



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL PETITION NO 605 OF 2013

PATRICK NYAMUKE ETORI.....PETITIONER

VERSUS

NATIONAL POLICE SERVICE COMMISSION....1ST RESPONDENT

MOI UNIVERSITY.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. *Patrick Nyamuke Etori*, the Petitioner filed a petition which he later amended, against *Moi University*, a public University and *The Attorney General*, the principal legal advisor to the National Government, the 1st and 2nd respondents respectively.

2. The petitioner averred that he was admitted to the 1st respondent university during the 2002/2003 academic year to study the degree of Bachelor of Science (information Science), and that on completion, he was awarded that degree upon graduating on 15th December 2006. He stated that his degree certificate was serialized No 211289.

3. It is the petitioner's case that on 27th April 2011, he was enlisted into the Kenya Police Service and joined the GSU Training School under the leadership of the 1st respondent. He contends that on 21st January 2011, he was asked to surrender his academic certificates and transcripts for onward transmission to Police Headquarters which he did. However, on 21st September 2011, he was arrested and charged in *Criminal Case No 4499 of 2011* with the offense of making a document without authority contrary to section 357(a) and uttering a document with intent to deceive contrary to section 357(b) of the Penal Code which cut short his training.

4. The petitioner states that when he made inquiries with the 1st respondent, he was issued with a different degree certificate serial No 210750 and attributes his tribulations to the 1st respondent's mistakes. He contends that his rights were violated, including the right to fair administrative action contrary to section 47(1), the right to dignity contrary to Article 28, security contrary to Article 29, the right to privacy among other rights.

5. The petitioner, therefore, sought the following reliefs:-

- i. A Declaration that the 1st and 2nd respondents breached the petitioner's fundamental rights as enshrined in articles 10(2)(b), 28, 31(b) and (c), 35(2), 40(1)a, 40(2)a, 43(1)(a)-(e) and 47;*
- ii. A declaration that the 1st and 2nd respondents' breach of the petitioner's fundamental rights as above encapsulated has caused the petitioner damage to his reputation and good name;*
- iii. A declaration that the suffering orchestrated on the petitioner is fully attributable to the unconstitutional actions of the respondents, jointly and severally and no fault of his own.*
- iv. A declaration that to the extent that the 1st respondent made a decisions to terminate the petitioner's training on the basis of an erroneous and uncorroborated dispatch from the 1st respondent was in breach of the petitioner's legitimate expectations, unfair and in breach of the Wednesbury principles;*

v. An order compelling the 2nd respondent to declare, the degree certificate that is attributable to the petitioner for purposes of future job applications;

vi. (a) an order of reimbursement of the Kshs11,400/- wrongfully levied on the petitioner by the 2nd respondent, as fees arrears.

vii. An order of compensation directed at the respondents'' compelling them to compensate the petitioner for the suffering, loss of opportunities, prejudice suffered and damage caused to him by their unconstitutional actions and the quantum of such compensation to be determined by the this Honourable court;

viii. In the alternative, and as against the 1st respondent and 4th respondents, an order compelling the reinstatement of the petitioner to the Kenya Police Service;

ix. An order compelling the 2nd respondent to declare, the Degree certificate that is attributable to the petitioner for future job applications and job placement;

x. An order compelling the respondents to correct their records by removing all the misleading information therein, particularly information on the alleged forgery.

xi. Such further orders as this Honourable court deems mete and just.

xii. Costs of his petition be awarded to the petitioner.

1st and 3rd Respondents' response

6. The 1st and 3rd respondents filed grounds of opposition dated 6th February 2014, contending that the 1st respondent does not employ police officers; that the petition discloses no cause of action against the 1st and 3rd respondents and that the petition lacks clarity and precision. The 1st and 3rd respondents further contend that the petition is a mere apprehension of alleged contravention of rights as no actual violation has been set out and the petition is misconceived incompetent and bad in law.

2nd Respondent's response

7. The 2nd respondent filed a response dated 25th May 2018 in which it contended that the petitioner did not clear with the 2nd respondent; that the petitioner's degree certificate is **serial No 2010750** and that Degree certificate with **Serial No 211289** belongs to a different person and course in the School of Business Management and was issued and collected in 8th August 2007.

8. According to the 2nd respondent, although the petitioner may have been recruited into the Kenya Police Service on 27th April, 2011, he collected his degree certificate on 28th September 2011 hence the petitioner could not have used certificate **Serial No 211289** to secure employment. The 2nd respondent denied having issued the petitioner with the disputed degree certificate. In that regard, the 2nd respondent denied violating the petitioners fundamental rights.

Petitioner's submissions

9. Mr Okemwa, learned counsel for the petitioner submitted, highlighting their written submissions dated 25th October 2018, that the petitioner was a bonafide student at the 2nd respondent, University and graduated with a degree in bachelor of information Science on 15th November 2006. He contended that the petitioner was however arrested and charged with offence of making a document and uttering a document because the 2nd respondent had disowned the petitioner as its former student. Counsel submitted that the petitioner was later acquitted for lack of evidence.

10. The petitioners contended that the events leading to his arrest and prosecution violated his rights and fundamental freedoms that the 2nd respondent acted unreasonably by writing to the office of the President disowning the petitioner as its student without according him a hearing or conducting investigations, he relied on the case of **Kenya Human Rights Commission v Non-Governmental Organization Coordination Board** [2018]eKLR. He contended that he had suffered indignity by being subjected to a criminal trial that had no basis and that he also lost employment.

1st and 3rd Respondent's Submission

11. Miss Chibole, learned counsel for the 1st and 2nd respondents submitted that the petition does not raise a constitutional issue for the court's determination. According to learned counsel, the petitioner having been acquitted he should have filed a civil suit for damages since that is a claim founded on defamation law.

12. Regarding the claim that the petitioner lost employment, learned counsel contended that the issue could properly be adjudicated by the Employment and Labour Relations Court (ELRC). Counsel further argued that the petitioner did not state with precision the rights that had been violated and relied on the case of **Anarita Karimi Njeru V Republic** [1979] KLR 154

13. On legitimate expectation, counsel submitted that the petitioner had not proved the aspect of legitimate expectation and relied on the case

of *Communication of Kenya & 5 others v Royal Media Services Ltd & 5 Others* [2014]eKLR. It was contended that the petitioner relied on disputed documents that could not found a legitimate expectation.

2nd Respondent's Submissions

14. Mr. Karanja, learned counsel for the 2nd respondent submitted, highlighting their written submissions, that it is not true that the petitioner was issued with degree certificate Serial No 211289. He contended that the certificate whose serial No the petitioner claims to have been issued with, belongs to ***Ngui Robert Muoki*** of the School of Business Management and Accounting and which was collected on 8th August 2007.

15. Counsel argued that the certificate issued to the petitioner was ***serial No 210750*** which he collected on 28th September 2011 after clearing outstanding fees on the same day. He contended, therefore, that if the petitioner was employed on 27th April 2011 he must have used a certificate that was not his because he had not collected his certificate by then.

16. In that regard, Mr. Karanja argued that the 2nd respondent did not violate the petitioner's rights and fundamental freedoms and relied on the cases of *Friends of Lake Victoria v Attorney General & 2 others* [2014]eKLR and *Rashid Odhiambo Alugo & 2 others v Hacco Industries Ltd* [2007]eKLR

Determination

17. I have considered this petition, the responses and submissions. I have also considered the authorities relied on. The issue that arises for determination is whether the petitioner's rights were violated.

18. The facts of this petition are straight forward. The petitioner joined the 2nd respondent university for his undergraduate studies in the 2002/2003 academic year. He graduated in 2007 with a Bachelor degree. In 2011, he enlisted with the Kenya Police Service but was later charged with offences of making a document without authority and uttering a document with intent to deceive. The case was later concluded and the petitioner acquitted. He filed this petition claiming violation of his rights and fundamental freedoms.

19. The document alleged to have been made and uttered was the degree certificate serial No 211289. The petitioner contends that he was arrested and charged because the 2nd respondent disowned him as its former student. The petitioner has, therefore, alleged violation of his rights and fundamental freedom. He has also contended that the 2nd respondent did not give him a hearing or comply with Articles 47(1) and 50(1) of the Constitution.

20. It is now settled law that a party who alleges violation of rights and fundamental freedoms must plead precisely the rights violated, the manner of violation and the constitutional provisions concerned. Courts have often stated that it is a fundamental principle in constitutional litigation that there should be accuracy in the identification of the provisions of the Constitution said to have been infringed on the grounds that the breach is inconsistent with the Constitution or fundamental rights and freedoms. The alleged constitutional challenge must also be explicit, with due notice to all those affected in order to ensure that the interested parties have an opportunity to suitably respond to the allegations to enable them lead relevant evidence where necessary. (*see Sali v National Commissioner of South African Police Service & others* [2014] ZACC19), *Phillips & others v National Director of Public Prosecutions* [2005] ZACC 15; 2006(1).

21. The Supreme Court in approving the decision in *Anarita Karimi Njeru V Republic(supra)* in the case of *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR, that 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 plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

22. The dispute in this petition as I see it, is based on the petitioner's arrest and arraignment on the basis of the degree certificate he had used to enlist with the Kenya Police Service. The petitioner used degree certificate ***serial No 211289*** and on being arrested and charged in court, he alleged that the 2nd respondent denied that he was not its student which the petitioner takes offence with contending that his right to Articles 47(1) and 50(1) of . Constitution. The 2nd respondent argued that the petitioner was not issued with that degree certificate he used to get employment pointing out that certificate ***serial No 211289*** belonged to someone else.

23. The 1st respondent further pointed out that the petitioner was issued with certificate ***serial No 210750*** on 28th September 2011 after he cleared outstanding fees on the same day. The 2nd respondent was also clear that the certificate the petitioner claimed to have belonged to a different person and school and was collected by the owner in 2007. On the facts as stated by the 2nd respondent, which are not controverted, the petitioner used a certificate that was not his hence his arrest and prosecution.

24. It is important to state that although the fact that the certificate the petitioner allegedly used were stated in a response filed on 21st June 2018, the petitioner did not say anything or dispute them more so regarding the contention that his certificate is ***Serial No 210750*** and that he only collected it on 28th September 2011 after clearing fees, many months after he had been arrested and charged with the offences of making a document and uttering a document. Based on those facts, I do not see how the 2nd respondent could have violated the petitioner's rights and fundamental freedoms.

25. Secondly, the petitioner was arrested and charged with two counts but the case was terminated in his favour. The criminal court's record shows that the charges were dismissed because an application for adjournment was declined. This was because the prosecution had earlier been given a last adjournment. That means the petitioner was actually complaining of malicious prosecution in this petition. However, for one to establish a case for malicious prosecution, he must prove that the prosecution had no legal basis and that it was actuated by malice.

26. The position was well stated in the case of *Mbowa v East Mengo Administration* [1972] EA 352, thus;

“The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit... It originated in the medieval writ of conspiracy which was aimed against combinations to abuse legal procedure, that is, it was aimed at the prevention or restraint of improper legal proceedings..... It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth.

27. The court went on to enumerate essential ingredients of the tort of malicious prosecution, namely;

1. “The criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority;

2. The defendant must have acted without reasonable or probable cause i.e. there must have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified;

3. The defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose; and

4. The criminal proceedings must have been terminated in the plaintiff’s favour, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge.”

28. The petitioner was bound to prove the above elements if he expected to succeed even on the basis that his arrest and prosecution was malicious. He did not attempt at all to prove any of the ingredients either against the 1st or 2nd respondents as was required of him by the law. The burden of proof fell on him in terms of sections 107 through 109 of the Evidence Act.

29. The petitioner has also asked that the 1st respondent be compelled to declare that the degree certificate is attributable to the petitioner for purposes of future employment. Well, the 2nd respondent has stated that the questioned degree certificate does not belong to the petitioner and has identified the petitioner’s degree certificate to be different. This court does not act by directing institutions to accord person what does not belong to them. It only acts on the basis of evidence and the law.

30. Having therefore, considered the petition, the responses, submissions and the law, I am not satisfied on the merit of this petition. Consequently, the amended petition is declined and dismissed with costs to the 2nd respondent.

Dated, Signed and Delivered at Nairobi this 22nd Day of February 2019

E C MWITA

JUDGE