



IN THE HIGH COURT OF KENYA AT SIAYA

CONSTITUTIONAL PETITION NO 3 OF 2017

IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS

UNDER ARTICLE 23 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ARTICLES 10,23,29,47 AND 49 (1)(4) 33(F)(2) OF THE CONSTITUTION OF KENYA, 2010

AND

ARTICLES 157 OF THE CONSTITUTION AND SECTION 87 OF THE CRIMINAL
PROCEDURE CODE AND ALL OTHER ENABLING PROVISIONS OF THE LAW

BETWEEN

ANTHONY OMONDI MUREMA.....APPLICANT

VERSUS

THE KENYA POLICE SERVICE

THROUGH THE OCS SIAYA POLICE STATION.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

JUDGMENT

1. The Petitioner herein **ANTHONY OMONDI MUREMA** brought this Petition dated 6th November, 2017 under the enforcement of the bill of rights under article 23 of the Constitution of Kenya (2010) and pursuant to Article 10, 23, 28, 29, 47 (1) and 2 and 49 (1) (4) 33 (c) 43 (1) (f) 47 (1) (2) of the Constitution of Kenya 2010 to this Court against the Respondents being the Kenya Police Service through the OCS Siaya Police Station as the 1ST Respondent and the Director of Public Prosecutions as the 2ND Respondent on alleged infringement of the Constitutional rights of the Petitioner herein.

2. The Petition is preceded by an Application dated 6th November, 2017 seeking that the proceedings in the Senior Principal Magistrates Court Siaya, Criminal Case No.644 of 2014 Republic vs Anthony Omondi Murema be stayed pending hearing of the application and petition thereof.

3. The Petitioners seek the following orders as listed at page 32 of the Petition:

(a) A declaration that the petitioner's rights to a fair administrative action pursuant to article 4 (1) and 2 were infringed by the 1st and 2nd respondents;

(b) A declaration that that the petitioner's right of being arrested and arraigned in court by his employer have been violated;

(c) A declaration that the right of the petitioner's employer's right to officially be informed of the petitioner's criminal liability has been violated;

(d) A declaration that the petitioner's rights under article 49 (1) a (i) were contravened;

- (e) *A declaration that the petitioner's right not to be subjected to psychological torture guaranteed under article 29 were contravened;*
- (f) *An order for compensation of the Petitioner by the 1st and 2nd respondents in all contraventions or by any other person found culpable;*
- (g) *An order of certiorari quashing the criminal proceedings against the petitioner in Siaya Criminal Case No.644 of 2014;*
- (h) *That the honourable court be pleased to make such other orders as it shall deem fit and just;*
- (i) *Cost of the Petition.*

FACTS

4. The depositions by the Petitioner as per the Supporting Affidavit in support of the above mentioned application dated 6th November, 2017 and the factual and procedural background of the Petition as at that date as enunciated at page 30 of the Petition alongside the supporting affidavit dated 6th November, 2017 to the Petition deposed by **Anthony Omondi Murema** are that:-

5. The Petitioner a Military Officer of the Kenya army stationed at Embakasi Barracks was deployed to Somali where he is at currently to conduct various operations for the Kenya army.

6. That on the 26th day of November 2013, the Petitioner found about 50 unattended cattle, sheep and donkeys that had trespassed onto his farm, he then drove away the animals from the farm but after about one hour they were back on his farm again feeding on his eucalyptus trees once again. Just as he sought to drive them away, a man from nearby bushes appeared claiming ownership of the animals and he, without notice started hurling insults at the petitioner and charged against him with a grazing stick seeking to hit him for no apparent reason.

7. The petitioner tried to defend himself and in h ensuing, a scuffle ensued wherein the Petitioner overpowered the man and threw him out of his farm together with the animals and the man went away howling insults at the Petitioner. After about 4 days, the Petitioner received a text message on 1/12/ 2013 informing him that there was a Warrant of Arrest against him and that it would be forwarded through his employer, the Kenya army.

8. The Petitioner contends that the procedure to be followed when a Kenya army person has committed an offence and has not been arrested is that the Warrant of Arrest is sent to the Kenya army who then place the accused person under arrest and taken to Siaya for arraignment on court and to date the Warrant of Arrest has not been forwarded to his employer and that this is a procedure known by the Kenya Police and him being a military officer, it is the military police who would have accompanied him to court and once he takes his plea, the military police take him away which procedure was not followed and his employer was not made aware as to date the employer has never received any warrant of arrest.

9. That after the incident, his family in the rural home in Siaya was harassed by persons claiming to be police officers from Siaya. that had the employer been made aware of the charges against him, he would not be a part of the military duties or force in Somali thus he would have avoided having to travel long distances through harsh terrain to attend court and that his employer does not grant him official leave to attend court for reason of not knowing officially that there are criminal charges against him.

10. He states that the foregoing has caused him prejudice and now runs risk of being declared a coward and being required to face a Court Martial as the asking of offs to attend court will be seen as refusing to face the enemy and the sentence for cowardice is death by firing squad.

11. The petitioner claims that sometime in June 2014, the Petitioner did through retired Lt. Col. Moses Sande who was the then Chief Legal Officer of the Kenya Army made a call to the investigating officer, Constable Koshen who promised to forward the warrants but never did and after two months of waiting, Lt Col. Moses Sande advised him that since it was possible that they would never receive the warrants, the best move would be for the Petitioner to present himself to Siaya police station and proceed to court which advise he took and appeared in court on 18/8/2014.

12. That the petitioner has attended all court sessions and only missed on 29/2/2016 when the Petitioner missed a flight out of South Sudan due to bad weather adding that his employer sent him to South Sudan as the Kenya army had not been officially informed that the Petitioner faces criminal charges.

13. That the Petitioner runs the risk of not being compensated for any eventuality happening to him at the time that he travels to attend court and that he will be prejudiced greatly due to the acts of the commission of the Kenya Police Officer –Police Constable Koshen. Further, that the Petitioner's rights as per the Constitution have been infringed upon by the 1st Respondent and further that the Petitioner made an application to court for the release of the Mpesa transactions to show that the investigating officer Koshen did receive some money as inducement by the employer of the complainant to have the Petitioner arrested and that that is the reason why no warrant was ever sent to the Kenya Army but that the court refused to grant the application saying it had no jurisdiction, despite the issue of no jurisdiction being raised and that the court's refusal to grant the orders for Safaricom to provide him with Mpesa statements violates the Petitioner's right to information as provided under Article 35 of the Constitution.

14. Particulars of unconstitutionality are raised as from paragraphs 32-42 of the Petition and under this subheading, it is stated that at no point in time was the Kenya Army informed of the charges facing the Petitioner, contrary to Article 47 (1) and (2) of the Constitution, a violation of the Petitioner's dignity guaranteed under Article 28 of the Constitution and a violation of the Petitioner's right to information as provided

for under Article 35 of the Constitution.

15. That the procedure with respect to an accused person who is a member of the Armed Forces of Kenya alluded to in the Petition, acts having not been followed resulted to a clear violation of the Petitioner's right to fair administrative action as under Article 47 of the Constitution. Adding that the failure by the investigating officer in ensuring that the Petitioner is presented to court by the Kenya Army in Criminal Case No 644 of 2014 is contrary to Article 10 (1) (2) b of the Constitution.

16. It is further stated that the failure to adhere to the procedure referred to above makes the actions of the Respondents an abuse of the court process and a violation of Article 49 (1) a (i) and that the court in relying on a technicality violated the Petitioner's right to administrative justice without undue regard to procedural technicalities. Further, that the Petitioner continues to attend court without security due to the fact that his employer was not informed makes him a soft target which is a violation of the Petitioner's right to security of the person under Article 29 (a) of the Constitution.

17. The Petition is further supported by the Supplementary Affidavit sworn by Lt. COL (Rtd) Moses L. Sande dated 23/1/2018 where it is deposed that he was the Chief Legal Officer of the Kenya Army. That he accompanied the Petitioner to Siaya Police Station. He states that the Petitioner reported to him on the 2nd week of December, 2013 that he had received SMS message from P.C Koshen informing him that a Warrant of Arrest had been issued for the Petitioner for assault. It is his averment that he told the Petitioner that that was not official communication and as it was from a private number, the best he could do was to ignore it and await official communication through the National Police Service and until then, the Petitioner was to go on with his official duties.

18. It is further deposed that no official communication was forthcoming and sometime in June 2014, the Petitioner inquired of the same. That at the 2nd meeting with the Petitioner, he opted to contact PC Koshen and asked him to send the warrants against the Petitioner as it is a mandatory procedure so as to enable the Kenya Army make certain necessary arrangements. He states that however, he waited for 2 months but still no warrants were forthcoming and that it was then that he decided to call OCS Shikoli who said that they would send the warrants and after 2 weeks of waiting he called OCS Shikoli again but the OCS informed him that the warrants had been lost and or misplaced.

19. That it was upon the foregoing that he decided to accompany the Petitioner to Siaya Police Station and to court. He reiterates the averments by the Petitioner that when an Armed Forces officer is to be charged with an offence in a civilian court, if he has not been arrested at the scene, warrants of arrest are sent to the Commanding Officer of the officer, where action is taken and is produced at the concerned Police Station and taken to court by Military Police. Reason being that the armed forces needs to be made aware so that contingencies may be put in place when need arises due to the special nature of the duty of armed forces and that the arrangement as it is right now, of the Petitioner travelling to and from his base leaves his unit short of a man less and can be disastrous to the unit.

20. He adds that in the above regard, the Petitioner's rights were abused and continue to be abused as the Petitioner is still amenable to be sent to military deployments and missions to his own detriment.

THE RESPONDENTS' CASE

21. The Petition was opposed by the Respondents through replying affidavits sworn by PC Peter Koshen and Maurine Odumba for the 1st and 2nd Respondent respectively. PC Koshen avers that he is the Investigating Officer in Siaya PM Cr case No. 644/2014 and that he sought the accused person Anthony Murema Omondi whom he had his contacts by calling him to avail himself at the Police Station. He adds that the accused was charged with the offence of Assault under Section 251 of the Penal Code CAP 263 and not the Armed Forces Act and that such offence is within powers of the police station to investigate. He contends that he is not aware of any procedure involved in such cases other than in the Criminal Procedure.

22. He states further that no fundamental right of the accused was violated and that the accused presented himself before court accompanied by a Senior Officer in the rank of Lieutenant Colonel.

23. Maurine Odumba Prosecution counsel appearing for the 2nd Respondent states in her Affidavit dated 21/12/2017 that the Applicant has not demonstrated in his pleadings what constitutional right has been breached if at all and that at the time of trial the Applicant voluntarily surrendered himself to court under the escort of senior Lt. Col. Moses Sande.

24. She deposes further that the alleged breach is in no way applicable to the proceedings before the PM's court, stating further that the Applicant is a Kenyan citizen and at the time of the commission of the offence, he was at home and was in no way performing duties as a soldier and that the Criminal Procedure Code applies to any offences under the Penal Code and other legal regimes other than those under the Armed Forces Act but that the offence herein is Assault of a civilian under the Penal Code.

25. Counsel further deposes that no individual is excluded from criminal offences under the Penal Code and that the Applicant has had ample time since 2014 to move the court over the alleged violation of fundamental rights and that it was until he was put on his defence that he brought this Petition which she contends is an attempt to delay the matter and as such she urged court to dismiss the Petition.

26. The Petitioner -Anthony Murema Omondi in another Supporting Affidavit dated 19/1/2018 in response to the undated Affidavit by PC Peter Koshen and the Replying Affidavit sworn by Maurine Odumba deposes that he is not against the criminal proceedings but that what is of utmost concern to him is that, as his employer is not aware of the criminal proceedings, he cannot be given official leave to attend court and that he is still available for active duty which puts him in a precarious position as he has to travel frequently from his base of operation in Somalia yet the journey has so many dangers as the enemy has started planting explosives on the routes that vehicles use.

27. He avers that as a Kenyan citizen, he is subject to the laws of this country and that his only complaint is that since he was called while at his duty station, that is Embakasi Barracks, the Warrant of his Arrest ought to have been sent to his employer for his employer to officially

facilitate his production to Siaya Station and appearance at the Siaya Law Courts.

SUBMISSIONS

28. The parties filed written submissions with the *Petitioner's Submissions* dated 26/2/2018 raising the following issues:

i. Whether the failure by the 2nd Respondent to send the warrants of arrest to the Petitioner was in breach of the Constitution;

ii. Whether the failure of the issuing the Warrant violated the rights of the Petitioner;

iii. Whether the 1st Respondent is mandated by law to send warrant of arrest to the Petitioner's employer for the alleged act the Petitioner is accused of.

29. It was submitted that the Petitioner herein being a Military Officer is to be arrested by the National Police as under Section 58 (f) of the National Police Service Act No. 11A of 2011 provides that, **“subject to Article 49 of the Constitution, a police officer may without a warrant, arrest a person.... (f) Whom the police officers suspects upon reasonable grounds of being a deserter from the armed forces or any other disciplined service”**.

30. It was submitted that for a person in the disciplined services, a warrant must be issued; that the court should take note that a person who has committed a crime and is found at the scene can be arrested at the scene and this applies to any member of the disciplined forces but if he is not found at the scene, then a member of the disciplined services must be served with a warrant of arrest which is served to the disciplined service where that person is serving.

31. It was further submitted that Section 58 (f) of the National Police Service Act is a mandatory requirement of the law and the investigating officer in PMCC No. 644/2014 never complied with this requirement despite the numerous attempts by the Legal Officer of the Kenya Army.

32. The petitioner further submitted that the reason for this requirement is for the Kenya Army to know the status of its employees at all times and know whether a soldier can be taken to active duty or dismissed from service. That therefore the Petitioner ought to abide by the rules and regulations in terms of deployment and engagement as provided for by AMISOM but that the Petitioner having been deployed in Somalia is not able to get formal leave to attend the court sessions in the Magistrate's Court in Siaya. Further, that on 11/6/2018, the Presiding Magistrate ordered that the Petitioner produce evidence that he was in Somalia which evidence may not be availed by the Kenya Army thus the Petitioner risks being put in remand for not attending court as well as being dismissed from service.

33. It was further submitted that the Petitioner has been requesting for informal leave to attend court from Somalia and as a result of the frequent informal leaves, he is likely to be charged with the offence of being a coward and may end up being court martialed and face a firing squad, be hurt or killed on his travel back to Kenya to attend court; and that if the Petitioner was to die or get injured while travelling to Kenya, he will not be compensated by African Union which is the financing body for AMISOM due to the fact that he was not travelling home on official leave.

34. It was further submitted that as the Investigating Officer did not obey the provisions of the section, the Petitioner's rights as provided for under the Constitution of Kenya have been violated and the Petitioner seeks intervention through Article 22 of the Constitution for the court to enforce the rights that the 1st Respondent has violated as stipulated in Article 23. That the rights stated to have been violated are to be found in Articles 10, 23, 28, 29, (a), 47 and 33, 35 (Access to information) and 159 (Judicial authority).

35. Reliance was placed on the case of **A.N.N. v Attorney General [2013]eKLR** where the court held in reference to Articles 27 and 28 that:

“I would be so bold as to hazard that the provision of Article 27 and 28 of the Constitution are the foundation on which the rest of the Constitution is built. Regardless of one's status in life, gender, ethnic or social origin, one has inherent dignity, is entitled to equal treatment before the law, and to have equal protection and enjoyment of all the rights set out in the Constitution.”

36. That if the foundation has not been followed then the court must then grant the petitioner the orders he seeks. It was submitted in conclusion that this court has the jurisdiction to grant the prayers sought because the Petitioner's rights have been seriously violated by the failure to serve the Petitioner's employer with the warrants of arrest of the Petitioner.

37. In the Respondents' submissions it was contended that the Petitioner's case is askew because at no point in time was he arrested for being a deserter and that it is the duty of an accused person to disclose the fact to the employer, that the police have no duty or burden to do so, but investigate the crime and forward the case for prosecution once evidence has been found sufficient.

38. That the Petitioner states that he is a member of defense forces based in Somalia yet provides no proof or communication to substantiate it and as such all the allegations are termed as baseless adding that the petitioner has failed to attach any known law, regulation, circular or even policy that directs the manner in which he claims Defense Force members are to be arrested to give credence to his claim of violation and litigation.

39. The issues as raised by the Respondents are as follows;

1. Who bears the burden of proof?

2. He who alleges a Constitutional violation or infringement must anchor the violation to the right

3. Whether a violation of a fundamental right if any can stop the criminal process.

40. On issue 1, it was submitted that he who alleges must prove and that the Petitioner's claim is not buttressed with any evidence in law, regulation, policy or communication and that there is no mention of any arrest warrant in the proceedings and no application was made to lift warrants as there were no warrants of arrest. It was contended that the Petitioner was only informed of the charges and summoned to appear in court and only if he had failed to appear would a warrant of arrest have been issued.

41. It was also submitted that the claim by the Petitioner of having received a text message is unsubstantiated. On this issue the Respondents placed reliance on the case of *Paul Ng'anga & 2 others vs. Attorney General & 3 others [2013] eKLR* and *Titus Barasa Makhamu vs Police Constable Simon Kinuthia Gitau No. 83653 & 3 others [2016] eKLR*. In the latter case, the court held that "**there is no doubt that it is for the Petitioner to satisfy the evidential burden that a specific right exists and which right has been violated or restricted besides pleading the same with reasonable particularity and precision**".

42. On issue 2, it was submitted that the burden of proof in constitutional petitions is even more stringent because the Petitioner is required to tie into or marry the facts of the violation with the right infringed upon and to this end reliance was placed on the case of *Stephen Nyarangi Onsomu & another vs. George Magoha & 7 others [2014] eKLR*.

43. It was further submitted that the manner for one to claim an abuse of administrative action is to be found at Section 8 of the Fair and Administrative Action Act, 2015 and that this Petition is not a form of Judicial Review, because the action that the Petitioner seems to be impugning is that no arrest warrant was sent to his employer.

44. In addition, it was submitted that the case having been brought under a Constitutional Petition violates the doctrine of constitutional avoidance which seeks to preserve the constitution as a document of last resort whereby the Constitution should be utilized where there is no law governing the area which the Petitioner seeks to challenge. Reliance was placed on the *Stephen Nyarangi* (supra) where the court stated that "**the Constitution is not a substitute for all complaints about unlawful processes and procedures.**"

45. On issue 3, it was submitted that, the court when extensively asked to weigh in on whether a violation of a procedural right can warrant a dismissal of a criminal suit answered in the negative and that the petitioner should be compensated for the violation but still stand trial as was in the case of *Wilson Olal & 5 others vs. Attorney General & 2 others [2017] eKLR* and *Julius Kamau Mbugua vs Rep CRA NO. 50/2008*.

46. In conclusion it was submitted that if the Petitioner proves that the correct procedure was not followed, which is denied, as the same cannot amount to have caused an injustice or prejudice to the Petitioner in standing the criminal trial. And that such an event can only lead to compensation which needs to be proved specifically and has not been done and it is urged that the court does dismiss the Petition.

DETERMINATION

47. I have very carefully considered the petition, the respondent's response opposing the petition and the terse submissions and authorities relied on by both sides.

48. In my view, the following issues fall for determination:

(a) Whether any of the petitioner's constitutional rights have been breached?

(b) Whether the petitioner is entitled to the judicial review order sought of certiorari?

49. On issue a) above, the Petitioner has not stated which constitutional rights he claims or have been violated and his only contention as from the 2nd ground of the Petition and the averments thereof in the Petition and Supporting Affidavit to the Petition, the Petitioner deposes that the Respondents violated the rights of his boss to be informed of the criminal charges facing him, in that being a member of the Kenya Defence Forces, he was subject to the Military Police Force for his actions and not to be arrested or detained under the Criminal Procedure Code or Penal Code.

50. Article 27 of the Constitution is clear that every person is equal before the law and has the right to equal protection and equal benefit of the law. The Article outlaws all forms of discrimination. What that means is that status of any individual cannot protect him or her from legal process. Both the Criminal Procedure Code And the Penal Code which are criminal statutes are to ensure that we all live in a peaceable environment. The petitioner was at the time of the alleged offence not on duty and therefore the law that applied to him was the law applicable to all civilians.

51. Furthermore, the Petitioner in his affidavit in response to the Reply to the Petition stated in deposition that he **is subject to the laws of this country and that his only complaint is that since he was called when at his duty station, that is Embakasi Barracks, the Warrant of his Arrest ought to have been sent to his employer and in that, his employer would have officially facilitated his production to Siaya Station and appearance at the Siaya Law Courts**. Thus, by his own words, the petitioner confirms that this is the only issue he has leading to this Petition.

52. Further, the Petitioner in his Supporting Affidavit dated 19/1/2018 in response to the undated affidavit by PC Peter Koshen and the Replying Affidavit sworn by Maurine Odumba flips and states that he is not against the criminal proceedings but **what is of utmost concern to him is that, as his employer is not aware of the criminal proceedings, he cannot be given official leave to attend court and that he is still available for active duty and that puts him at a precarious position as he has to travel frequently from his base of operation in**

Somalia and the journey has so many dangers as the enemy has started planting explosives on the routes that vehicles use.

53. In my humble opinion, such averments cannot be the subject of a constitutional Petition. There is no proof of breach of the [petitioner's rights and fundamental freedoms guaranteed by the Constitution.

54. On issue b), the Petitioner has not demonstrated an unfair method of procedure despite him giving situations that he may likely suffer or would be termed unfair. In addition, the petitioner did not cite before this court any specific legal provision which mandates the sending of warrants to his employer and or that would offend the provisions of Articles 157 (10) and 245 (4) of the Constitution which Articles provide for Investigations, arrests and prosecutions. The Articles stipulate:

'157 (10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority' while

245 (4) provides that

'The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector

-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to—

(a) the investigation of any particular offence or offences;

(b) the enforcement of the law against any particular person or persons; or

(c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service'.

55. For the above reasons, I find no legal requirement that override constitutional provisions. Furthermore, this is a Constitutional Petition and not a Judicial Review application. There are no specific prayers seeking to compel the respondents to forward the warrants of arrest against the petitioner to his employer the Kenya Defence Forces. Further, the prayers for Certiorari are not supported as the grounds upon which this court is being asked to quash the criminal proceedings are not spelt out in the petition.

56. The upshot is that the Petition is dismissed with no orders as to costs.

57. However, in the interest of justice, I exercise discretion and order that for convenience of the petitioner and to enable him procure permission from his employer to enable him attend court for the hearing of his criminal case in the lower court, the summons to him to attend court shall at all times be issued to him through his employer the Kenya Defence Forces.

58. I so order.

Dated, signed and Delivered in open court at Siaya this 22nd Day of January 2019

R.E ABURILI

JUDGE

In the presence of

Mr. Okachi Senior Principal Prosecution Counsel

Mr. Wanyanga Counsel for the petitioner

Petitioner Absent

CA: Brenda