



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 19 OF 2019

IN THE MATTER OF: VIOLATION AND INFRINGEMENT OF ARTICLES 10, 12, 19, 24, 27, 28, 31, 32, AND 33 OF THE
CONSTITUTION OF KENYA

BETWEEN

MICHAEL KIOKO.....PETITIONER

AND

THE HON. ATTORNEY GENERAL...RESPONDENT

JUDGMENT

Introduction

1. The Petition herein dated 18/12/2019 prays for a declaration that **Section 162(a) and (c), 163 and 165 of the Penal Code** are unconstitutional, null and void for being in violation of Articles **10,12,19,24,27,28,31,32** and **33** of the **Constitution of Kenya, 2010**.

Parties

2. The Petitioner **Mr. Michael Kioko** describes himself in this Petition as a citizen of the Republic of Kenya, and he brings this Petition in his own behalf and on the behalf of the public at large. The Petition is supported by Affidavit sworn by the Petitioner on 18/12/2019.

3. The Respondent is the Attorney General of the Republic of Kenya and is described in this Petition as a legal adviser and representative of the Government of Kenya.

The Petition

4. According to the Petitioner, Sections 162(a) and (c), 163, and 165 of the Penal Code Chapter 63 of the Law of Kenya violate the Constitution of Kenya by denying and/or limiting the following; the right to human dignity guaranteed under Article 28 of Constitution; the right to privacy guaranteed under Article 31 of the Constitution; the freedom of conscience and belief guaranteed under Article 32 of the Constitution; the freedom of expression guaranteed under Article 33 of the Constitution; the right to equality and freedom guaranteed under Article 33 of the Constitution; and the right to equality and freedom from discrimination guaranteed under Article 27 of the Constitution.

5. The Petitioner further states that the said provision of the Penal Code violate: Article 24 of the Constitution as the same are not reasonable and justifiable in an open and democratic society based on human dignity; equality and freedom; Article 10 on national values; Article 12(1) (a) on entitlement of citizens; Article 19 encapsulating the nature and object of right and fundamental freedoms guaranteed under the Constitution; the said penal provisions are unreasonable, unjustifiable and serve no legitimate aim.

6. The Petitioner avers that there are adequate penal provisions in place in Sexual Offences Act (2006) to serve any legitimate aims that the State may have. Therefore, the Penal provisions, and any enforcement by the State thereof will lead to gross violation of the individual's right to privacy, dignity, and expression.

7. Based on the above, the Petitioner prayed for:

a. a declaration that Section 162(a) and (c), 163 and 165 of Penal Code, Chapter 63 of the Laws of Kenya are in violation of Article 10, 12, 19, 24, 27, 28, 31, 32 and 33 of the Constitution of Kenya, and are therefore null and void.

b. Any other relief that this Honourable Court deems fit to grant under the circumstances.

c. That each party bears its own costs of the Petition.

The Response

8. In response to the Petition, the Attorney General filed a Reply to Petition dated 2/12/2020, stating as follows:

a. That the Petition is misconceived, vexatious and an abuse of the process of Court.

b. That the Petition does not meet the test of a constitutional Petition laid down in the case of *Anarita Karimi Njeru v Republic (No.1) [1979] KLR 154*.

c. That the petition is based on a narrow interpretation of Article of the Constitution in contravention of Article 159(2) (e) and Article 259 of the Constitution.

e. That the Sections 162, and 163 of Penal code apply to all persons irrespective of race, sex, marital status, health status, ethnic origin, age, religion, conscience, belief, culture or social status hence not discriminatory.

f. That the offence in Section 165 of the Penal Code can only be committed by a male person and the Section applies to all persons irrespective of their sexual orientation hence not discriminatory.

f. That the Petitioner has not placed before Court any evidence and/or submission to support allegations that the impugned sections contravene and or violate Article 32 and 33 of the Constitution.

g. That the Constitutional Petition as a whole seeks orders that contravene Article 45(2) of the Constitution and therefore contravenes the principle of Harmonization that require all provision of the Constitution bearing upon a specific issue to be considered together.

h. That any interpretation of the Petitioner's right has to be in conformity with Article 45(2) of the Constitution to ensure the purpose and principle of this Constitution are protected and promoted in line with Article 159 of the Constitution.

i. That the Petitioner has not discharged the Burden of proof.

j. That having failed to discharge the burden of proving that the impugned sections violate his fundamental rights and freedom the Petition herein ought to be dismissed with costs.

Submissions

9. Parties filed submissions that were highlighted orally in Court on 25/1/2021.

10. **Mr. Kioko** the Petitioner herein adopted his written submissions and added that the impugned Sections of the Penal Code infringe on the right to privacy and inherent dignity, which this Court ought to guard jealously since the impugned Sections have the effect of regulating sexual conduct or decisions between consenting adults of both sexes. Counsel submitted that it is neither the duty of the State to safeguard public morality nor legislate on the issue of morality.

11. **Mr. Makuto** learned counsel for the Attorney General relied on their pleadings on record and submitted that the Respondent is unable to adequately reply to the Petition appropriately because the Petition has failed to meet the threshold set in *Anarita Karimi Njeru v R.*

12. Counsel referred the Court to *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae), Nairobi H.C. Petition 150 & 234 of 2016 (Consolidated) Petition 150 & 234 of 2016 (Consolidated)* and submitted that a five (5) Judge bench already determined the constitutionality of Sections 162(a) and (c), 163, and 165 of the Penal Code and therefore this Petition is res-judicata.

13. **Mr. Makuto** referred to the preamble of our Constitution, which acknowledges the Almighty God, and cultural institutions of our society. Counsel further referred to Leviticus 18:22 in the bible, which states: "*you shall not lie with a male as with a woman. It is an abomination. (New King James Version).*" **Mr. Makuto** submitted that if the Petition were to be allowed, this Court would have legalized homosexuality in Kenya, when in fact, the people of Kenya in a constitutional moment rejected same sex union.

14. On alleged limitation of the Petitioner's right to privacy and human dignity, Counsel submitted that under Article 24 of the Constitution, the said rights are not absolute, since they can be limited for public good.

15. In rejoinder to the Respondent's submissions, **Mr. Kioko** submitted that they have set out the provisions that violate the Constitution and the manner in which they would be violated if the impugned law was enforced and it is not mandatory that an actual violation needs to have

occurred for one to come to Court. The existence of the impugned law itself with the possibility or threat of enforcement causing the violation is sufficient.

16. As to allegation that the Petition is res-judicata, **Mr. Kioko** submitted that no material has been furnished by the Respondent to show the Court what the issues were in the Petition alluded to. Further, that decision is of the same Court and does not bind this Court.

17. On allegations that fundamental rights can be limited, the Petitioner submitted that impugned Sections must meet the criteria set out in Article 24 of the Constitution and the limiting of a right must have a legitimate aim, must be necessary and proportionate to secure the legitimate aim in an open democratic society

Determination

18. I have carefully considered the Petition and submissions. The issues that emerge for determination are as follows:

a. Whether the Petition is res-judicata.

b. Whether the Petition meet the test of a constitutional Petition laid down in the case of Anarita Karimi Njeru.

c. Whether the impugned Sections are unconstitutional.

19. To start us off, the Respondent has raised the issue of *res-judicata*, an issue which goes to the root of the jurisdiction of the Court to entertain this dispute. If the said issue is successfully ventilated, the doctrine will deny this Court the requisite jurisdiction to take any further steps herein with the consequence that the Petition will be struck out for being res judicata. It is trite law that when a point of law, which goes to the jurisdiction of the court is raised, the court must first deal with that issue before proceeding any further in the matter. In the celebrated case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1 Nyarangi, J.A held:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step."

Whether the Petition is Res Judicata

20. The principle of *res judicata* is provided for under Section 7 of the Civil Procedure Act, which provides as follows: -

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

21. The test for *res judicata* was aptly summarized in the case of Kamunye & Others v The Pioneer General Assurance Society Ltd [1971] EA 263 at page 265 as follows;

"The test whether or not a suit is barred by res judicata seems to me to be – is the Plaintiff in the second suit trying to bring before the court, in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of res judicata applies not only to points upon which the court was actually required to adjudicate but to every point which properly belonged to the subject of and which the parties, exercising due diligence, might have brought forward at the time."

22. Similarly, the Court of Appeal in John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR, the court made the following finding at pages 7: **'On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of res judicata. However, we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions.**

23. **Mr. Makuto** submitted that the matters the subject of this petition are *res judicata* having been decided and finalized in the decision by a bench of Judges in EG & 7 others v Attorney General; DKM & 9 others (Interested Parties)(supra). This submission was refuted by the Petitioner who submitted that his Petition is general and affects any person who has a right to make a sexual decision. However, the Petition in EG & 7 others v Attorney General; DKM & 9 others (supra) was filed by a specific group including homosexuals and lesbians.

24. I have looked at the pleadings herein. I have also looked at consolidated constitutional Petition EG & 7 others v Attorney General; DKM & 9 others (supra). This latter consolidated Petition addressed the constitutionalism of Section 162 (a) (c) and 165 of the Penal Code and was founded on Articles 2, 19, 20, 21, 24, 25, 31, 43 and 259 of the Constitution in Petition 150 of 2016, EG & 7 others vs. Attorney General. Further, in Petition 234 of 2016, Kenya Human Rights Commission v Attorney General, the same was founded on Articles 27(4), 28, 29, 31, 32, 43, 50 of the Constitution. In the instant Petition, the Petitioner is challenging the constitutionality of **Section 162 (a) and (c), 163 and 165** of the Penal code in relation to the right to human dignity guaranteed under Article 28 of the Constitution, the right to privacy guaranteed under Article 31 of the Constitution, the freedom of conscience and belief guaranteed under Article 32.

25. Section 162 of the Penal Code provides as follows: -

Unnatural offences

“Any person who--

- a) Has carnal knowledge of any person against the order of nature; or
- b) Has carnal knowledge of an animal; or
- c) Permits a male person to have carnal knowledge of him or her against the order of nature,

Is guilty of a felony and is liable to imprisonment for fourteen years.

Provided that, in the case of an offence under paragraph (a), the offender shall be liable to imprisonment for twenty-one years if—

- i. the offence was committed without the consent of the person who was carnally known; or
- ii. the offence was committed with that person’s consent but the consent was obtained by force or by means of threats or intimidation of some kind, or by fear of bodily harm, or by means of false representations as to the nature of the Act.”

26. Section 163 of the Penal Code provides as follows:

Attempt to commit unnatural offences

“Any person who attempts to commit any of the offences specified in section 162 is guilty of a felony and is liable to imprisonment for seven years.”

27. On the other hand, Section 165 of the Penal Code provides that: -

Indecent practices between males

Any male person who, whether in public or private, commits any act of **gross indecency** with another male person, or procures another male person to commit any act of **gross indecency** with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in **public or private**, is guilty of a felony and is liable to imprisonment for five years.

28. In **Benjamin Koech v Baringo County Government & 2 others; Joseph C. Koech (Interested Party) [2019]** Muriithi J held:

“*The doctrine of res judicata has two main dimensions: cause of action res judicata and issue res judicata. Res judicata based on a cause of action, arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. Cause of action res judicata extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion is alleged. Issue res judicata may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue.*”

25. Lord Penzance in *Wytherley v Andrews [1871] LR 2 P& D 327 at 328*). *The full passage is in these words: -*

“...there is a practice in this Court, by which any person having an interest may make himself a party to the suit by intervening; and it was because of the existence of that practice that the Judges of the Prerogative Court held that if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to re-open the case.”

26. In the instant case, for a Petition to be *res judicata*, the subsequent Petition must raise similar or substantially similar issues to those in the former Petition; the petition must be between the same parties or their representatives and relate to the same subject matter and the cause of action or issues must have been conclusively determined by a Court of competent jurisdiction. It is noteworthy that the central issue for determination in this Petition and the former Petition is the issue of the unconstitutionality of Sections 162(a) and (c) 163 of the Penal code. It is the view of this Court that the cause of action and issues raised in the instant Petition are identical to those in the earlier proceedings save for the prayer seeking to declare Section 163 of the Penal Code unconstitutional, both Petitions having been brought in public interest and against the Respondent, and having involved the same subject matter. In such a case, the bar to litigating the cause of action sought herein is absolute unless fraud or collusion is alleged which is not the case herein.

27. On the alleged unconstitutionality of Section 163 of the Penal code, it is clear that the said issue is tied to the unconstitutionality of Section 162(a) and (c) of the Penal Code and the same cannot be determined in isolation.

28. Accordingly, it is my considered view that applying the stated law to the facts before me, it is clear that entertaining the instant Petition initiated by the Petitioner amounts to reopening a matter that was adjudicated and determined by a Court of competent and concurrent jurisdiction. The Petitioner is simply trying to re-litigate a cause of action and issues, which were directly and substantially in issue in a previously decided Petition. The court has a duty to stop such abuse of the court process.

29. The upshot of the foregoing is that the court finds no merit in the petition dated 18/2/2019. The same is incompetent and abuse of the process of this Court and is dismissed with costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 19TH DAY OF APRIL, 2021

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Mr. Maundu for Petitioner

Mr. Makuto for Respondent

Ms. Peris Court Assistant