



REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CONSTITUTION PETITION NO. 2 OF 2019

DAVID GATHU THUO.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

J U D G E M E N T

This Petition is brought under Articles 19(1), 3a), c)20(1) for alleged violation of the National Values and Principles of Governance enshrined in Article 31(1), 232 and 244(c) of the Constitution of Kenya whereas the petitioner alleges infringement and violation of his rights and fundamental freedoms as provided for in Articles 27(1) and 2, 29(d) and (f). It is also alleged that the petitioner's rights as provided in Article 47 and Articles 165(b), 20(3) and 23(1) of the Constitution were violated.

1. The Petition dated 1st April 2019 was supported by the affidavit of one DAVID GATHU THUO and seeks the following reliefs:-

- a) A declaration that the impugned acts and omissions of the 2nd and 3rd Respondents' agent violated the Constitution of Kenya, 2010;
- b) A declaration that the plaintiff is entitled to the payment of damages and compensation for violations and contraventions of his fundamental rights and freedoms under the aforesaid provisions of the Constitution;
- c) General and exemplary damages on an aggregated scale under Article 23(1) of the Constitution of Kenya for the unconstitutional conduct by the respondent's agents;
- d) That the Respondents bears the costs of this Petition with interest.

2. The Respondents came on record by filing a Notice of Appointment dated 24th May, 2019 and then filed grounds of opposition in response to the Petition, dated 24th May, 2019.

3. The parties agreed that the Petition be disposed off by way of written submissions which both parties exchanged and filed accordingly

The Petitioner's Case

4. The Petitioner deposes that between September 1981 and April 2002, he was serving as a police officer stationed at Enderasha Police Post and had earlier worked in other stations. Alongside other police officers, he was arraigned in Nyeri High Court in Criminal Case No. 1 of 2007 whereas he was charged with the offence of murder of the deceased Paul Kimani Wambiru. That he was not given the chance to explain himself in breach of Article 48 and 50(1) of the constitution.

5. That in breach of Article 27(1) of the Constitution, the petitioner was discriminated against for the charges were not supported by cogent evidence for he was subsequently acquitted by the court having spent three (3) years in prison custody which was in breach of Article 29(a) of the Constitution.

6. That during the pendency of the trial, the petitioner suffered financial hardship, psychological torture which continued even after acquittal in that he was not reinstated to his job which was his livelihood.

The Respondents case

7. The respondents in their grounds of opposition dated 24/05/2019 stated that the petition lacks merit and does not meet the threshold of a Constitutional petition, neither does it demonstrate how any of the alleged violations were done, and that the petitioner's claim lies in the tort of malicious prosecution which is time barred prompting the petitioner to circumvent this by filing a constitutional petition.

The Petitioner's Submissions

8. The Petitioner urged the court to consider the facts of the petition and the contents of the supporting affidavit and to further make a reference to the chronological events as brought forth in the petition.

9. The Petitioner lamented that at the time he filed his submissions on 05/08/20, the respondent had not filed a replying affidavit or filed their submissions and as such the petition remained uncontroverted.

The Respondents' Submissions

10. The respondents submitted that this petition did not meet the threshold of a constitutional petition and is indeed a claim of malicious arrest and prosecution whose time for filing had long expired. It was further stated that this petition may be regarded as an employment dispute disguised as a Constitutional Petition.

11. The respondents cited the case of **Gabriel Mutave & 2 others Vs Managing Director, Kenya Ports Authority [2016] eKLR** where the court held that the Constitution is not a general substitute for normal procedures for invoking redress under substantive law and that the proper cause is to bring the claim under that law but not under the Constitution.

12. The respondents relied on the case of **Anarita Karimi** and that of **Mumo Matemu Vs. Trusted Society of Human Rights Alliance & 5 others [2013]eKLR** in arguing that the petition does not set out with reasonable precision the rights that were violated and in what manner thus falling short of the threshold set out in these cases.

13. That the respondents acted honestly and reasonably within its statutory mandate in preferring charges against the petitioner following a justifiable complaint of a criminal nature. It was further argued that the mere fact that an accused has been acquitted of a criminal charge does not necessarily connote malice on part of the prosecutor. On this argument, the respondent relied on the case of **James Karuga Kiiru Vs. Joseph Mwamburi and 3 others Nairobi Civil appeal No. 171 of 2000** and urged the court to dismiss the Petition being an abuse of the court process.

The Issues for Determination

14. The following issues are identified for determination:-

- a) Whether the new Constitutional provisions cited are applicable in this Petition;.
- b) Whether the petition meets the threshold of a Constitutional Petition;
- c) If the answer for (a) is in the affirmative, the court ought to decide whether the Petitioner is entitled to a remedy.
- d) Who between the parties should meet the costs of the petition.

15. This court is empowered by Article 165 to hear and determine Constitutional Petitions which article provides:-

Subject to clause 5, the High Court shall have :-

(a) Unlimited original jurisdiction in criminal and civil matters.

(b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of rights has been denied, violated, infringed or threatened.

Article 165 therefore empowers this court to hear and determine this petition.

The Law

16. The Petitioner alleges violation of a host of constitutional rights falling under several articles of the Constitution of Kenya 2010 as follows:-

- i. Article 27(1);

Every person is equal before the law and has the right to equal protection and equal benefit of the law.

- ii. Article 29.

Every person has the right to freedom and security of the person, which the right not to be—

(a) deprived of freedom arbitrarily or without just cause;

iii. Article 48 provides that;-

The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

iv. Article 50(1) provides that;-

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

17. I have perused the proceedings in Criminal Case No. 1 of 2003 wherein the petitioner and four(4) others were jointly charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. Okwengu J (as she then was) delivered her ruling on 25th May 2005 acquitted all the accused persons of the charge under Section 210 of the Criminal Procedure Code. Under the law of torts, the petitioner would have filed a case for damages against the respondents soon after the acquittal and pursued his right of compensation.

Whether the Provisions of the Constitution 2010 is applicable herein.

18. The petitioner was charged and convicted during the period of the repealed Kenyan constitution in 2003 and his case was concluded in 2005. The 2010 constitution which contains the Bill of Rights with a host of individual rights and freedoms was enacted several years later. Article 50 which confers upon an accused person the right of fair trial is a part of the new Constitution.

19. The repealed Constitution provided for compensation in civil suits where one's rights were proved to have been violated or infringed.

20. The petitioner herein had a right to claim compensation in a civil court on the tort of malicious prosecution after he was acquitted in 2005. He filed this petition in 2019 which was about fourteen(14) years after his acquittal rendering the tort claim time barred.

21. It was held in the High Court case of **Bernard Murage Vs.Fineserve Africa Ltd & 3 others [2015]eKLR that:-**

“Where there exists an alternative remedy through statutory law, then it is desirable that such statutory remedy be pursued first”

22. The petitioner failed to claim his right and it is tantamount to an abuse of the due process of the court to bring forth a Constitutional Petition fourteen years after acquittal. By using the provisions of the new Constitution that provide for rights that did not exist in the repealed constitution, the petitioner is in a legal gamble to seek a remedy a bit late in the day.

23. It is trite law that the law will not apply retrospectively and I am of the considered view that the petitioner cannot claim that rights which did not exist at the time of his acquittal were violated

Whether the Petitioner's petition was pleaded with reasonable precision as per the required standard in Constitutional Petitions;

24. It is now a well-developed principle that in constitutional litigation, a party that alleges violation of his or her rights must plead with reasonable precision in regard to the manner in which there has been such alleged violation. This proposition was enunciated in the case of **Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272** where the court stated:-

“Constitutional violations must be pleaded with a reasonable degree of precision.

25. The Articles of the Constitution which entitles rights to the Petitioner must be precisely enumerated and the claim pleaded to demonstrate such violation with the violations being particularized in a precise manner. Furthermore, the manner in which the alleged violations were committed and to what extent must be shown by way of evidence based on the pleadings.

26. The Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** provided the standard of proof in Constitutional Petitions.

The Court of Appeal judges stated;-

*“...The principle in **Anarita Karimi Njeru (supra)** that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of **Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639** holds true today:*

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and

delay, especially as regards the amount of testimony required on either side at the hearing.”

The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19,20 and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars.

We wish to reaffirm the principle holding on this question in **Anarita Karimi Njeru (Supra)**. In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting,” without requiring remedy by the 1st respondent..”

27. Lenaola J. while referring to the **Anarita Karimi** and **Mumo Matemu** Cases in **Dr. Rev. Timothy Njoya vs The Hon. Attorney General and Kenya Review Authority HC Constitutional and Human Rights Division Petition No. 479 of 2013** stated:-

“The Petitioner cannot come to court to seek facts and information he intends to use to prove the very case that he is arguing before the court. He must also plead his case with some degree of precision and set out the manner in which the Constitution has been violated by whom and even state the Article of the Constitution that has been violated and the manner in which it has been violated.”

28. I find the Dr. Timothy Njoya case (Supra) by Lenaola J. persuasive while that of **Mumo Matemu (Supra)** being a Court of Appeal decision is binding on this court.

29. Looking at the Petitioner’s pleadings, the evidence as well as the submissions of the parties, it is my conserved view that the Petitioner has not met the requirements of a Constitution Petition. Although the Petitioner has pleaded provisions of the Constitution, he has not demonstrated to the required standard how his individual rights and fundamental freedoms were violated, infringed or threatened by the respondents. He has not adduced any evidence to demonstrate the alleged violations.

30. Even assuming that this petition was competent, it would not pass the test of the burden of proof. It is trite law that he who alleges must prove his claim. The claim must be propounded on an evidentiary foundation. In saying so, I rely on the case **Leonard Otieno Vs. Airtel Kenya Limited [2018]** where Mativo J. held that:-

“It is fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the proposition he asserts to prove his claim. Decisions on violation of Constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the constitution an inevitable result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.”

31. The petitioner was charged alongside four(4) other people. He has not pleaded the manner in which he was discriminated under Article 27(1). Neither has he adduced any evidence to support the alleged violation of the right. Similarly, the petitioner has not explained how he was denied a fair hearing under Article 50(1). Article 48 is about access to justice and the petitioner has failed to plead or show how this right was violated by the respondents.

32. I reach a conclusion that this petition has not been pleaded with a reasonable degree of precision and that the alleged violations have not been proved.

Whether the Petitioner is entitled to compensation:

33. Consequently, I am of the considered view that the Petitioner has not met the threshold of a Constitutional Petition and therefore the issue of award of damages does not arise herein.

Costs of the Petition

34. It is trite law that costs follow the event. The petitioner having presented a petition that offends the set down Constitutional principles, ought to meet the costs of the said petition.

35. It is my finding that this petition lacks merit and it is hereby dismissed with costs.

36. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 25TH DAY OF FEBRUARY, 2021.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 25th day of February 2021.