



**Jagero v Judicial Service Commission & 2 others (Petition  
260 of 2018) [2019] KEHC 9204 (KLR) (14 March 2019) (Judgment)**

*Phillip Oremo Jagero v Judicial Service Commission & 2 others [2019] eKLR*

Neutral citation: [2019] KEHC 9204 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA**

**PETITION 260 OF 2018**

**EKO OGOLA, J**

**MARCH 14, 2019**

**BETWEEN**

**PHILLIP OREMO JAGERO ..... PETITIONER**

**AND**

**JUDICIAL SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTION ..... 2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. By a petition dated and filed herein on 17<sup>th</sup> December, 2018, the Petitioner prays for the following orders:
  - (i) A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are responsible for exposing the Petitioner to risk to loss of life and should take full responsibility to overseas referral costs for treatment as recommended by the doctors.
  - (ii) A declaration for a reasonable compensation for general damages occasioned by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to the Petitioner.
  - (iii) A declaration of a clear structure in the administration of justice in terms of who should facilitate prosecution witnesses to attend court and tender their evidence comfortably without any color of humiliation between the Office of the Director of Public Prosecution and the Judiciary.
  - (iv) Costs of the petition.
  - (v) Any other relief or orders the Honourable Court may deem fit to grant.



2. The Petitioner is an adult male of sound mind presently residing in Nyakach Sub-County in Kisumu County. The 1<sup>st</sup> Respondent is the Judiciary established under the Constitution. The Petitioner states that the 2<sup>nd</sup> Respondent is constitutionally the prosecuting agency in all criminal matters in the Republic of Kenya.
3. The Petitioner alleges that the 3<sup>rd</sup> Respondent is the official legal representative of state organs and arms of Government of the Republic of Kenya. The Petitioner states that he is a prosecution witness in Shanzu Criminal Case No. 118 of 2017 Republic vs. Rose Mwikali Muindi and that he has been attending the Court for hearing which never took off severally and the Court has been granting his prayers for reimbursement of travelling expenses. The Petitioner states that at all material times to the commencement of the aforementioned criminal proceedings he informed the Court that he was undergoing cardiac treatment at St. Jairus Hospital in Kisumu out-patient facility under his NHIF cover and specialized treatment at Tenwek AIC Mission Hospital, a fact which persuaded the Court to grant his reimbursement of travelling expenses upon exhibiting his medical records and travelling bus tickets. The Petitioner states that he attended court on the 23<sup>rd</sup> July, 2018 with a view to tender his evidence as was bonded to do so but was unable to do so since the matter was adjourned to 4<sup>th</sup> October, 2018 and reimbursement prayers were granted. The Petitioner states that on the 4<sup>th</sup> October, 2018, he again travelled to attend the Court with a view to tender his evidence, which he did in the presence of the accused. The Petitioner states that upon concluding tendering his evidence, the Honourable Magistrate Court No. 3 fished from his drawer copies of complaint letters the Petitioner had written to the Hon. Presiding Judge and the Office of Public Prosecution Mombasa for a possible review of the manner the proceedings were being conducted. The Hon. Magistrate cross-examined the Petitioner on the contents which in the Petitioner's view offended the Hon. Magistrate. The Petitioner states that on making the usual application for reimbursements of his travelling expenses the Court declined the same stating that the organization the Petitioner works for is established in Mombasa therefore the Petitioner was not entitled to any reimbursement of travelling expenses a matter which in the Petitioner's view was translated to a personal vendetta. The Petitioner states that he wrote to the Hon. Presiding Judge on the 9<sup>th</sup> October, 2018 for a possible review, visited physically his Lordship's Chambers unsuccessfully for follow up of any possible response to enable the Petitioner travel back for treatment to no avail. The Petitioner states that on the 9<sup>th</sup> November, 2018 he braved the pain and did a reminder to the Hon. Presiding Judge and the same has not been acted upon to date rendering this petition necessary. The Petitioner states that he suffered another cardiac attack due to lack of treatment and medication occasioned by the Court declining to reimburse him his travelling expenses back to Kisumu where he has access to treatment under his NHIF cover and at Tenwek AIC Mission Hospital for specialized treatment. The Petitioner states that due to denial access to treatment by the Court and failure by the High Court to review the same within time, he suffered another attack and was admitted at Coast Provincial General Hospital as a high-risk cardiac patient for three weeks from the 12<sup>th</sup> to 30<sup>th</sup> November, 2018 which case is now beyond Kenyan doctors to handle hence referral to overseas for urgent surgery.

### **The Response**

3. The petition is opposed by all the Respondents. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents filed Grounds of Opposition to the petition on 4<sup>th</sup> January, 2019, stating:
  - (a) That the Petition is misconceived, frivolous and vexatious.
  - (b) That Petitioner/Applicant has failed to establish any constitutional or statutory right forming the basis of these proceedings.



- (c) That having failed to establish any constitutional and/or statutory right warranting institution of these proceedings the Petition herein has no basis in law and is an abuse of the process of court.
  - (d) That the Petitioner has failed to demonstrate which of his fundamental right or freedom is under threat or has been infringed by the 1<sup>st</sup> and/or 3<sup>rd</sup> Respondent to warrant grant of the orders sought.
  - (e) That the Petitioner is guilty of material non-disclosure and therefore does not deserve the orders sought.
  - (f) That the decision rendered by the trial court in Shanzu CMCR. Case No. 118 of 2017, on 4<sup>th</sup> October, 2018, declining to reimburse the Petitioner/Applicant's travel expenses has not been reversed and/or set aside hence the Petition herein is moot.
  - (g) That the Petitioner has failed to establish a cause of action against the Respondents and the Petition herein ought to be dismissed with costs.
4. The 2<sup>nd</sup> Respondent also filed Grounds of Opposition on 15<sup>th</sup> January, 2019 stating that:
    - (i) The 2<sup>nd</sup> Respondent is wrongly sued and enjoined in the petition.
    - (ii) The 2<sup>nd</sup> Respondent has no mandate and/or duty under law to discharge the petition.
    - (iii) The prayers sought are not enforceable as against the 2<sup>nd</sup> Respondent for lack of legal duty.
  5. The Petitioner filed a response to the Respondents Grounds of Opposition aforesaid on 11<sup>th</sup> January, 2019 restating his allegedly violated rights under the constitution.
  6. On 24<sup>th</sup> January, 2019 the 1<sup>st</sup> Respondent through Robert Kioko filed a Replying Affidavit to the Petition. In that affidavit Mr. Kioko depones that he is the Executive Officer Shanzu law Court competent and authorized to swear the affidavit. The deponent states that he has perused the proceedings in Shanzu Chief Magistrate Criminal Case Number 118 of 2017 hand written copies which he attached to the affidavit. The deponent confirms that the Petitioner herein was a prosecution witness in Shanzu Chief Magistrate Criminal Case Number 118 of 2017. That from the proceedings the Petitioner herein attended Court on 13<sup>th</sup> May, 2018 for hearing of the Criminal case. However counsel for the accused sought and was granted an adjournment as she had not been served with documents the prosecution wished to relay on.
  7. On 13<sup>th</sup> May, 2018 the trial court adjourned the hearing of the said criminal case to 9<sup>th</sup> May, 2018 and ordered that the Petitioner be reimbursed his travelling expenses from Kisumu to Mombasa. The Petitioner attended court similarly on 9<sup>th</sup> May, 2018 and the court ordered that his travel expenses from Kisumu to Mombasa be reimbursed, and those costs have been reimbursed.
  8. The deponent further states that the Petitioner attended court and testified on 4<sup>th</sup> of October, 2018. The Petitioner herein testified that he is a Human Rights Defender based in Mombasa for the last 20 years. On making an application for reimbursement of travel expenses the court noted that the Petitioner came from an office based in Mombasa and therefore declined the application for reimbursement of travel expense (see Page 45 of the hand written proceedings).
  9. The deponent avers that the 1<sup>st</sup> Respondent has not infringed any of the Petitioner's right to warrant this petition. That the allegations being made by the Petitioner as against the Respondent are baseless and misguided and the petition ought to be dismissed.



## Submissions

7. The Petition was canvassed vide oral submissions on 24<sup>th</sup> January, 2019. The Petitioner submitted that he was a prosecution witness in Criminal Case No.118 of 2017 in Shanzu Court. He submitted that the court was notified that he was undergoing treatment upcountry and that the Petitioner travelled from time to time to tender evidence in court. The Petitioner submitted that the court was persuaded on the basis of treatment notes that the Petitioner was sick. The Petitioner submitted that on 4<sup>th</sup> October, 2018 he tendered his evidence but the court declined to pay his witness expenses on the basis that the organization for whom the Petitioner worked is based in Mombasa. For that reason the Petitioner was not able to access the means to travel back to Kisumu for treatment. This caused his condition to worsen and he was admitted in hospital between 12<sup>th</sup> and 30<sup>th</sup> November, 2018. He was later admitted to Aga Khan Hospital where it was discovered that his condition had worsened beyond management in Kenya. The Petitioner was advised to go for treatment in India. The Petitioner attached a Medical Report dated 27<sup>th</sup> November, 2018 by Dr. D. Acullu. The Petitioner's case is that the 1<sup>st</sup> Respondent is responsible in negligence for failure to award the Petitioner witness expenses to enable the Petitioner to travel for treatment. The Petitioner also prays for general damages of Kshs. 10,000,000/=. The intended treatment in India is expected to cost Kshs. 4,000,000/= plus other related costs.
8. Mr. Makuto counsel for 1<sup>st</sup> and 3<sup>rd</sup> Respondents submitted that the 1<sup>st</sup> Respondent's mandate under the constitution in Section 394 CPC allows payment on part of government for witness expenses. He further submitted that there is no statutory obligation for the 1<sup>st</sup> Respondent to provide witness costs for the Petitioner. Secondly, there is no claim against the 3<sup>rd</sup> Respondent. So the case against the 1<sup>st</sup> and 3<sup>rd</sup> Respondents should be dismissed. Mr. Makuto further filed hand written proceedings from Shanzu Court where at page 9 it is clear that the Petitioner already had a heart condition. Counsel submitted that on 3<sup>rd</sup> May, 2018 and 9<sup>th</sup> May, 2018 the Petitioner was awarded costs on basis that he had travelled to Mombasa from Kisumu. The matter then came up on 4<sup>th</sup> October, 2018 when the Petitioner testified. That he is a human rights defender based in Mombasa and he had been in Mombasa for 20 years. For this reason the court said there was no reason to award the travel costs since the Petitioner was a resident in Mombasa. Mr. Makuto submitted that this fact was not disclosed to this court by the Petitioner. Mr. Makuto submitted that the Petitioner is not deserving of any benefits from this court. On the procedure for payment of witness expenses, Mr. Makuto submitted that Section 394 CPC has already taken care of that and there is no lacuna in policy. Counsel urged the court to dismiss the petition as it lacked constitutional basis.
9. Mr. Isaboke counsel for 2<sup>nd</sup> Respondent submitted that he opposed the petition for lack of cause of action. There was no statutory duty that was breached by the 2<sup>nd</sup> Respondent. Counsel submitted that the prosecution in the criminal court sought for re-imburement of witness expenses. But the DPP has no power to grant witness expenses. Mr. Isaboki submitted that the Petition before the court is frivolous and should be dismissed. The claim for damage of Kshs.10,000,000/= is frivolous. The Petitioner's condition was already pre-existing. His condition was never caused by any of the Respondents. He introduced himself as a person based in Mombasa. Further, the Petitioner has not shown this court any recent doctor's appointment around the time he alleges to have been denied witness expenses to travel. Counsel urged that the Petition be dismissed.

## The Determination

10. I have considered the petition and the parties' submissions. The following are the issues I raise for the court's determination.



- (1) Whether the Respondents have breached any constitutional or statutory duty owed to the Petitioner.
  - (2) Whether the court in Shanzu was right to deny the Petitioner witness expenses on 4<sup>th</sup> October, 2018.
  - (3) Whether the Petitioner had a duty to mitigate his alleged loss and travel to his home for his treatment.
11. As submitted by Mr. Makuto the 1<sup>st</sup> Respondent is required under Section 394 of the CPC to pay part of witness expenses. That section however does not obligate the court to do that. Be that as it may, the proceedings of the court show that on 3<sup>rd</sup> may, 2018 and 9<sup>th</sup> may, 2018 the Petitioner testified in the said court and was awarded travel expenses on the basis that he travelled to Mombasa from Kisumu. However, on 4<sup>th</sup> October 2018 the Petitioner tendered evidence in the said court and testified as follows:
- “My name is Phillip Jagero. I am a human rights defender based in Mombasa. I have been working as such for 20 years.”
- (See page 26 of hand written proceedings).
12. At the end of the testimony, the Petitioner sought travel expenses. The record at page 45 shows the court’s response:
- “The witness comes from an office based in Mombasa and there is no need of reimbursing his travel costs.”
13. From the foregoing it is clear that the learned magistrate exercised his discretion under Section 394 of the CPC judiciously. Further, on 4<sup>th</sup> October, 2018 the learned magistrate correctly observed that the Petitioner was from a Mombasa based human rights body, and as such could not qualify for reimbursement of travel costs to Kisumu.
14. In my view, there is no statutory breach of any rights allegedly owed to the Petitioner, leave alone a constitutional one. Secondly, the court in Shanzu was right to deny the Petitioner witness expenses. The Petitioner himself had testified that he was from Mombasa. On what basis would a court then award travel expenses from and to Kisumu?
15. The last issue I raised is whether the Petitioner had a duty to mitigate his alleged loss and travel to Kisumu for treatment. It is in the testimony of the Petitioner that the court knew that the Petitioner was a sick person. The medical report attached hereto also shows that the Petitioner’s condition was pre-existing. Therefore, the Petitioner was always obligated to take adequate precaution and steps to safeguard his own health. Even assuming that the Respondents owed him obligation to pay travel costs and failed to do that, it was upon him to raise money to travel to Kisumu for treatment. He could not just stay around in Mombasa knowing that he needed to attend to his health.
16. In any event, the alleged failure to pay travel costs, and the prayer by the Petitioner for Kshs. 4,000,000/- treatment costs and Kshs. 10,000,000/= as damages have no nexus, and the alleged damages were not in any way foreseeable. It was always much easier for the Petitioner to look for Kshs. 2,000/= to travel for treatment in Kisumu, than to look for damages of Kshs. 14,000,000/= in costs and damages for alleged failure by the Respondents to pay travel expenses to Kisumu.



17. For the foregoing reasons the Petition before the court lacks merit. It is dismissed. Parties to bear own costs.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 14<sup>TH</sup> DAY OF MARCH, 2019.**

**E. K. OGOLA**

**JUDGE**

In the presence of:

Petitioner in person

Mr. Makuto for Hon. Attorney General

Mr. Isaboke for DPP

Mr. Kaunda Court Assistant

