



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 443 OF 2019**

**IN THE MATTER OF ARTICLE 1, 2, 3, 10, 19, 20, 21, 23, 27, 28, 47, 48, 49, 159, 165(3)(d)**  
**OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF VIOLATION OF THE RIGHT TO HUMAN DIGNITY, FAIR ADMINISTRATIVE ACTION**  
**AND PROTECTION OF FREEDOM, LIBERTY AND SECURITY OF PERSONS**

**AND**

**IN THE MATTER OF ABUSE OF OFFICE AND COURT PROCESS BY THE 4<sup>TH</sup>, 5<sup>TH</sup> AND 6<sup>TH</sup> RESPONDENTS**

**AND**

**IN THE MATTER OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT, 2011**

**BETWEEN**

**MARGRET WAIRIMU GACHERU.....1<sup>ST</sup> PETITIONER**

**ELIAS MAINA NG'ANG'A .....2<sup>ND</sup> PETITIONER**

**VERSUS**

**THE ATTORNEY GENERAL..... 1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup> RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE.....3<sup>RD</sup> RESPONDENT**

**PC PATRICK MUSYOKA (PC NO.34652).....4<sup>TH</sup> RESPONDENT**

**MARGARET W. JOHN MATHENGE.....5<sup>TH</sup> RESPONDENT**

**BETA HEALTHCARE INTERNATIONAL LTD.....6<sup>TH</sup> RESPONDENT**

**RULING**

**PETITION**

1. The Petitioners through a Petition dated 4<sup>th</sup> November 2019 filed on 5<sup>th</sup> November 2019 seek the following reliefs:-

a) *An order for Compensation as provided in Article 23(3) (e).*

b) *Any other Order that this Honourable Court deems fit to meet the ends of Justice and the Protection of the Constitutional rights of the Petitioners.*

c) *Costs of this Petition*

#### **PETITIONER'S CASE**

2. The Petitioners contend that sometimes in April 2014, the 5<sup>th</sup> Respondent caused the Petitioners to be arrested following a malicious complaint of an event that had happened a year earlier, thus 2013 based on private email chats between the Petitioners and herself claiming Petitioners had threatened her life.

3. The Petitioners employer Beta Healthcare International Ltd, the 6<sup>th</sup> Respondent formed and convened a Kangaroo like International Committee "*the grievance Committee*" which within an hour and half and without due regard to the rules of National Justice, went ahead and found the email chats in question were:-

***"Genuine, Hate speech, misuse of company .... And amount to character assassination."***

4. The Petitioners contend the committee formed by the 6<sup>th</sup> Respondent was at the instance of the 5<sup>th</sup> Respondent, a Human Resource Manager and the complainant, which proceeded to advise the management of the Beta Healthcare International Limited, the 6<sup>th</sup> Respondent to take disciplinary action against the Petitioners.

5. The disciplinary action taken was summary dismissal of the Petitioners from the employment. The committee further advised the 5<sup>th</sup> Respondent to lodge a formal complaint with police, after which a criminal investigation was initiated for threat of 5<sup>th</sup> Respondents' life. The 5<sup>th</sup> Respondent made complaint to PC Patrick Musyoka, the 4<sup>th</sup> Respondent on 25<sup>th</sup> April 2014.

6. The Petitioners were duly arraigned before *Makadara Law Courts vide Republic v Margaret Wairimu, CRC 3375 of 2014 and CRC No. 3698/2014 Republic vs. Elias Maina Ng'ang'a.*

7. The Petitioners contend the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents violated their Constitutional Rights as enshrined in **Articles 27, 28, 29, 31 and 47 of the Constitution** in that their right to fair administrative action were violated by the 5<sup>th</sup> and 6<sup>th</sup> Respondents by undertaking a sham disciplinary committee.

#### **THE 1<sup>ST</sup> AND 3<sup>RD</sup> RESPONDENTS RESPONSE**

8. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents filed grounds of opposition opposing the Petitioners claim dated 19<sup>th</sup> July 2020 and avers the Petition herein does not meet the threshold of constitutional Petition as it does not disclose the rights allegedly infringed upon and how those rights have been infringed.

#### **THE 5<sup>TH</sup> AND 6<sup>TH</sup> RESPONDENTS RESPONSE**

9. The 5<sup>th</sup> and 6<sup>th</sup> Respondents are opposed to the Petitioners Petition and in doing so filed a Preliminary Objection setting out three (3) grounds of objection being:-

a) *The claim filed is bad in law and amounts to an abuse of this Honourable Court's process.*

b) *The Petitioners' claim is a non-starter and does not lie as the matters herein largely rest on a claim for malicious prosecution which ought to be brought by way of a Civil Claim and not by way of a Constitutional Petition.*

c) *This Honourable Court lacks jurisdiction to entertain the same as observed by the Court of Appeal in the case of Njenga Karume vs. Speaker of the National Assembly CA 1992, that the Court stated that, 'where the law provides that a certain procedure must be followed, then such procedure must be strictly followed.'*

#### **ANALYSIS AND DETERMINATION**

10. I have carefully considered the Petition, and the Preliminary Objection herein by the 5<sup>th</sup> and 6<sup>th</sup> Respondents, as well as the submissions in support by the 1<sup>st</sup> Respondent; 5<sup>th</sup> and 6<sup>th</sup> Respondents and submission in opposition by the Petitioners and from the above only one (1) issue arise for consideration thus:-

a) *Whether the Honourable Court has jurisdiction to hear and determine the Petition herein.*

11. The 5<sup>th</sup> and 6<sup>th</sup> Respondents in their Preliminary Objection contend that the Petitioners claims as filed is bad in law and amounts to an abuse of this Honourable Court's process. It is further averred that the Petitioners claim is a non-starter and that it does not lie as the matters raised in the Petition largely rest on a claim for malicious prosecution which ought to be brought by way of civil claim and not by way of a

constitutional petition. In other words it is contended by the Respondents, the Petitioners' Petition do not raise any constitutional issues for consideration by the Honourable Court. It is in that regard the Respondents contend this Court lacks jurisdiction to hear and determine the Petition herein.

12. The 5<sup>th</sup> and 6<sup>th</sup> Respondents further assert that the Petitioners claim is of malicious prosecution. Further they argue that although the petitioners' claim is raising some constitutional claims, it is wholly based on the civil wrongs to wit, unlawful arrest and malicious prosecution. The 5<sup>th</sup> and 6<sup>th</sup> Respondents contend that this being the case, the court with proper mandate to hear and determine the claim is the civil Division of the High Court. To buttress this proposition the 5<sup>th</sup> and 6<sup>th</sup> Respondents seek to rely in the case of **Jaston Ongule Onyango vs. Attorney General & another [2015] eKLR** where the Court observed as follows:-

**“...and also the civil claim for malicious prosecution which falls for determination under the civil jurisdiction of the High Court.”**

13. It is further stated by the 5<sup>th</sup> and 6<sup>th</sup> Respondents that the Petition as presented is what has been described elsewhere as an omnibus Petition and sought reliance in the case of **Hon. Justice Gikonyo J Case of Murithiwanjao (T/A Wanjao & Wanjau Advocates) v Samuel Mundati Gabaki & Another [2015] eKLR** in which the Court quoted with approval the words of **Ringera J (as he then was)** in the case of **Pyaralalmhandbheru Rajput vs. Barclays Bank and others Civil Case No. 38 of 2004** who held that:-

**“There is no doubt the application is an all-cure, omnibus application. It is a wide net cast over a large body of water, and out of all the lake or sea, creatures caught in it, there will be one or two edible crabs or fish. It is not quite so. An omnibus application is incapable of proper adjudication by the court for each of the reliefs sought apart from being governed by different rules, is also subject to long established and different judicial principles which counsel need to bring to the attention of, and the court needs to consider before granting the entire relief sought. This alone makes the plaintiff's application incurably defective, and a candidate for striking out.”**

14. The 1<sup>st</sup> Respondent supports the Preliminary Objection by the 5<sup>th</sup> and 6<sup>th</sup> Respondents. The 1<sup>st</sup> Respondent rely in the decision in the case of **Anaritta Karimi Njeru vs. Republic (1976 – 80) KLR 1272**, which laid down the principle that a person who alleges a violation of his constitutional rights and freedom must plead such allegation with a degree of precision. The allegation of violation of Constitutional Rights in my view must be particularized in a reasonably precise manner and further also that the specific provisions of the Constitution which availed the violated rights had to be stated as was the manner of violation and extent thereof. There should be no room for speculation what the Petition is all about.

15. The 1<sup>st</sup> Respondent urge the Petitioners claim is pegged on malicious prosecution which is a civil claim and not a constitutional issue. It is contended in the Petition, it alleges in paragraph 13 **“that the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents were all instrumental in setting into motion the mentioned criminal proceedings, which proceedings were actuated by malice and spite premised on improper and wrongful evidence, that was so questionable and so obviously crafted to be self-serving, so as to settle workplace differences...”** *Emphasis added*).

16. The 1<sup>st</sup> Respondent further urge the Petition does not raise any constitutional issues pointing out that under **Section 24 of the National Police Service Act No. 11A of 2011**, the Kenya police have a duty to protect property, investigate crimes and apprehend offenders. The material before this Court does not demonstrate any violation of their fundamental rights to warrant invoking of the jurisdiction of this Constitutional Court. It is further stated that the police only need to establish reasonable suspicion before preferring charges. The 1<sup>st</sup> Respondent sought reliance in the decision of **Abdiwahab Ibrahim Ali & Another v Inspector General of the national Police Service & 3 others [2017] eKLR**, where the Honourable Court held; **“The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.”** *(Emphasis added)*

17. It is further averred by the 1<sup>st</sup> Respondent that jurisdiction is thus granted either by the constitution or statute and may be limited in like manner. Reliance in support is placed in **Samuel Macharia Kamau & another vs. Kenya Commercial Bank Limited [2012] eKLR**, where the Supreme Court stated that:-

**“A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”**

18. In order to determine the issue of whether this Court has jurisdiction to hear and determine the instant Petition, the Honourable Court is obligated to consider the facts of the case and reliefs sought in the petition. In the instant Petition the petitioners in response contend that this court is clothed with inherent jurisdictional remit to hear and determine the instant Petition.

19. **Article 23 of the Constitution** which deals with authority of Courts to uphold and enforce the Bill of Rights provides that the High Court has jurisdiction, in accordance with **Article 165 of the Constitution**, to hear and determine applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Rights. It is further provided under **Article 23(3) of the Constitution** that in any proceedings brought under **Article 22 of the Constitution**, a Court may grant appropriate relief, including:-

a) A declaration of rights

b) An injunction

c) A conservatory order

***d) A declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24 of the Constitution***

***e) An order for compensation and***

***f) An order of Judicial Review.***

20. Further ***Article 165(3)(b) of the Constitution*** clearly provides that the High Court shall have; jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

21. In the instant petition the Petitioners Petition is premised on various Articles such as ***Article 27, 28, 29, 31 and 47 of the Constitution***. The Petitioners Petition as drawn and filed is clear that the Petitioners are seeking redress for denial, violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights. The Petitioners aver that their rights to fair hearing, not to be discriminated; right to inherent dignity, right not to be deprived of freedom arbitrary and right to privacy of communication was infringed. It is further contended that the Petitioners right to fair administrative action was violated. The Petitioners further seek remedy as provided under ***Articles 22 and 23 of the Constitution***. The Petitioners claim is not based as alluded to by the Respondents on malicious prosecution.

22. Upon consideration of the facts of the Petition and reliefs sought it turns out that the Petitioners claim is not based on malicious prosecution but the Petitioners applications are for redress of denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Rights. I find by virtue of provisions of ***Article 23*** and ***Article 165 (3) (b) of the Constitution***, this Court is properly clothed with jurisdiction to hear and determine the issues raised in the instant Petition being the question whether a right or fundamental freedom in the Bill of rights has been denied, violated, infringed or threatened.

23. ***The upshot is that the Preliminary Objection by the 5<sup>th</sup> and 6<sup>th</sup> Respondents dated 12<sup>th</sup> June 2020 is without merits and is dismissed with costs.***

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF MAY, 2021.**

.....

**J. A. MAKAU**

**JUDGE**