



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO. 50 OF 2020**

**MOHAMED ADBIKADIR MOHAMED.....PETITIONER**

**VERSUS**

**THE COUNTY GOVERNMENT OF WAJIR.....1<sup>ST</sup> RESPONDENT**

**THE GOVERNOR-WAJIR COUNTY GOVERNMENT.....2<sup>ND</sup> RESPONDENT**

**WAJIR COUNTY SECRETARY.....3<sup>RD</sup> RESPONDENT**

**THE COUNTY EXECUTIVE COMMITTEE**

**MEMBER OF FINANCE.....4<sup>TH</sup> RESPONDENT**

**AND**

**THE OFFICE OF THE ADMINISTRATIVE JUSTICE.....1<sup>ST</sup> INTERESTED PARTY**

**OGADEN COUNCIL OF ELDERS.....2<sup>ND</sup> INTERESTED PARTY**

**JUDGMENT**

1. The Petitioner, Mohamed Abdikadir Mohamed, through his petition dated 18<sup>th</sup> February, 2020 introduces himself as a public spirited individual and human rights defender who resides in Wajir South Constituency within the County of Wajir. The County Government of Wajir is the 1<sup>st</sup> Respondent and its Governor is the 2<sup>nd</sup> Respondent. The Wajir County Secretary is the 3<sup>rd</sup> Respondent and the County Executive Committee Member of Finance is the 4<sup>th</sup> Respondent. The Office of Administrative Justice is the 1<sup>st</sup> Interested Party and Ogaden Council of Elders is the 2<sup>nd</sup> Interested Party.

2. In summary, the Petitioner's case is that on 6<sup>th</sup> February, 2020 the 1<sup>st</sup> Respondent advertised tenders for improvement and construction of roads in Wajir East, Tarbaj and Eldas constituencies with a combined road length of 12.3 kilometers. Earlier, on 4<sup>th</sup> February, 2020 the 1<sup>st</sup> Respondent had advertised tenders for dams, water pans and water harvesting structures for irrigation in Eldas, Tarbaj and Wajir North constituencies.

3. It is the Petitioner's case that Wajir South Constituency was deliberately left out of all the advertised tenders thereby infringing on the residents' rights to socio-economic development.

4. According to the Petitioner, the people of Wajir South Constituency have not been involved by way of public participation in any County Integrated Development Plan, County Sectoral Plan or County Spatial Plan as required by law and they therefore do not have any idea of any development agenda for them by the 1<sup>st</sup> Respondent.

5. It is the Petitioner's case that the construction of the proposed road of about 12.3 kilometres across the other constituencies is a mega project which the people of Wajir South Constituency should also benefit from so as to develop at par with the rest of the constituencies.

6. According to the Petitioner, the respondents disregarded the principle of inclusivity and non-discrimination. The Petitioner asserts that the decision of the respondents was based on tribe or clan and it confirms a long standing belief that the people of Wajir South Constituency are being punished for opposing the Governor in the 2017 general election.

7. The Petitioner avers that the County Executive Committee acted in bad faith by awarding and advertising tenders in newspapers while denying development projects to the biggest and most densely populated constituency in the County contrary to the Wajir County Integrated Development Plan (2018 – 2022) and the County Government Act, 2012.

8. The Petitioner finally contends that the respondents have no County Sectoral Plan that has been subjected to public participation and reviewed as required by the law.

9. The Court is therefore asked to issue orders as follows:

**a) A Declaration that within the intendment of Article 10 of the Constitution the Respondents are bound by the key national values and principles, to have regard to equity, social justice, inclusiveness, equality, non-discrimination and human rights;**

**b) A Declaration that the failure to include Wajir South Constituency in developments in particular the construction of roads and dams within the larger Wajir County is inconsistent with the provisions of Articles 10, 27(4), 28, 35(1) and 47 of the Constitution, and is illegal, null and void;**

**c) An order of judicial review in the form of certiorari do issue from this court to quash the decision of 6<sup>th</sup> February 2020 and 4<sup>th</sup> February 2020 by the 1<sup>st</sup> Respondent inviting tender for projects of dams and roads improvement/construction in Wajir County to the exclusion of Wajir South Sub-County;**

**d) An order of permanent injunction to be issued to restrain the Respondents, their agents and persons acting under the authority of the respondents from implementing any of the projects as advertised on 6<sup>th</sup> of February 2020 and 4<sup>th</sup> February 2020 by the 1<sup>st</sup> Respondent;**

**e) An order of prohibition against the Respondents, their agents or persons acting on their authority and command, from implementing the projects advertised on 6<sup>th</sup> February 2020 and 4<sup>th</sup> February 2020 by the 1<sup>st</sup> Respondent on the construction of roads and dams as advertised until it makes the projects inclusive and proportionate to land size and population density to protect the rights of the Wajir South Community in accessing development projects within the County.**

**f) An order and declaration be hereby issued that the Respondents violated Chapter Six of the Constitution.**

**g) An order that the costs consequent upon this petition be borne jointly and severally by the office holders of Respondents from their personal accounts.**

**h) Any other or further orders, writs and directions this Honourable Court considers appropriate and just to grant for the purpose of the enforcement of the petitioners' fundamental rights and freedoms.**

10. The respondents opposed the petition through the replying affidavit sworn on 27<sup>th</sup> March, 2020 by Abdullahi Hassan Maalim, the Acting County Secretary.

11. It is the respondents' case that Wajir County is comprised of six sub-counties/constituencies namely Wajir West, Wajir North, Wajir East, Wajir South, Tarbaj and Eldas. They aver that Wajir South has seven wards being Banane, Burder, Dadajabulla, Habaswein, Laghbogol South, Ibrahim Ure and Diff.

12. Turning to the substance of the petition, it is averred that on 5<sup>th</sup> February, 2020 the 1<sup>st</sup> Respondent advertised in the Standard Newspaper Tender No. WCG/OT/RDS/RMLF/23/2019 – 2020 for the proposed gravelling of Biyamathow junction road in Wajir South Sub-County which demonstrates that Wajir South Constituency is not discriminated upon by the respondents as alleged by the Petitioner.

13. It is the respondents' case that during the budget making-process, the 1<sup>st</sup> Respondent engaged the public in respect of the 2019–2020 financial year estimates and the residents of Wajir South identified twenty-five projects or programs to be included in the 2019–2020 financial estimates. This assertion is supported by a public participation report annexed to the replying affidavit.

14. It is further the respondents' case that the public participation forums for the County in regard to the 2019/2020 financial year budget estimates were held at the sub-county headquarters of the sub-counties on 26<sup>th</sup> April, 2019 except for Wajir West which was holding a by-election on that date. Additionally, that the public participation exercise was published in the Star Newspaper and Wajir Community Radio which is a local FM radio station.

15. According to the respondents, the budget proposals were explained to the residents who were given a chance to give their views, seek clarifications and propose new priorities.

16. On the tenders advertised on 6<sup>th</sup> February, 2020, the respondents explained that the proposed improvement of Wajir Bor Road is intended to link it with the airport which serves all sub-counties and by extension part of the North Eastern region.

17. It is also the respondents' case that between 2017 and 2020 the 1<sup>st</sup> Respondent allocated KShs.387,778,864/- for development projects in Wajir South Sub-County which is a clear manifestation that Wajir South Sub-County is given a proportionate allocation of resources from the County Government and has not been disadvantaged or discriminated upon by the respondents.
18. The respondents aver that the national government through the intervention of the leadership of the 1<sup>st</sup> Respondent has through Kenya National Highways Authority ("KeNHA") proposed and identified Modogashe-Samatar-Wajir Road which runs through Wajir South Sub-County to be upgraded to bitumen standards and it would not be tenable to duplicate work when there are other sub-counties to be considered.
19. It is denied that Wajir South Sub-County has been discriminated against. The respondents aver that the 1<sup>st</sup> Respondent has identified and is committed to set aside resource allocation for the improvement and upgrading of road networks in all the sub-counties.
20. It is further the respondents' case that the 1<sup>st</sup> Respondent had formulated and developed a ward-based project allocation for each financial year where financial resources are allocated equally to each ward without preferential treatment.
21. Specific reference is made to tender No. WCG/OT/WTR/10/2019-2020 advertised in October, 2019 for the construction of a water pan at Garaska-Dhadaja Bulla Ward, Habaswein within Wajir South Sub-County as demonstration that the residents of Wajir South Sub-County have not been discriminated against in the implementation of development projects.
22. It is therefore the respondents' assertion that the Petitioner has not provided evidence of bias and neither does his case meet the standard of proof for constitutional petitions.
23. The Petitioner swore an affidavit on 3<sup>rd</sup> August, 2020 in response to the replying affidavit. He reiterated his averment that no development project had been implemented in Wajir South Constituency from the time the current regime took over the administration of Wajir County.
24. Further, that the tenders advertised for improvement and construction of roads in Wajir East, Tarbaj and Eldas constituencies are the only development projects implemented by the current regime and Wajir South Constituency was therefore entitled to its proportionate share of the projects.
25. It is the Petitioner's case that the ward-based budget allocations referred to in the replying affidavit are the fixed annual ward funds that every ward in the County gets. The Petitioner avers that the respondents' claim that there are development projects in Wajir South Constituency is not supported by any documents.
26. The Petitioner rejects the respondents' deposition that there was public participation on the proposed projects.
27. The respondents filed a further affidavit sworn on 18<sup>th</sup> September, 2020 by Abdullahi Hassan Maalim through which they insist that the 1<sup>st</sup> Respondent has undertaken various development projects in Wajir South Sub-County.
28. Through submissions dated 5<sup>th</sup> August, 2020 counsel for the Petitioner reiterated the Petitioner's case and urges that the residents of Wajir South Constituency have been discriminated against when it comes to the allocation of development funds. Counsel refers to what he calls the "*devolution resource sharing calculator*" and submits that an application of the formula would mean that counties with higher population, higher poverty rates and larger land mass should receive a greater share of revenue. Based on this argument, the Petitioner submits that Wajir South Sub-County being the largest and most populous sub-county ought to have received the majority of the development projects which is not the case.
29. It is the Petitioner's case that the respondents' failure to take into account the huge population and the vast land amounted to a violation of the inclusivity principle.
30. The Petitioner contends that Article 35 of the Constitution protects the right to information whereas Section 87 of the County Governments Act, 2012 provides for public participation.
31. The 1<sup>st</sup> Respondent is said to have contravened the principles of planning and development facilitation as enumerated in Section 102 of the County Governments Act. Further, that the 1<sup>st</sup> Respondent did not adhere to the planning procedure necessary in the formulation and execution of development projects as the Petitioner and his people were not given a chance to either participate or benefit from the projects.
32. The Petitioner additionally contends that the discrimination of the residents of Wajir South Sub-County also exists at the national level.
33. In closing, the Petitioner submits that the economic rights of the inhabitants of Wajir South Sub-County will be violated unless this Court provides appropriate remedy.
34. The respondents urged this Court to dismiss the petition through submissions dated 18<sup>th</sup> September, 2020. According to the respondents, the evidence adduced in this case does not support the Petitioner's allegations of marginalization and lack of public participation. The decision in the case of **Mui Coal Basin Local Community & 5 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR** is cited as stating the principles guiding public participation and it is urged that the respondents complied with those principles. The Court is therefore implored to find that the orders sought should not be granted.

35. Upon perusal of the pleadings and submissions, I find that the central issue for the determination of this Court is whether Wajir South Constituency or Sub-County has been discriminated against in the distribution of development funds for Wajir County. The question as to whether or not there was public participation in the budget proposals of the County is peripheral to the central issue.

36. The right to equality and freedom from discrimination is provided under Article 27 of the Constitution as follows:

**(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.**

**(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.**

**(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.**

**(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.**

**(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).**

**(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.**

**(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.**

**(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.**

35. What amounts to discrimination has been expressed in various decisions in this country. In **Jacqueline Okeyo Manani & 5 others v Attorney General & another [2018] eKLR** it was held that:

**“...discrimination, simply put, is any distinction, exclusion or preference made on the basis of differences to persons or group of persons based such considerations as race, colour, sex, religious beliefs political persuasion or any such attributes that has real or potential effect of nullifying or impairing equality of opportunity or treatment between two persons or groups....**

**The Constitution advocates for non-discrimination as a fundamental right which guarantees that people in equal circumstances be treated or dealt with equally both in law and practice without unreasonable distinction or differentiation. It must however be borne in mind that it is not every distinction or differentiation in treatment that amounts to discrimination. Discrimination as seen from the definitions, will be deemed to arise where equal classes of people are subjected to different treatment, without objective or reasonable justification or proportionality between the aim sought and the means employed to achieve that aim.”**

36. The general principle of the law of evidence requires that he who alleges must prove. In this case, the Petitioner relied on advertisements for tenders on two occasions as evidence of discrimination of the residents of Wajir South Sub-County by the County Government of Wajir. There was also the claim that the residents of Wajir South were not given an opportunity to give their views on the budget proposals.

37. The respondents countered the Petitioner’s allegations by production of documentary evidence. Abdullahi Hassan Maalim annexed to his further affidavit of 18<sup>th</sup> September, 2020 a copy of page 51 of the Standard Newspaper of 5<sup>th</sup> February, 2020 in which nine tenders were advertised and one of them was for the gravelling of Biyamathow Junction Road which is said to be in Wajir South Sub-County. This averment was never disputed.

38. It is also important to note that the Petitioner based his case on tenders advertised on 4<sup>th</sup> and 6<sup>th</sup> February, 2020 in the same Standard Newspaper and conveniently, I suspect, overlooked the tenders advertised on 5<sup>th</sup> February, 2020.

39. The respondents also annexed to the further affidavit of 18<sup>th</sup> September, 2020 several completion notices for various projects undertaken by the 1<sup>st</sup> Respondent in Wajir South. Although the Petitioner casually dismissed the notices as being in respect of clearing of bushes, a perusal of the certificates of practical completion shows that they are for road works completed between 2019 and 2020 in Wajir South Constituency.

40. The Petitioner did not adduce any evidence to show that any of the other sub-counties received more development funds than those allocated to Wajir South Sub-County in the period 2017–2020.

41. The Petitioner’s claim that there was no public participation by the people of Wajir South on the budget proposals was also proved to be incorrect after the public participation report for all the sub-counties was annexed to the respondents’ replying affidavit sworn on 27<sup>th</sup> March, 2020.

42. It was incumbent upon the Petitioner to adduce evidence in support of each and every allegation made. In **Mohammed Abduba Dida v Debate Media Limited & another [2018] eKLR** the Court of Appeal stressed the need to adduce evidence in support of a claim alleging violation of rights. The Court stated that:

**“In the Zimbabwean case of *Catholic Commission for Justice and Peace in Zimbabwe vs Attorney General (1993) 2 LRC (Const) 279*, when considering where the burden of proof rested in disputes concerning fundamental rights, Gubbay, CJ stated thus;**

***“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”.***

**This is to say that, ordinarily, the burden of demonstrating that a right was infringed would be upon the person alleging such violation, as, that person would be in the better position to prove it. It is for the petitioner to show that, compared to another person, he or she has been denied a benefit or suffered a disadvantage, which are matters that are within the petitioner’s knowledge. Once the case is made out, the burden shifts to the other party. More particularly, in view of the observation that the rights alleged to have been infringed do not fall within the grounds classified by *Article 27 (4)*, more so the reason for the petitioner have to prove that his or her rights have been infringed in respect of the grounds alleged. In other words, the burden of proof was on Dida to show that, on a balance of probabilities, the guidelines were in violation of the prohibition set out in *Article 27* which burden did not shift until a case was made out.”**

43. Even though the Petitioner did not adduce any evidence in support of the alleged discrimination by the respondents against Wajir South Sub-County in the distribution of development projects, the respondents nevertheless went ahead and produced evidence showing that the Sub-County had received similar treatment with the other sub-counties.

44. Those who use the banner of public interest litigation to institute cases in court should do so in good faith. The evidence adduced in this case shows that the Petitioner failed to make full disclosure and as a result obtained conservatory orders that may have retarded instead of advancing the development of Wajir County. The funds that were earmarked for the tenders that were stopped may have been returned to the National Treasury to the detriment of the people of Wajir County.

45. The upshot is that this petition is without merit. The same is dismissed. This is one case in which the Petitioner should meet the costs of the respondents. The respondents are therefore awarded costs of the proceedings against the Petitioner.

**Dated, signed and delivered virtually at Nairobi this 17<sup>th</sup> day of December, 2020.**

**W. Korir,**

**Judge of the High Court.**