



## REPUBLIC OF KENYA

### IN THE HIGH COURT OF KENYA AT KAKAMEGA

### CONSTITUTIONAL PETITION NO. 1 OF 2019

**IN THE MATTER OF ARTICLES 19, 21, 22, 23, 24, 25, 28, 29 AND 47 OF THE CONSTITUTION OF KENYA 2010**

**AND IN THE MATTER OF AN APPLICATION BY GIDEON WESONGA WAKHANU**

**BETWEEN:**

**REPUBLIC.....APPLICANT**

**AND**

**1. THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA**

**2. JORAM MAKOMERE EKESA.....RESPONDENTS**

**EX PARTE GIDEON WESONGA WAKHANU**

### J U D G M E N T

1. The Court has before it a Petition filed by GIDEON WESONGA WAKHANU filed on 11<sup>th</sup> February 2019. The Petitioner is seeking the following relief:

- “a) A declaration that the petitioner’s rights under articles 39, 48 and 49 were violated by the respondents jointly and severally*
- b) An award compensating the petitioners special damages of Ksh.6,000/=*
- c) An award of general damages for the violation of the constitutional rights of the petitioner.”.*

2. It should be noted that although the body of the Petition refers to **Articles 39, 48 and 49**, the Heading states that the matter is brought under **Articles 19, 21, 22, 23, 24, 25, 28 29 and 47 of the CoK 2010**.

3. The Petitioner has filed a Statement of Facts, the facts he relies upon is that he was arrested on 1<sup>st</sup> October 2016 on an allegation of assault. The Complainant to the assault was the Second Respondent. The Petitioner says he was not produced to Court at the earliest opportunity, which he states was 3<sup>rd</sup> October 2016. Instead, he says, he was brought to Court on 7<sup>th</sup> October 2016. He says that a consequence of what happened his right to movement was curtailed and his dignity was violated *“as he was prevented to access justice for 7 good days before he could be taken to court”*.

4. In addition, the Petitioner is seeking special damages being travel costs subsistence for attending Court on the days the matter was heard. He alleges the trial for assault was heard for a period of 10 (ten) days. It was heard in the Chief Magistrate’s Court Kakamega by Hon Eric Malesi (hereinafter the Learned Trial Court). The Petitioner was acquitted by the Learned Trial Court. He feels that he should receive damages for the alleged infringement to his rights. Based on his pleading, he believes the persons who should compensate him are the Attorney General of the Republic together with the Complainant in the Court below, the Second Respondent herein.

5. The Parties were directed to file their Written Submissions. In the course of legal argument, the Petitioner’s case has changed to state that he is relying on **Article 19(3)(a), Articles 20(1), Article 20(2) Article 21(1) and Article 156 of CoK 2010**.

6. The First Respondent entered appearance but did not participate in the proceedings thereafter. The Second Respondent entered appearance and filed a Reply and Cross Petition, followed an Amended Reply. The gist of the Respondent’s Reply is that the facts and matters pleaded are denied. It is denied that the Petitioner incurred the expenses alleged. It is denied that his rights were infringed and it is denied that he is

entitled to the declarations sought. The Second Respondent states that the Learned Trial Court found the assault had occurred but that the Petitioner should not, in the view of that court, be held culpable. There was reference to boundary features but none were identified.

7. The Parties were directed to file written submissions which they did. In his Submissions the Petitioner states he relies entirely on Ruling of the Court in ***High Court Constitutional and Human Rights Division Constitutional Petition 347 of 2015: MWK & Another v The Attorney General, the Inspector General of the Police, the Director of Public Prosecutions and 2 Others***. That case related to the violent arrest, strip search, photographing and other intrusions. In this case the only factual complaint is of detention.

8. The facts of this case that are not in dispute are that the Petitioner and Respondent occupy adjoining pieces of land. The Second Respondent, leases his from the owner. It is also common ground that the Second Respondent was clearing the land, which was said to have been used for cultivating sugar cane. He employed several people to assist him and he was cutting the overgrown fence (according to him). The Petitioner came onto the Second Respondent's land and an altercation followed. The Learned Trial Court found that there was the factual basis for an assault having been committed. The Second Respondent was injured. He sought the assistance of the village elder and medical assistance. He reported the matter to the Police in Navakholo. The Petitioner was not arrested then. About a fortnight later, he himself went to the Police station on a Saturday when he was arrested. He was not brought to Court until the following Friday when the Charge was read to him. He pleaded not guilty and was released on a cash bail to return on subsequent dates for trial. The Petition claims he is entitled to KShs.6,000/= as special damages. He asks the Court to assess damages attributable to the infringement of his rights and also hurt feelings. As stated above the persons he holds responsible are the Respondents.

9. It seems that the Petition is trying to bring the common law claim for unlawful arrest and/or malicious prosecution under the guise of a constitutional petition together with a claim that he was produced to the Court at the earliest opportunity. Firstly, he suggests that he was detained when he should not have been. In particular, that he was not produced to Court immediately. In his Submissions he changes that to say that the first day when he could have been produced to Court was Monday 3<sup>rd</sup> October 2019, but his detention continued until 7<sup>th</sup> October. His assessment of 7 days infringement is then said to be 4. The Court must ask, who is the person who detained the Petitioner? It must be the Police. Who then, we ask is the person who should have produced the Petitioner to the Court, again it must be the Police. In the case, it must be that part of the Police Force that is responsible for Navakholo. Neither of the Respondents were charged with those responsibility. The Petitioner has not named either the Inspector General of Police nor the Officer in Charge of the Police Station where he was arrested, nor the investigating officers who may have been involved in investigating the assault and/or bringing witnesses to court. In the alternative, it is possible that the plea was not taken because there were no prosecutors available. In that case, the body responsible would be the prosecuting authority in the form of the then Director of Public Prosecutions.

10. The Petitioner has not joined any of those parties to the Petition. That means that the Court is denied the opportunity of hearing any explanation that may exist. It also means that no orders can be made against them.

11. The Petitioner relies on **Article 19(3)**, however it is instructive to consider the whole of **Article 19** which provides:

*19. (1) The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. (2) The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings. (3) The rights and fundamental freedoms in the Bill of Rights— (a) belong to each individual and are not granted by the State; (b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter; and (c) are subject only to the limitations contemplated in this Constitution.*

12. It is clear from the foregoing that **Article 19** recognises that some fundamental rights and freedoms may be limited as provided for by **the CoK. Article 20 (1) and (2)** provides:

*“20. (1) The Bill of Rights applies to all law and binds all State organs and all persons. (2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom...4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote— (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights.”.*

13. The Petitioner also relies on **Article 21** which relates to implementation and provides;

*“21. (1) It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. (2) The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43. (3) All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities. (4) The State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.”.*

14. **Articles 39** enshrines the right to freedom of movement. **Articles 48 and 49** provide:

*“48. 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. 49. (1) An arrested person has the right— (a) to be informed promptly, in language that the person understands, of— (i) the reason for the arrest; (ii) the right to remain silent; and (iii) the consequences of not remaining silent; (b) to remain silent; (c) to communicate with an advocate, and other persons whose assistance is necessary; (d) not to be compelled to make any confession or admission that could be used in evidence against the person; (e) to be held separately from persons who are serving a sentence; (f) to be brought before a court as soon as reasonably possible, but not later than— (i) twenty-four hours after being*

arrested; or (ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day; (g) at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and (h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons Access to justice. Rights of arrested persons. 34 The Constitution of Kenya not to be released.”.

15. The Petitioner claims that his rights have been infringed. He seems to suggest that his rights were infringed by the Second Respondent. In order to decide whether any rights have been infringed as alleged, the Court must consider whether, firstly the right asserted exists and then whether on the facts pleaded there has been infringement. Article 19 is a general statement of rights some of which may be curtailed according to the Law. Those that cannot be limited are set out in **Article 25** which provides:

*“25. Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited— (a) freedom from torture and cruel, inhuman or degrading treatment or punishment; (b) freedom from slavery or servitude; Fundamental Rights and freedoms that may not be limited. 24 The Constitution of Kenya (c) the right to a fair trial; and (d) the right to an order of habeas corpus.”.*

16. The Petitioner also relies on **Article 156(6)** which provides:

*(6)The Attorney-General shall promote, protect and uphold the rule of law and defend the public interest*

17. The Petitioner asserts that he should have been produced before the Court on 3<sup>rd</sup> October 2016, however, he has not demonstrated that the Court was in fact sitting on that day or any of the days following. He has not joined the Police and therefore the Court does not have before it any evidence as to the reason why. That omission does not mean that the evidence does not exist, that omission is because the Petitioner failed to join an essential party to the Petition.

18. Further, the Learned Trial Court found that there was a case to answer. It also found that the act of assault occurred. In the circumstances, it was reasonable for the Petitioner to be arrested and detained up to the point of charge. The decision of the Learned Trial Court was that (a) the Petitioner was provoked and (b) the provocation was such as to justify a violent assault. It is the view of this Court that what occurred was a boundary dispute. The Learned Trial Court has not given its reasons for finding that the provocation was such as to justify an assault.

19. In the circumstances, the Petitioner has failed to demonstrate any rights were infringed. Further, he has failed to demonstrate that the infringement, if such existed was by the Parties joined. For those reasons the Petition is dismissed. Although it is usual for an order that each Party pay its own costs, in this case the fact of the attack and misjoinder of the Second Respondent makes it an appropriate case for the Petitioner to pay the costs of both Respondents. It is so ordered.

**Order accordingly,**

**FARAH S. AMIN**

**JUDGE HIGH COURT**

**DELIVERED, DATED AND SIGNED THIS THE 19TH DAY OF NOVEMBER 2021 IN KAKAMEGA**

**Note: Date of Delivery changed because Court was on Circuit in Vihiga on 20<sup>th</sup> – 24<sup>th</sup> September 2021. Delivered after service of Notices**

In the Presence of:

Court Assistant: Dennis Wasilwa

Mr Momanyi for the Petitioner

No Appearance for the Respondents