



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CONSTITUTIONAL PETITION NO. 24 OF 2016

ISAAC SHIVACHI MUTOKA.....1ST PETITIONER
STEPHEN ATENYA.....2ND PETITIONER
WYCLIFFE MBOYA.....3RD PETITIONER
WYCLIFFE SHIKUKU.....4TH PETITIONER
GEORGE OYALE.....5TH PETITIONER
JOHN MATIKHO.....6TH PETITIONER
MORRIES ETEMESI.....7TH PETITIONER
MILDRED AYAKO.....8TH PETITIONER
NON-ALIGNED LEADERS COUNCIL.....9TH PETITIONER

VERSUS

OFFICE OF THE PRESIDENT.....1ST RESPONDENT
MINISTRY OF INTERIOR &
NATIONAL COORDINATION.....2ND RESPONDENT
COUNCIL OF GOVERNORS.....3RD RESPONDENT
REGISTRAR OF POLITICAL PARTIES.....4TH RESPONDENT
NATIONAL COHESION &
INTEGRATION COMMISSION.....5TH RESPONDENT
ETHICS & ANTI-CORRUPTION COMMISSION.....6TH RESPONDENT
KENYA NATIONAL COMMISSION ON
HUMAN RIGHTS.....7TH RESPONDENT
ATTORNEY-GENERAL.....8TH RESPONDENT
COUNCIL OF NON-GOVERNMENT

ORGANIZATIONS.....	9 TH RESPONDENT
KENYA PRIVATE SECTOR	
ASSOCIATION ALLIANCE.....	10 TH RESPONDENT
NATIONAL COUNCIL OF CHURCHES IN KENYA.....	11 TH RESPONDENT
EVANGELICAL FELLOWSHIP OF KENYA.....	12 TH RESPONDENT
CATHOLIC JUSTICE & PEACE COMMITTEE.....	13 TH RESPONDENT
SUPREME COUNCIL OF KENYA MUSLIMS.....	14 TH RESPONDENT
HINDU COUNCIL OF KENYA.....	15 TH RESPONDENT
MEDIA OWNERS ASSOCIATION (K).....	16 TH RESPONDENT
CENTRAL ORGANIZATION OF	
TRADE UNIONS(COTU).....	17 TH RESPONDENT
FEDERATION OF KENYA EMPLOYERS (FKE).....	18 TH RESPONDENT
KENYA PARENTS ASSOCIATION.....	19 TH RESPONDENT
KENYA HUMAN RIGHTS COMMISSION.....	20 TH RESPONDENT

JUDGMENT

1. The petitioners herein filed what they termed as a “petition,” dated 23rd December 2016, in as much as the said document was headed “Chamber Summons.” The body of the said document makes reference to it being a “petition filed in the public interest,” and as drawn and filed by the 1st petitioner. The chamber summons was brought under Articles 22(1), (2) (b) (c) and 258(1) and (2) (b), (c) and (d) of the Constitution of Kenya. The chamber summons seeks for orders and declarations that:

“(a) This petition be certified as urgent.

(b) Upon hearing the petition *inter-parties*, the Honourable Court be pleased to declare the continuing runaway insecurity, corruption, ethnicity, inequity, injustices and irresponsible self-serving politicking in Kenya a national disaster/crisis requiring radical measures to contain .

(c) The politics of this nation and the crop of politicians it nurtures are inimical to nation-building and the cause of major ills afflicting Kenyans .

(d) The usual politics of government and opposition seesaw, usual self-serving politicking and general elections be suspended for at least 20 years in favour of a council of responsible national leaders to steer this nation to right footing.

(e) Every individual Kenyan who lost their life or whose bodies have been maimed due to runaway insecurity be granted Kshs. 2 million compensation by the government, top politicians, leading business community, leading civil society and religious organizations .

(f) After the 20 years, the seat of Presidency and Deputy Presidency, Governor and Deputy Governor be held in turns regionally on rational basis by law within the nation and county to promote inclusive nation building, equitable resource allocation, development, justice and peace.

(g) The practice of winner takes it all and tokenism be declared unconstitutional and after 20 years be replaced with 50%, 40% and 10% practice of sharing national resources, power, ministries, job appointment, business, government agencies among others between government, main opposition and minority opposition in the promotion of a win practice to all Kenyans.

(h) Every elected public office holders be subject to the constitution of Kenya, 2010, all laws of Kenya and be made to pay summarily a penalty of Kshs. 5 million whenever any of them is determined to have incited Kenyans against any other or misused his vote in any public matters in any public institutions .

(i) Every public, political, civil society, religious or business leader who metes out verbal and/or physical violence and or makes public pronouncement against others which is found to be false shall summarily pay a penalty of Kshs. 20 million to the innocent person or 5 years imprisonment.

(j) The live coverage of National Assembly proceedings on radio and/or television be suspended until the members desist from manifesting verbal and/or physical violence during the said proceedings.

(k) The power to vote given to elected and nominated/appointed public office holders in all offices and/or institutions is a public trust to be used within the spirit and letter of the Constitution of Kenya 2010, public interest, public morality and sound governance practice, and not to be used personal or institutional self-serving interest.

(l) Any motion/resolution and/or law passed via the said public vote shall be unconstitutional, against public morality and sound governance practice.

(m) Costs of the application be borne by the respondents.”

2. The chamber summons is premised on the grounds, set out in the body of the chamber summons, and supported by an affidavit sworn on 23rd December 2016, by Isaac S. Mutoka, the 1st petitioner herein. The 1st petitioner swore an affidavit of service, on 15th May 201, deposing that he had served all the respondents, save for the 4th, 5th, 9th and 19th respondents, whose offices he was unable to locate. He added that the 19th respondent no longer existed. On 19th July 2017 the petitioners requested for an interlocutory judgment against the respondents, who had not entered appearance or filed any replies.

3. The 1st, 2nd and 3rd respondents filed Grounds of Opposition, dated 27th March 2019, to the chamber summons, stating that the application ought to be dismissed on the following grounds:

“(a) That the Petition as filed does not satisfy the threshold of filing constitutional petitions as set out in the case of *Anarita Karimi Njeru vs. Republic*, (1979) KLR 154 and which was reaffirmed by the Court of Appeal in *Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR .

(b) That the Petition lacks merit as it discloses no cause of action against the Respondents herein and it is a classical description of an abuse of the court process.

(c) That orders being sought by the petitioner are untenable as against the Respondents as some of the reliefs will require a constitutional amendment through parliament or a referendum.

(d) The petition is misconceived, frivolous, and hopeless, without merit and should be dismissed with costs.”

4. On 8th July 2019, the court directed that the chamber summons be disposed of by way of written submissions, to be highlighted. From the record, it is only the petitioners who filed written submissions, on 11th October 2019.

5. After perusing through the filings, I have identified the following as the issues for determination:

(a) whether the application satisfies the threshold for filing of constitutional petitions as set out in *Anarita Karimi Njeru vs. Republic* (1979) KLR 154 and *Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR;

(b) whether the petition discloses a cause of action against the respondents; and

(c) whether the reliefs sought by the petitioners ought to be granted.

6. The first issue was raised by the 1st, 2nd and 3rd respondents, in their Grounds of Opposition, dated 27th March 2019. Neither of the parties submitted on this. Under Article 22(3)(b) and (d) of the Constitution of Kenya, in the enforcement of Bill of Rights, the Chief Justice is obligated to develop rules that encourage courts to keep formalities to the minimum, and not be unreasonably restricted by procedural technicalities. To contextualize the same, Article 22(3) of the Constitution of Kenya provides as follows:

“(3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—

(a) the rights of standing provided for in clause (2) are fully facilitated;

(b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;

(c) no fee may be charged for commencing the proceedings;

(d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and

(e) an organization or individual with particular expertise may, with the leave of the court, appear as a friend of the court.”

7. In obedience to Article 22(3) of the Constitution, the Chief Justice promulgated the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, which are also referred to as “Mutunga Rules.” Rule 10 of the Mutunga Rules provides as follows:

“10. Form of petition

(1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.

(2) The petition shall disclose the following—

(a) the petitioner’s name and address;

(b) the facts relied upon;

(c) the constitutional provision violated;

(d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;

(e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;

(f) the petition shall be signed by the petitioner or the advocate of the petitioner; and

(g) the relief sought by the petitioner.

(3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.

(4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.”

8. The Supreme Court of Kenya in *Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others* [2014] eKLR said that:

*“Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru vs. Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”*

9. The Court of Appeal in *Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR stated that:

“(41) We cannot but emphasize 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. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial ---decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.”

10. In *Trusted Society of Human Rights Alliance vs. Ag. & 2 Others* [2012] eKLR , it was said that:

*“We do not purport to overrule *Anarita Karimi Njeru* as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violations to allow her adversary to adequately prepare her case and to save the court from embarrassment on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional Petitions. Neither does it require talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.”*

11. I have gone through the document that was filed by the petitioners herein on 23rd December 2016. In the purposive spirit of Article 22(1) of the Constitution of Kenya, I believe that the same can be treated as a constitutional petition for all intents and purposes. However, after going through the application, and the submissions of the petitioners, one cannot help but notice the generalities in the petitioners' case. The petitioners allege a wide range of issues with no specificity and particulars to those allegations. The petition does not disclose which provisions of the Constitution are threatened there are no particulars of how or against whom any of the respondents have violated or threatened to violate the Constitution or any other law. There are no facts or evidence to support the allegations levelled against the respondents, and I refuse to accept the petitioners' invitation to take judicial notice of all of the issues raised and to "relax the rule of evidence" that required them to lay evidential facts before the court. This is a court of law, and the allegations levelled against the respondents, by the petitioners, which are quite weighty and emotive, and cannot be determined in favour of the petitioners without any evidence of. In all fairness, I do not see how the respondents can respond to any of the allegations.

12. The petition, together with the reliefs sought, are general and lack clarity, and by all means fails the test and threshold for constitutional petitions as set out in the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, and in *Anarita Karimi Njeru vs. Republic* (1979) KLR 154 and *Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR.

13. To this end, I find that the chamber summons, dated 23rd December 2016, is hopelessly insufficient, for want of specificity and precision. The chamber summons is accordingly dismissed. Since the petitioners stated that the petition was filed in public interest, I shall make no order as to costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 13TH DAY OF MARCH, 2020

W MUSYOKA

JUDGE