Further on June 7, 2021 the 4th Respondent in company of the 1st and 2nd Respondent's Officers visited the (ICI) where they were ushered into the (ICI) lab and the 4th Respondent was able to confirm the identity of the Haematology machine in question bearing the serial number 8030YOX01419 at the said lab.
29. The 4th Respondent deposed that he was later on informed by the 1st and 2nd Respondent's officers that the Haematology machine in question bearing the serial number 8030YOX01419 had been impounded as an exhibit on the June 8, 2021, pending further investigations on the matter.

Submissions

30. The petition was canvassed by way of written submission. The Petitioner filed his submissions on June 17, 2022 whereas the 1st & 2nd Respondents filed their submissions of 21/6/2022. The rest of the parties did not file any submissions.

Determination

31. I have considered the petition, the responses; submissions and the authorities relied on. The issue that arises for determination is whether the police violated the Petitioner's rights in entering his business premises at International Cancer Institute (ICI) on June 7, 2021 and June 8, 2021 and conducting a search thereon and impounded a Haematology Analyser Machine Serial Number 8030YOX01419.
32. The facts of the petition that are not in dispute are that on June 8, 2021 officers of the 1st Respondent visited the petitioner's premises being (ICI) along Nandi Road, Eldoret and impounded a Haematology Analyser Machine Serial Number 8030YOX01419.
33. The Petitioner's main contention is that in doing so the 1st Respondent's officer breached his and his members of staff right to privacy, right to human dignity and freedom and security of person. The Petitioner further contends that in carrying out the raid the police roughed up some of his members of staff and even went as far as arresting his security guard. The Petitioner's case is that 1st Respondent's



officers did not produce any search warrant that authorised the search and seizure of the machine in question.

34. In response the Respondents contend that they had lawful reasons to undertake the said search having received a complaint from the 3rd Respondent that a Haematology Analyser Machine Serial Number 8030YOX01419 was missing from its precincts and that the same was allegedly being kept in the premises of (ICI) an organization to which the Petitioner was one of the directors. The Respondent further contend the Petitioner having been a former director at AMPATH there was reasonable suspicion to warrant the said search.
35. *The Constitution* guarantees the right to privacy. Article 31 provides that every person has the right to privacy which includes the right not to have their person, home or property searched and their possessions seized.
36. Article 243 of *the Constitution* establishes the National Police Service and the NPS Act gives full effect to this Article. At the same time, Article 244 provides for the objects and functions of the NPS which are also emphasized under section 24 of the NPS Act. The Kenya Police Service has mandate to investigate crime, prevent corruption and promote and practice transparency and accountability. Article 244(c) in particular requires the NPS to comply with constitutional standards of human rights and fundamental freedoms in the discharge of its mandate. This is important because human rights and fundamental freedoms and the rule of law are founding values in our Constitution.
37. Section 26 of the *Criminal Procedure Code*, provides that;
- “(1) A police officer, or other person authorized in writing in that behalf by the Commissioner of Police, may stop, search and detain – (c) any person who may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained”.
38. In the same vein, Section 118 of the Code provides that;
- “Where it is proved on oath to a court or a magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court or a magistrate may by written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and, if the thing be found, to seize it and take it before a court having jurisdiction to be dealt with according to law.”
39. The above provisions must however be read in the context of Article 31 of *the Constitution* on the right to privacy as read with other Articles, including Article 244(c) on the observance of the highest standards of human right by the police so that the police should never act at whims when their actions threaten to violate human rights and fundamental freedoms.
40. In *Vitu Limited vs The Chief Magistrate Nairobi & Two Others*, (H.C. Misc. Criminal Application No. 475 of 2004), it was observed that:
- “Since Police duties are not judicial functions, then in the performance of [their] duties, it is anticipated that warrants or [summonses] may be required and for this reason Parliament in its wisdom enacted section 118 of the Criminal Procedure Code (Cap. 75) and section 19 of the Police Act (cap. 84)...I am therefore constrained to agree with Counsel for



the petitioners that the respondents' justification of their actions is, in the circumstances, unsustainable. Their acts in carrying out the raid on the petitioners' premises had no lawful justification."

41. In the present case it is noteworthy that the 1st Respondent did not provide any evidence of search warrant as stipulated by the law. That said, it is clear from the facts of this case that the initial search that was carried on June 7, 2021 and on June 8, 2021 that saw the impounding of the Haematology Analyser Machine Serial Number 8030YOX01419 was arbitrary and patently unlawful thus violated the Petitioners' and his members of staff right to privacy guaranteed under Article 31 of *the Constitution*.
42. At this point I cannot verify the averments on the breach to human dignity and freedom and security of the person as deposed by the Petitioner. No evidence has been tendered before this Court to prove the acts of inhuman treatment by officers of the 1st Respondent during the said search.
43. The Petitioners have urged the Court to grant various reliefs including general damages for various violations. In constitutional litigation the Court may award damages depending on the level of violations proved by the Petitioner.
44. In present case, it is not disputed that the Haematology Analyser Machine Serial Number 8030YOX01419 that was seized by the 1st Respondent from the Petitioner's premises has since been released to the 3rd Respondent vide the Consent order entered into by the Petitioner and 3rd Respondent on September 23, 2021.
45. Consequently, and for the above reasons, the petition partially succeeds and I make the following orders.
 - a) A declaration be and is hereby issued that the 1st, 2nd and Respondents breached the Petitioner's fundamental rights including the right to privacy guaranteed under Article 31 of *the Constitution*.
 - b) The 1st Respondent herein, the National Police Service is ordered and directed to make a personal apology to the Petitioner within 14 days from the date hereof in the following terms:

“We, the National Police Service, a law-abiding organization under *the Constitution* of Kenya, do hereby make an apology to you, Professor Fredrick Chite Asirwa, the Petitioner, for raiding your premises, intimidating and harassing your staff without lawful authority, and thereby infringing your Constitutionally guaranteed rights. This apology is pursuant to order No (b) of the Judgment in Petition No.Eldoret E013 of 2021.”
 - c. If the 1st Respondent complies with Order (b) above, then parties shall bear own costs of the petition.
 - d. Should the 1st Respondent fail to make apology in terms of Order No. (b) above then the 1st Respondent shall pay the Petitioner general damages of Kshs.500,000/- for infringing the Constitutional rights of the petitioner. In addition, it shall pay costs herein to the Petitioner.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 20TH OF SEPTEMBER 2022.

E. K. OGOLA

JUDGE

