



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

PETITION NUMBER E010 OF 2021

IN THE MATTER OF ARTICLES 2(1) & 4, 3, 10, 19, 20, 21 (1), 22, 23, 27, 28, 36(1) & (2), 38, 73(1), 81, 258, AND 259 OF THE
CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE CONSTITUTION

AND

IN THE MATTER OF VIOLATION OF PETITIONERS'S POLITICAL RIGHTS AND FREEDOM OF ASSOCIATION

BETWEEN

HON. LUKA K. KIGENPETITIONER

AND

HON. ATTORNEY GENERAL.....RESPONDENT

J U D G M E N T

1. On 8th December 2011, six (6) persons namely Amos Kibet Konyae, Sylvester Totona Kibet, Musa Chemitei Kapkamba, Kimunai Ole Kimeiwa, Dan Ashitiva Daudi and Francis Mungai Thuo were charged with the offence of **Hindering Burial of Dead Body Contrary to Section 137 as read with Section 36 of the Penal Code in Nakuru Chief Magistrate's Criminal Case Number 4473 of 2011.**
2. The particulars were that; On the night of 30th November 2011 and 1st December 2011 at Banita Farm in Rongai District within Rift Valley Province, jointly with others not before court they unlawfully disinterred the burial of the body of Francis Mbuthia and removed the body to Banita Dispensary.
3. After hearing five (5) witnesses the learned trial magistrate *Hon. G. N. Mutiso (Senior Resident Magistrate)* on 21st December 2012 returned a finding of no case to answer and acquitted each of them under **Section 210 of the Criminal Procedure Code.**
4. The six persons thereafter filed **High Court of Kenya at Nakuru Petition Number 38 of 2014, Kimunai Ole Kimeiwa & 5 Others vs Joseph Motari Mosigisi (the then District Commissioner, Rongai District) & 3 others [2019] eKLR.**
5. In the Petition they sought *inter alia* the declaration that their rights to human dignity, fair administrative action and protection of freedom and security of the person and liberty had been violated.
6. The court (*Prof Joel Ngugi J*) found in their favour on 16th January 2019 and awarded them each General Damages of Kshs. 800,000/=.
7. At paragraph 26, 27, 28 of the judgment the learned judge stated;

“26. The petitioners say that they were being used as “sacrificial lambs” that the real target was Hon. Luka Kigen who had differences with the 1st Respondent. They claim that the act of disinterment was actually done by the office of the 1st Respondent and that their arrests were baseless. They claim that the 1st Respondent wanted them to falsely confess that it was Hon. Kigen who had disinterred the body and they were only charged when they refused to do so.

27. The petitioners say that the “entire trial was shambolic and abusive of process as the complainants were never disclosed in any real sense nor was there any remote connection between the crime and the Petitioners. It was a classic case of abuse of power of the people of Kenya and the security apparatus of the country against the petitioners. They believe that the criminal process was used to harass them and settle political scores in a ploy stage-managed by government officials.

28. All these factual allegations are not responded to or disputed by the Respondents. They are, therefore, taken to be established, in my view, if one gleans at the proceedings, the ruling of the Learned Magistrate, one will be justified to believe the theory advanced by the Petitioners that this was nothing but malicious use of the criminal justice systems.”

8. On 13th May 2021 Hon. Luka K. Kigen filed this petition suing the Hon. Attorney General, seeking the following prayers;

1. A declaration that the Petitioner’s fundamental rights and freedoms under Articles 27, 28, 36 and 38 of the Constitution and Articles 25 and 26 of International Covenant on Civil and Political Rights of 1966 were contravened and grossly violated by the then District Commissioner, Rongai District and the Security Personnel, who were Kenyan Government servants, agents and/or employees.

2. A declaration that the Petitioner is entitled to the payment of damages and compensation for the violations and contraventions of his fundamental rights and freedoms under Article 27, 28, 36 and 38 of the Constitution and Articles 25 and 26 of International Covenant on Civil and Political Rights of 1966.

3. General damages, exemplary damages and moral damages on an aggravated scale under Article 23 (3) of the Constitution of Kenya, 2010 for the unconstitutional conduct by the Kenyan Government servants and agents be awarded.

4. Any further orders, writs, directions, as this Honourable Court may consider appropriate.

5. Costs of the suit, and interest.

9. The Petition is supported by the affidavit of the petitioner sworn on 11th May 2021. It defines the parties, sets out the legal and factual basis of the petition, together with the alleged violations. The affidavit reiterates the claims made in the petition.

10. The respondent filed a Response to the Petition on 12th August 2021. In it, the respondent responds to each of the paragraphs set out in the petition.

11. Parties agreed to dispose of the petition by way of Written Submissions. The petitioner’s were filed on 21st September 2021 and the respondent’s on the 8th December 2021.

12. The petitioner set out the issues for determination as;

i. Whether the petitioner’s Petition was pleaded with reasonable precision as per the principles of **AnnaRita Karimi Njeru vs Republic (1976 – 1980) KLR 1272.**

ii. Whether the petitioner’s fundamental rights and freedoms under Articles 27, 28, 36 and 38 of the Constitution of Kenya and Article 25, 26 of the ICCPR 1996 were contravened and grossly violated.

iii. Whether the petitioner is entitled to compensation.

13. The respondent raised the same issue (ii) and (iii) for consideration.

14. Generally, the factual basis for the petition is that the petitioners is a citizen of the Republic of Kenya who served as elected Member of Parliament on ODM Party for Rongai Constituency in 2007 to 2013. The respondent is the Hon. Attorney General established under **Article 156(1) of the Constitution of Kenya**, the legal representative of Government of Kenya in civil proceedings, and who is also obligated by the **Constitution of Kenya** to promote, protect and uphold the Rule of Law and defend the public interest.

15. According to the petitioner, he had aspirations of being re-elected in the general elections of 2013. However, on diverse dates between November 2011 and 4th March 2013 the Government of Kenya through its employees, servant, and operatives, engineered an operation to ensure that he was not re-elected as a Member of Parliament to represent Rongai Constituency. He avers that this operation was orchestrated by senior officials working in the Office of the President based at Harambee House in Nairobi. Particulars of those orchestrations are given in his affidavit where he deponed that the arrest, prosecution of the six (6) persons in **Nakuru Chief Magistrate’s Criminal Case Number 4473 of 2011** was one of the actions done on instigation from the said senior officials at Office of the President to the District Commissioner Rongai then, that the arrested persons were his supporters, and that before their arraignment in court they were pressurised by the District Commissioner to implicate him (the petitioner) as the person who had ordered or conducted the illegal exhumation of the body, subject of the criminal case; that the said criminal case was a part of the wider scheme and similar campaign by the state operatives led by the then District Commissioner one Joseph Motari to bring his name into disrepute and point him as a person who was against other tribes residing in the then Rongai District, specifically from Banita Settlement Scheme.

16. That since the said actions were done during the period preceding the general elections the actions of the said officials painted him as a tribal, brutal, beastly and ruthless politician who did not deserve to be re-elected. He deposed further that the case was widely reported in the media and annexed extracts from the Daily Nation reporting the charging of the six and their acquittal. That despite the acquittal, the

government through Joseph Motari DC continued smear campaigns and an entire security personnel from General Service Unit (GSU) and regular police were deployed in Rongai to monitor his movements, disrupt his engagements with his constituents and disrupt his political campaigns, all of which were led by the DC and done in reckless abandon.

17. The petitioner further deponed that in 2013 towards the elections, his campaigns would be cancelled or forcefully ended or stopped by security personnel on allegations that it was past campaign time while the rest of the candidates would be allowed to continue with their campaigns. He deponed that three times he was ejected from the podium while addressing his supporters.

18. It is the petitioner's case that the DC regularly informed him that "*the system*" had decided he was not going to be re-elected in Parliament because of the political stand which was not well with "*who & who*" in government then. That he later won a nomination to run as a Member of Parliament on a United Republican Party, but lost despite the fact that the party was popular in Rift Valley. That is was because of the smear campaigns, the exhumation of the body saga that also led to the closure of his business by the name, Executive Dry Cleaners.

19. It is from the foregoing that the petitioner contends that, the government officials actions were discriminatory against him **Contrary to Article 27 of the Constitution of Kenya.**

20. That his right to human dignity under **Article 28** was been violated.

21. That his right to freedom of association which includes the right to form, join or participate in the activities of any association of any kind as provided for by **Article 36 (1) and (2)** had been violated.

22. That his right as a citizen to make political choices, to form or participate in forming a political party, campaign for a political party or cause, be a candidate for public office, or office with a political party of which he is a member, and if elected, to hold office, as provided for by **Article 38** was been violated.

23. He contends that the state officers acted against their powers as provided for under **Article 73(1) of the Constitution** which vests state officers with authority, that is a public trust to be exercised in accordance with the **Constitution. The said article states: (1) Authority assigned to a State officer—**

(a) is a public trust to be exercised in a manner that—

(i) is consistent with the purposes and objects of this Constitution;

(ii) demonstrates respect for the people;

(iii) brings honour to the nation and dignity to the office; and

(iv) promotes public confidence in the integrity of the office; and

(b) vests in the State officer the responsibility to serve the people, rather than the power to rule them."

Further that the state officers acted contrary to the requirements of **Article 81 of the Constitution;**

24. The petitioner called upon **Article 2 (6) of the Constitution to rely on Articles 25 and 26 of the ICCPR**, specifically 25 which provides at (b) for the right to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors and **Article 26**, which prohibits any discrimination and guarantees all persons equal and effective protection against discrimination on any ground virtually political or other opinion.

25. The Respondent did not file a Replying Affidavit but filed a response to the petition. In the response the respondent stated that it did not involve itself in national politics, that there was no correlation between the criminal case against the six (6) persons and the petitioner herein or his loss of the parliamentary seat or other political ambitions. It was denied that the arrest of the six (6) had anything to do with the petitioner's campaigns as they were charged for an offence known in law, that the six (6) were arrested in their capacity as suspects and at no time was the petitioner arrested as a suspect or charged with any offence. Further that the six (6) persons were not seeking to be elected, and if they were, they would be the ones rightly placed to institute this petition, since they were the ones who were directly affected by the arrest, that the allegations that security personnel were deployed to monitor and follow the petitioner was not true as these officers are found in every constituency. That if the petitioner was to be believed with regard to the six (6), the fact that they were acquitted long before the elections of 2013 ought to have led to a win for him. That the petitioner had not demonstrated how his rights had been violated or infringed by the arrest, charging and subsequent acquittal of the six (6).

26. That the petitioner had not met the threshold set out in the case of **Annarita Karimi Njeru**, as his petition did not disclose how the respondent violated or infringed the petitioner's constitutional rights.

27. The first for determination issue is whether the petition meets the threshold in **Annarita Karimi Njeru**. I note from the respondent that there was no submission on that issue and it would appear that the same was conceded. However, the petitioner did submit that the principle is,

"constitutional violations must be pleaded with a reasonable degree of precision."

The petitioner relied on Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others [2013] eKLR, Marpe Buildings, General Engineering vs Attorney General & 3 Others [2016] eKLR where the court cited Kevin Turunga Ithagi vs Hon. Justice Fred Ochieng & Others [2015] eKLR where *Onguto J* precisely stated;

“In my view, the threshold of the competency is met if a court can painlessly identify from the petition the Articles allegedly violated and also the alleged manner of violation.”

28. The petitioner’s position is that he complied with these requirements. That he had set out the articles violated and the manner of violation. In his submissions he summarised it thus: That the respondent;

“By interfering, limiting and or interrupting the petitioner’s political engagements in favour of his competitor’s and by using state machinery and propaganda against the petitioner, the state operatives, government officials and security personnel violated the petitioner’s rights to form, or participate in forming, a political party; to campaign for a political party or cause and to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office contrary to Article 38 of the constitution and Article 25 of International Covenant on Civil and Political Rights of 1996.”

29. That this was so clear and precise that the respondent was able to file a response to the petition.

30. On whether the Petitioner has cited the articles he alleges were violated, from perusing the Petition it is evident that the petitioner has set out as **Articles 26 27, 28, 36 and 38 as the Articles of the Constitution of Kenya**. He has stated that the violations were by way of *interfering, limiting and or interrupting the petitioner’s political engagements in favour of his competitor’s and by using state machinery and propaganda against the petitioner*. He has also set out in his affidavit the manner in which he alleged the rights were violated, he alleged that the smear campaign was set up, by having his supporters arrested and charged with an offence that created the impression that he was not suitable for re-election, he alleged that his campaigns interrupted, at times forcefully stopped by state operatives. He alleged that by these acts, his was discriminated upon, and his right to political association, fair electoral process were violated. So, I find that on this issue, the Petition is competent.

31. On whether the petitioner proved that the petitioner’s rights were violated? The petitioner bears the burden of proof. The standard of proof is on a balance of probabilities. The petitioner bears the burden to prove the alleged violations actually took place. This is the requirement of **Section 107(1) of the Evidence Act**: Burden of proof

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

32. And in Githunguri Dairy Farmers Co-operative Society Limited vs The Attorney General and 2 Others HCCP and 2 Others HCCP No. 257 of 2015 [2016] eKLR the court stated as follows;

“[46] The complainant has to satisfy an evidential burden to show or establish that the specific right existed and that it had been restricted or violated and then the burden fell on the State to prove on a balance of probabilities that such violation or alleged violation was saved by the Constitution: see Catholic Commission for Justice and Peace in Zimbabwe vs Attorney General [1993] 2LRC (Const) 279 at 290 where Gubbay CJ stated as follows:

“I consider that the burden of proof that a fundamental right, of whatever nature has been breached is on he who asserts it... [it] is essentially a matter of fact and some evidence would have to be adduced to support the contention. The Respondent is not obliged to do anything until a case is made out which requires to be met.”

33. This was further elaborated on in the case of Kiambu County Tenants Welfare Association vs Attorney General & Another [2017] eKLR where the court stated;

“Courts have over the years established that for a party to prove violation of their rights under the various provisions of the Bill of Rights they must not only state the provisions of the Constitution allegedly infringed in relation to them, but also the manner of infringement and the nature and extent of the injury suffered (if any).”

34. I am in agreement, hence it is therefore not in dispute that the petitioner bears the burden to establish that the specific rights he claims were violated existed, state the provisions under the Bill of Rights, and show how those rights relate to him, and the infringement, and the injury suffered as a result of the infringement. That is to say that the Petitioner must also establish and show how those rights were infringed or violated, and if any injury resulted from that violation or infringement.

35. It is the petitioner’s position that he gave evidence by way of his supporting affidavit to prove the infringements and the injury he suffered. It is his position that that evidence remains unchallenged because the respondents did not file a replying affidavit, and that, to that extent, the petitioner has supplied the court with sufficient proof through the affidavit and the annexures thereto. On this the petition cited, Court of Appeal case of Daniel Kibet Mutai & 9 Others vs Attorney General [2019] eKLR

36. In that case the Court of Appeal in dealing with unchallenged affidavit evidence held;

“The position before us is that the appellants averred to certain facts under oath in an affidavit. These facts were not controverted by the respondents either through an affidavit in response or through cross examination. An affidavit is sworn evidence. It occupies a higher pedestal than grounds of opposition that are basically issues of law intended to be argued. Two things flow from this. First, by the mere fact of the affidavits not having been controverted, there is an assumption that what is averred in the affidavit as factual evidence is admitted.”

37. What the petitioner is saying is that there is this assumption that what he averred in the affidavit was factual evidence which was admitted as the was not controverted. The court said it was an assumption, that the facts were admitted. The court did not say that the mere fact that the affidavit was not controverted was sufficient proof of the claims, the court spoke to the probative value of that affidavit evidence, stating;

“As regards the weight or probative value of the factual evidence that was averred in the affidavits and whether the evidence is sufficient to prove the appellants’ claims. The appellant swore to what they personally suffered and experienced and thereafter their averments in the affidavit are direct evidence of what transpired.”

38. It is submitted for the petitioner that the purport of this authority is that since the respondent did not file an affidavit to challenge the averments in the petitioner’s affidavit, those averments are uncontroverted and this court is urged on that basis to find that the facts and the evidence by the petitioner are the only ones to be assessed by the court.

39. It is correct that the respondent has not filed any response to the affidavit, hence the averment therein were are not controverted. However, there was a response to the Petition that raised issue with the Petition, and in particular whether or not whatever evidence the Petitioner had placed before the court was sufficient to prove the claims of rights violations. So the question that begs is whether are those averments are proof that the petitioners’ rights were violated as alleged? There is a difference between laying evidence before the court, proof. Even when a matter is heard on formal proof, the party alleging whatever they are alleging must prove the same, and it comes as no surprise when even cases on formal proof are dismissed.

40. The issue as to whether the petitioner’s rights were actually violated is still contested, that is clear from the Response to the Petitioner. The only issue is whether the evidence as laid before the court proves that the petitioner’s rights were violated.

41. It is my view that this matter is no different from matter where the plaintiff testified and the defendant offers no evidence, the plaintiff is still obligated to prove his case to the required standard. This is the purport of the submissions by the respondent who relied on Christine Juma Wabwire in Attorney General [2019] eKLR citing LL Col. Peter Ngari Kagume & 9 Others vs Attorney General Constitutional Application Number 128 of 2004.

“It is incumbent upon the petitioners to avail tangible evidence of violation of their rights and freedoms. The allegations of violations could be true but the court is enjoined by law to go by the evidence on record. The petitioners’ allegations ought to have been supported by further tangible evidence such as medical records, witnesses... the court is dead to speculation and imaginations and must be guided by evidence of probative value. When the court is faced by a scenario where one side alleged and the rival side disputes and denied, the one alleging assumes the burden to prove the allegation...”

42. The respondent further submits that an allegation of violation of **Article 27 of the Constitution** must be established to a certain standard relying on the case of John Harun Mwau vs Independent Electoral and Boundaries Commission & Another [2013] eKLR, *the Court stated referring to Article 27 of the Constitution*;

“...It must be clear that a person alleging a violation of Article 27 of the Constitution must establish that because of the distinction made between the claimant and others the claimant has been denied equal protection or benefit of the law. It does not necessarily mean that different treatment or inequality will per se amount to discrimination and a violation of the Constitution.”

43. So what evidence is there to prove the manner of violation? The trigger for this Petition is the criminal case against the 6 persons who were arrested, prosecuted and acquitted. The Petitioner was not among those six. The statements made by the six in their Petition to the effect that their trial was a jab at the petitioner herein were their own statements. However, during the trial in the subordinate court, there was not a single mention of the petitioner herein by any of the witnesses. The record is clear that not even one of the allegations made in the Petition by the six was put to any of the witnesses to deny or admit that the target was indeed the Petitioner herein. Even the media references made to by the Petitioner do not mention him. Hence, it would appear to me that the allegations by six in that Petition with respect to the Petitioner did not emanate from the Criminal case they were charged with as they do not form part of that record.

44. The case proceeded as against the accused persons and nowhere in those proceedings was the petitioner herein mentioned. Hence as a fact the petitioner has not proved that the case **Criminal Case Number 4473 of 2011** had anything to do with his campaigns or political ambitions. There is nothing in those proceedings to show or that can demonstrate the alleged discrimination of the petitioner. Surely he cannot say that because he was not charged he was discriminated against.

45. I did not find anything in those proceedings to show that the six were the Petitioner’s supporters, that he was actually campaigning and any of his campaign rallies was stopped by government operatives, neither is there anything in those proceedings to show that he was ejected from any podium while addressing his supporters, or in any way to connect him with the six (6), nothing at all. He has not pointed out any part of the charge sheet, proceedings and ruling where he has been mentioned by anyone or connected with that offence.

46. As I have pointed out the only connection that the petitioner creates with that case is what the accused persons, as petitioners said in Petition 38 of 2014. I perused the judgment. It was not a fact in issue whether or not the petitioners therein were charged I lieu of the Petitioner herein. The Petitioner was not a party and there was no finding specific to the petitioner that would bind this court. The issue there

was whether the case against the petitioners amounted to malicious prosecution. That was found in their favour. If the Petitioner was a victim of those proceedings nothing would have been easier than to join the Petition.

47. I find therefore that the Petitioner has not established any relationship between the criminal case and the alleged violation of his rights. Did the Petitioner establish how his political rights, fundamental rights and freedoms under **Articles 27, 28, 36 and 38 of the Constitution and Articles 25 and 26 of international Covenant on Civil and Political Rights of 1966** were violated? Or how his legitimate expectation of being reelected as a Member of Parliament for Rongai Constituency for a second term in 2013 and further re-elected in 2017 was cut short by the respondent through the actions of its officials through the alleged;

- a. Arresting his supporters and charging them with baseless offence of hindering burial of a dead body contrary to section 137 as read with section 36 of the penal code.
- b. Taking the GKA 610 V Motor vehicle belonging to the office of Rongai Constituency Development Fund thus paralyzing the operations of the said office.
- c. Deploying security personnel drawn from General Service Unit to regularly monitor his moves.
- d. Perpetrating smear and dirty campaign linking him to exhumation of the dead body and painting him before his supporters as a tribal and brutal politician and
- e. Forcefully ending his campaign for reelection on grounds that it was past campaign time while allowing his competitors to complain freely.

48. I must point out once again, that from the affidavit sworn by the Petitioner there was no tangible evidence offered by the Petitioner. Authorities abound as to the requirement for tangible evidence. See **John Cheruiyot Rono vs- Attorney General, Petition No. 536 of 2015**, where the Court observed that:

“32. The burden of proving violation of a right or freedom enshrined in the Constitution rests on the person alleging the violation: See **Matiba v. Attorney General [1990] KLR 666**. Such burden is to be discharged on a balance of probabilities by the Petitioner showing that the right existed and that it has been violated and the manner of such violation...”

49. See also Christian **Juma Wabwire vs Attorney General [2019] eKLR** where the courts stated:

“24. I am alive to the fact, that the petitioner in his petition alluded to various constitutional violation, but without having availed tangible evidence of violation of his rights and freedoms, I find the allegation by mere words without any other evidence, the court cannot find that the petitioner has proved violations of his rights and freedoms. The petitioner herein ought to have produced documentary evidence such as medical reports and called witnesses to ensure court considers the same. The courts of law are deaf to speculations ... as it must always base its decision on evidence. I therefore find and hold that the petitioner failed to discharge the burden of proof to the required standard of proof. I find that the petitioner did not give evidence of probative value to enable this court decide the petition in his favour and grant the orders sought.”

50. The petitioner did not place any tangible evidence before me to prove the alleged violations specifically that; the respondent through its employees/officials disrupted and forcefully ended his campaign for reelection and or his public interactions with the electorates on account that it was past campaign time while allowing the rest of the candidates to campaign freely; that the six individuals were arrested by dint of politically supporting him; that actions by the state machinery interfering with the electoral system of Rongai Constituency of March 2013 by curtailing the freedom of citizen to exercise their political rights; that the Respondent deployed Security personnel from the General Service Unit to Rongai to monitor his movement; that the Respondent's officials or employees painted him as a tribal and brutal politician; that the Respondent's officials or employees linked him to the exhumation of the dead body in the criminal case; that there was state machinery propaganda which violated his rights to form or participate in forming a political party.

51. In the upshot I find that the petitioner did not provide any tangible evidence of violation of his rights. The Petition is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 20TH DAY OF DECEMBER, 2021

MUMBUA T. MATHEKA

JUDGE

In the presence of:-

Court Assistant Edna

For petitioner: Langat for Petitioner

For respondent N/A