



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

PETITION NO. 09 OF 2019

BETWEEN

BERNARD OTIENO OKEBE.....PETITIONER

AND

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

THE ETHICS AND ANTI-CORRUPTION COMMISSION.....3RD RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....4TH RESPONDENT

JUDGMENT

Background

1. The Petitioner was charged in **Kisumu Chief Magistrate's Criminal Case No. 555 of 2008** with 3 counts under the Anti-Corruption and Economics Crimes Act.
2. The Petitioner was tried and acquitted by a judgment delivered on 30th May, 2011.

Petitioner's case

3. The Petitioner asserts that upon his acquittal, he had a legitimate expectation that the Respondents could jointly and severally update the criminal records held by 2nd Respondent clearing him to show that he had been tried and acquitted.
4. The Petitioner complains that the 1st Respondent has refused, ignored and or abdicated its duty to give sound legal advice to the 2nd, 3rd and 4th Respondents concerning his constitutional rights.
5. It is the Petitioner's case that the 2nd, 3rd and 4th Respondents have refused to communicate to the relevant offices to update his records that he had been tried and acquitted.
6. On 20th May, 2014; 15th August, 2017 and 29th October, 2018, the Petitioner was issued with Police Clearance Certificates which showed that he was facing trial for the offence of corruption that was still outstanding.
7. The Petitioner blames the Respondents for his failure to secure employment with the County Assembly of Kisumu in March, 2014; the Anti-Doping Agency Kenya in April, 2017; County Assembly of Kisumu in July, 2018 and Competition Authority of Kenya in August 2013.
8. It is the Petitioner's case that the Respondents' actions have caused him to suffer damage and loss and he prays for judgment against the Respondents jointly and severally as follows:

1) An order compelling the Respondents jointly and severally to ensure that the acquittal of the Petitioner in Kisumu Chief

Magistrate's Criminal Case No. 555 of 2008 is immediately relayed and communicated to the Criminal Records Office at the Director of Criminal Investigations office and the Petitioner's records be updated accordingly

2) An award for damages to compensate the Petitioner for his being unable to secure employment

3) Costs of the petition

Respondents' Case

9. The 1st Respondent entered appearance for the 1st and 2nd Respondents but did not file responses nor submissions.

3rd Respondent's Case

10. The 3rd respondent's case is that by a letter dated 15th March, 2019, it informed the Nyamira Sub-County Police Commander that the Petitioner had been acquitted of the Anti-Corruption case on 30th May 2011 and requested that the Petitioner's criminal record be updated.

11. The 3rd Respondent urged the court to find that it had played its part and that the Petitioner's claim against it was therefore misplaced.

4th Respondent's Case

12. It is the 4th Respondent's case that its mandate under Article 157 of the Constitution does not include maintaining of or updating of criminal records.

13. The 4th Respondent similarly urged the court to find that the Petitioner's claim against it was therefore misplaced.

ANALYSIS AND DETERMATION

14. After careful consideration of the pleadings filed herein, the submissions made by the parties' respective advocates and the authorities that they cited, I note that the issue for determination is whether the Petitioner's fundamental rights under the Constitution were violated by the Respondent.

15. A Petitioner who desires the court to give judgment in its favour in a constitutional petition must meet the threshold of the principle of sufficient precision. In the case of Anarita Karimi Njeru V R (No 1) 1979 KLR 154 where the court stated that:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

16. This position was emphasized by the Court of Appeal in Mumo Matemu Vs Trusted Society of Human Rights Alliance & 5 Others [2013] e KLR when it stated:

“We cannot but emphasise the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims.”

17. There is no doubt that the mandate of the 1st, 3rd and 4th Respondents does not include maintaining of or updating of criminal records. I am therefore persuaded that the Petitioner's claim against the 1st, 3rd and 4th Respondents is misplaced.

18. A certificate of good conduct is issued pursuant to Section 142 of the Criminal Procedure Code and it's the preserve of the 2nd Respondent.

19. There is evidence that the Officer Commanding Nyamira Police station received the letter from the 3rd Respondent requesting it to update the Petitioner's records and by a letter dated 25th March, 2019 requested the Criminal Records Office, Nairobi to update the Petitioner's criminal.

20. There is also evidence that by a letter dated 07th April, 2014, the DCIO Kisumu forwarded the proceedings in Kisumu Chief Magistrate's Criminal Case No. 555 of 2008 to the Criminal Records Office, Nairobi requesting that the Petitioner's criminal record be updated.

21. Three Police Clearance Certificates issued to the Petitioner on 20.05.14; 15.08.17 and 29.10.18 confirm that the Petitioner's records have to date not been updated.

22. From the foregoing, I am persuaded that Petitioner's legitimate expectation that the 2nd Respondent would update the criminal records to

show that he had been tried and acquitted has not been met. I am equally persuaded that the 2nd Respondent's actions violate the Petitioner's right under Article 27 which provides that: **“Every person is equal before the law and has the right to from discrimination, equal protection and equal benefit of the law. “**

23. The Petitioner seeks compensation on the ground that he has been unable to secure employment more particularly with the County Assembly of Kisumu Since March, 2014; the Anti-Doping Agency Kenya in April, 2017; County Assembly of Kisumu in July, 2018 and Competition Authority of Kenya in August 2013.

24. Whereas there is evidence that the certificate of good conduct was a requirement for the jobs that the Petitioner had applied for and had been shortlisted for interview, he did not tender evidence that he failed to secure the jobs mainly because he did not have a Police Clearance Certificate.

25. From the foregoing, I make the following orders

1) A declaration be and is hereby issued that failure by the 2nd Respondent to update the criminal records clearing the Petitioner to show that he had been tried and acquitted in Kisumu Chief Magistrate's Criminal Case No. 555 of 2008 is discriminatory

2) Petitioner's claim for damages has not been proved and it is declined

3) 2nd Respondent shall bear the costs of this petition

DATED AND DELIVERED IN KISUMU THIS 20th DAY OF February 2020

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Okodoi

For the Petitioner - Ms. Adwar hb for Mr. Onsongo

For the 1st and 2nd Respondent - N/A

For the 3rd Respondent - Ms. Omari

For the 4th Respondent - Ms. Gathu