REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CONSTITUTIONAL PETITION NO. 15 OF 2019

GEORGE A. KHAMATI.....PETITIONER

VERSUS

MASINDE MULIRO UNIVERSITY

OF SCIENCE AND TECHNOLOGY.....1ST RESPONDENT

THE ACTING VICE-CHANCELLOR,

PROF. ASENETH AGOT.....2ND RESPONDENT

THE ACTING REGISTRAR, PROF. THOMAS SAKWA.....3RD RESPONDENT

THE ACTING DEAN OF STUDENTS,DR. B. ABWAO.....4TH RESPONDENT

AND

SIMIYU VINCENT LUMALA.....1ST INTERESTED PARTY

MAINA GERALD MACHERA.....2ND INTERESTED PARTY

ADSON MICHAEL

WERE AMOS KIPTARUS.....3RD INTERESTED PARTY

ELVIS NGAIRA.....4TH INTERESTED PARTY

JUSTUS OUMA WANDERA.....5TH INTERESTED PARTY

MUCHUMA SIKUKU VICKY.....6TH INTERESTED PARTY

AYAL DAN BRAMWEL ODONGO.....7TH INTERESTED PARTY

JARED OYIER ODHIAMBO.....8TH INTERESTED PARTY

AMBROSE OCHIENG ANDAI.....9TH INTERESTED PARTY

ODUOR ABISINNIA .....10TH INTERESTED PARTY

BONVENTURE OKOTH OPANGA.....11TH INTERESTED PARTY

ALEX MUSYOKI MUTIA.....12TH INTERESTED PARTY

GRIGGIN ODHIAMBO ADEK.....13TH INTERESTED PARTY

NATHANIEL ODONGO.....14TH INTERESTED PARTY

GIDEON AMALEMBA.....15TH INTERESTED PARTY

SAMSON KIPISH.....16TH INTERESTED PARTY

JOHN MWANZA MUTUKU.....17TH INTERESTED PARTY

GEORGE GATHURI KARIUKI.....18TH INTERESTED PARTY

JUDGMENT

1. The petition herein, dated 17th October 2019, was brought by George A. Khamati, to be known hereafter as the petitioner, citing several constitutional violations of the rights of persons he has named as interested parties, to be hereafter referred to as such, who are students at the Masinde Muliro University of Science and Technology, named herein as the 1st respondent.

2. The petitioner is a public spirited individual, who has brought the instant petition on behalf of the interested parties, and he has brought the suit against the 1st respondent, which is a public university established under the Universities Act, No. 42 of 2012. The 2nd respondent is the Acting Vice-Chancellor of the 1st respondent, while the 3rd respondent is the Acting Registrar of the same institution and the 4th respondent the Acting Dean of Students. The interested parties are not described in the petition.

3. The cause is initiated by the petitioner on behalf of the interested parties. He has not set out the factual background to the petition, in terms of narrating the events and the actions of the 1st respondent and the other respondents that triggered the filing of the petition, which may then be described as the genesis of the matter.

4. The legal and constitutional foundations of the petition are set out in the petition, to be Articles 10, 22, 23, 35, 37, 46, 55, 165, 232 and 258 of the Constitution of Kenya; relating to national values and principles of governance, the right to institute court proceedings to claim violations of the fundamental rights and freedoms under the Bill of Rights, the powers of the High Court to entertain such suit and the reliefs available, guarantees of right to access to information, guarantees to right to assemble picket and demonstrate, consumer protection, protection of the youth, among others.

5. The Petitioner contends that there has been violation of the rights of the interested parties by the respondents. He states that following peaceful demonstrations by the interested parties and other students at the campus of the 1st respondent, the respondents have taken steps against the interested parties in a manner that has violated their fundamental rights and freedoms under the Constitution. He has alleged violation of the interested parties right to fair administrative action guaranteed under Article 47 of the Constitution, right to access education under Article 46 of the Constitution, and the right to fair hearing under Article 50 of the Constitution. He further alleges contravention of Article 35 with regard to their right to access information held by the 1st respondent, which is tied up with their right to a fair hearing.

6. With respect to Article 47, the petitioner contends that the interested parties right to fair administrative action in an expeditious, efficient, lawful, reasonable and procedural manner was violated, to the extent that the action taken against them, specifically their suspension, was arbitrary, did not follow due process and did not afford platform for a fair hearing and no reasons were given for it.

7. On Article 46, the petitioner avers that the right to services in the education sector were infringed. He avers that they were chased out of the university, denied access to it and their right to education as entrenched in Article 43 of the Constitution had been infringed. He contends that the protection of their psychological health and sustainable economic interests were abused by the arbitrary discontinuance of their studies, with the attendant loss of school fees, which had exposed them to mental stress.

8. On the right to a fair hearing under Article 50, the petitioner contends that the interested parties had a right to be presumed innocent until proven guilty and to be informed of the charge against them in sufficient detail to enable them respond to it. It is also argued that the interested parties right to assemble, picket, and demonstrate was capriciously limited, through disciplinary proceedings, instead of their grievances being heard instead. It is asserted that the right to fair hearing cannot, by virtue of Articles 24 and 25 of the Constitution, be abrogated.

9. The Petitioner therefore seeks the following reliefs:

(1) a declaratory order that the actions of the respondents contravened the provisions of Articles 10, 22, 23, 24, 25, 35, 37, 46, 47, 50, 55, 232 and 258 of the Constitution and thus contravened the rights and freedoms of the petitioner;

(2) a mandatory injunction directing the respondents to:

(a) quash the decision of the Senate dated 2nd October 2019, effectively suspending the interested parties from the University;

(b) re-admit the interested parties to the University and permit them to take part in academic and other activities; and

(c) accept the students' petition, and forthwith deal with grievances of the students in a timely and sustainable manner;

(3) a prohibitory injunction proscribing the respondents from:

(a) suspending, ejecting, banishing or otherwise removing the interested parties from the University;

(b) pressing any form of charges against the interested parties over the demonstrations held; and

(c) discriminating against the interested parties on any ground or reason, or treating them at any degree of disadvantage;

(4) a mandatory injunction to compel the respondents to immediately address the grievances of the students and uphold their welfare;

(5) an order of structural interdict for the court to supervise the integration of the interested parties in the University, and compliance with its orders;

(6) any other relief the court deems fit to grant; and

(7) costs of the application be borne by the respondents.

10. The petition is supported by an affidavit sworn by the petitioner on 16th October 2019. He avers that the petition related to the rights of student youths, which were being continually abused by the respondents. It is stated that the petition was brought on behalf of the interested parties who had been notified of their suspension in a process that was arbitrary unfair and administratively unsound. It is contended that the respondents used arbitrary mechanisms to exert discipline on the students through an administrative process that was not recognized in law or statute. It is averred that after peaceful demonstration by students complaining about adverse treatment by the respondents, the respondents handpicked the interested parties who were student leaders and suspended them randomly. Some of the leaders were arrested and incarcerated on instructions of the respondents without following due process. It is contended that the actions of the respondents violated various Articles of the Constitution of Kenya. It is also contended that the 2nd respondent was not lawfully in office, and had abused office when she got the 3rd respondent to do certain acts and illegally conducted a Senate meeting. She is also accused of making false allegations against the students.

11. To buttress his case, the petitioner has attached several documents to his affidavit. There is a bundle of copies of letters which placed the interested parties under suspension. There is also a copy of the Masinde Muliro University Student Organization (MMUSO) Constitution.

12. The respondents replied to the petition by way of a replying affidavit, sworn by Prof. Thomas Sakwa, the 3rd respondent, on 22nd October 2019. He contends that the petition was not sustainable nor merited. He states that there were invitations to the student disciplinary proceedings, and that the orders sought in the petition ought to have been sought before the proceedings were conducted then. He avers that only nineteen students were suspended, in accordance with the regulations set out in the Students Handbook, and especially Article 15 thereof. It is asserted that the petitioner was not a student and, therefore, he had no *locus standi* to bring the petition. He adds that some of the students were already facing criminal charges and that some of the students engaged in forgery.

13. To support the respondents' case, the 3rd respondent has attached documents to his affidavit. There is a report of an *ad hoc* committee of the 1st respondent's Senate on the students' unrest of Wednesday 18th September 2019. There is a bundle of letters inviting the interested parties, and other students, to the disciplinary proceedings.

14. The petition was heard orally on 5th November 2019, a date that had been given in open court on 23rd October 2019, by Njagi J. The respondents were served with a hearing notice through their advocates on record, and an affidavit for return of service was filed in court on 5th November 2019. The advocates for the respondents did not attend court despite service, but the matter, nevertheless, proceeded as there was evidence of proper service.

15. The petition was argued by Mr. Otsyeno, on behalf of Mr. Akusala, the advocate on record for the petitioner. He submitted that under Article 22 of the Constitution a person could bring a petition on behalf of another, alleging violation of rights. He submitted that the respondents were bound by Article 10, on national values as they were a public institution and public officers. He contended that the right to assemble and picket was guaranteed by Article 37 and the same could not be abrogated, save as prescribed in the Constitution. He referred to a meeting that was held at the office of the Dean of Students, and agenda 106 of that meeting, which raised consumer protection issues, arguing that Article 46 of the Constitution on consumer rights were violated, for students are consumers of services, yet the respondents were not offering services to them as contemplated by the Constitution and the university statues and regulations. He also submitted that there was violation of the MMUSO constitution. He cited Article 55 of the Constitution to argue that students were special interest persons and said that the suspension of their studies violated that Article of the Constitution. On Articles 46 and 50, he submitted that the students were not accorded a fair hearing before the decision to suspend them was made.

16. I need to first of all assess whether the constitutional petition herein qualifies for one. I have a duty to consider the responsibility that is placed upon a party who comes to court on a constitutional petition alleging a violation of constitutional provisions and who seeks redress from the court in respect of the violations alleged, to determine whether the petitioner herein has discharged that responsibility.

17. The High Court is established under Article 165 of the Constitution, 2010, and conferred with jurisdiction, over, among other things, constitutional matters. The relevant provision for the purpose of these proceedings is Article 165(3)(b) which states as follows:

"*(3) Subject to clause (5), the High Court shall have—*

(a) …

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) …

18. The matter before me is no doubt anchored on Article 165(3) (b) of the Constitution.

19. Then there is Article 258 of the Constitution, which deals with enforcement of the Constitution, and states the right of every person to institute court proceedings claiming that the Constitution has been contravened or is likely to be contravened. The provision states as follows:

"258. (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by— (a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members."

20. Article 165(6) of the Constitution is also relevant. It confers a supervisory jurisdiction on the High Court over subordinate courts, and other bodies or persons or entities, that exercise a judicial or quasi-judicial function. The 1st respondent is one such body, and the quasi-judicial decisions of its organs and officers should be amenable to supervisory jurisdiction of the High Court. Traditionally, the High Court exercised that supervisory jurisdiction through the judicial review process provided for under sections 8 and 9 the Law Reform Act, Cap 26, Laws of Kenya, and Order 53 of the Civil Procedure Rules, and occasionally under the inherent powers of the court saved under section 3A of the Civil Procedure Act, Cap 21, Laws of Kenya. For avoidance of doubt, Article 165(6) states:

"(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court."

21. Then there is Article 47, which provides for a right to fair administrative action, which is expeditious, efficient, lawful, reasonable, and procedurally fair, a constitutional and human right. Parliament passed the Fair Administrative Action Act of 2015 to give effect to Article 47 of the Constitution. Article 47 states as follows:

"47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration."

22. The presence of these provisions in the Constitution on the supervisory jurisdiction of the High Court over subordinate tribunals and bodies and of the right to fair administrative action have opened avenues for litigation at the High Court over these issues, often through constitutional petitions. The petition before me should, therefore, be seen in that context. The petitioner has a right to move the High Court under Articles 22, 47, 165(6) and 258 for the remedies set out in Article 23 of the Constitution, among others. The petition herein is, therefore, properly before me.

23. What I need to determine at this stage is whether there is material in the petition upon which I can exercise the discretion given to me by the Constitution to redress its violations or contraventions.

24. Judicial precedent has it that a person who seeks redress under the Constitution must state his or her claim with precision and demonstrate the provisions of the Constitution that he alleges to have been violated or infringed, and the manner of the alleged violation. That position was initially articulated in *Anarita Karimi Njeru vs. Attorney General* (1979) KLR 154 , where the court stated:

"We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to - the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed."

25. *Meme vs. Republic* [2004] eKLR, followed, where it was said:

> *"Where a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important that he should set out with a reasonable degree of precision that of which he complains, the provisions said to have been infringed and the manner in which they are alleged to have been infringed and that the applicant's instant application had not fully complied with the basic test of constitutional references, as it was founded on generalised complains without any focus on fact, law or Constitution, hence it had nothing to do with the constitutional rights of the appellants."*

26. The same principle has been restated by the court under the new Constitution. In *Trusted Society of Human Rights Alliance vs. AG. & 2 others* [2012] eKLR it was said, by the Court of Appeal, 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."*

27. The Supreme Court then weighed in in *Mumo Matemu vs. Trusted Society of Human Rights Alliance and others*, Nairobi Civil Appeal No. 290 of 2012, in the following terms:

> *"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 conterminous 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 ... Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party. The Principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle."*

28. The effect of the principles stated above is that a party moving the High Court by way of a constitutional petition for relief arising from a contravention or violation of the Constitution must state their case in such terms as would assist the court fashion a relief suitable to the facts and circumstances of the case.

29. Has the petition in the instant cause met that test? The principal challenge that I have with respect to this cause is that the factual background to the matter has not been set out in the petition and the supporting affidavit. There is no narrative of the facts. The affidavit on record does not narrate facts, it presents arguments that are not based on any coherent facts. After the students unrest what happened? What transpired between the time of the unrest and the time the suspensions were communicated to the interested parties? Were summonses issued to them? Did they receive them? Did they harken to them? Did the disciplinary proceedings happen? Did they participate in them? What transpired at the hearings? Were they given a chance to respond to the allegations against them, whether orally or in writing? Averments around these matters have not been made in both the petition and the affidavit.

30. Law is applied to facts. It does not apply in a vacuum. A party who alleges a legal violation must present the facts that provide the background to that violation. Indeed, it is the facts that bring out or demonstrate the alleged violation. The violation is based on a certain set of facts. There must be that intersection between fact and law, and one cannot begin to argue or submit about violations where no facts have been presented. The facts must be placed on record through the pleadings, they must not remain in the minds of the parties. They are the building blocks which construct the case. Without them the edifice has no chance. My view is that the case for the petitioner, as presented in his petition and the affidavit in support, is so attenuated as to make it impossible for me to concretely appreciate the violations alleged. The pleadings are so bare and thin on the facts, and do not give a fair amount of detail of the facts surrounding the decision and actions in question.

31. Overall, I am not persuaded that the petition is for granting for the reasons that I have stated above, and I hereby dismiss the same. Each party shall bear their own costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 26TH DAY OF NOVEMBER, 2019

W. MUSYOKA

JUDGE