



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CONSTITUTIONAL PETITION NO 1 OF 2016

(FORMERLY CONSTITUTIONAL PETITION NO 485 OF 2016

IN THE HIGH COURT OF KENYA AT NAIROBI)

IN THE MATTER OF ARTICLES 2, 3(1), 10, 22, 23, 28, 49(1A)(B)(C) AND (H), 50 (2)(A) AND (C) (SIC), 159& 165(3)(A), (B), (D) (SIC) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 28, 29, 49 AND 50 OF THE CONSTITUTION OF KENYA

CHARLES VETARO MWANZIA.....1ST PETITIONER

RAMADHAN MATHENGE KAMOZU.....2ND PETITIONER

JUSTUS MUNYAO.....3RD PETITIONER

FABIAN NGURE.....4TH PETITIONER

JULIUS KIMONDIO.....5TH PETITIONER

FRANK MBOMAWI.....6TH PETITIONER

AMBROSE HEMEDI.....7TH PETITIONER

MSAFIRI MKILLO.....8TH PETITIONER

JULIUS KASINA.....9THPETITIONER

PETER KITHOME.....10TH PETITIONER

PETER MULI.....11TH PETITIONER

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS..12TH PETITIONER

AND

TAVETA SENIOE RESIDENT MAGISTRATE'S COURT.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....4TH RESPONDENT

THE OCPD TAVETA.....5TH RESPONDENT

THE OCS TAVETA.....6TH RESPONDENT

AND

NATIONAL COALITION OF HUMAN RIGHTS DEFENDERS-

KENYA (NCHRD-K).....INTERESTED PARTY

JUDGMENT

INTRODUCTION

1. The Petitioners' initially filed their Petition and Notice of Motion application dated 18th November 2016 at the High Court of Kenya at Nairobi. In his Ruling of 29th November 2016, Muriithi J transferred the matter to the High Court of Kenya Voi on the ground that it had supervisory jurisdiction over the Taveta Law Courts where the criminal cases that were subject matter of the Petition herein had been instituted.

2. The aforesaid application was brought pursuant to the provisions of Articles 22, 23, 35, 50 and 159 of the Constitution of Kenya, Rule 4, 10, 11, 23, 24 of the (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules 2013 and Section 1A, 1B and 3A of the Civil Procedure Act, Section 10 of the Judicature Act Cap 8, Rule 2(1) and (2) of the High Court (Practice and Procedure) Rules and all enabling provisions of the law.

3. The said application had sought the following substantive orders **THAT:-**

a. An order do forthwith issue staying the proceedings in Taveta SRMCC No 380, 381 and 382 of 2016 pending the hearing and determination of the application and petition herein.

b. A downward revision of the bail and bond terms for all the accused persons in Taveta SRMCC No 380, 381 and 382 of 2016 pending the hearing and determination of the application and petition herein (sic).

4. The said application was served upon all the Respondents. The 1st, 2nd, 3rd and 5th Respondents never filed any pleadings in opposition to the same. On his part, the 6th Respondent filed a Replying Affidavit in opposition to the said application and Petition. The same was sworn by No 232138 CI Abdullahi M Adan and filed on 28th November 2016. Notably, only the 4th Respondent actively participated in the proceedings herein by filing substantive pleadings, Written Submissions and attending court whenever the matter was listed for mention.

5. On 19th December 2016, the State informed this court that it did not have any objection to the 1st, 2nd, 5th, 6th, 7th, 8th, 9th, 10th and 11th Petitioners being granted cash bail because they had been charged with the offence of unlawful assembly. However, it objected to the 3rd and 4th Petitioners being granted a cash bail because they had been charged with the offence of attempted murder.

6. After carefully listening to the oral submissions by the Petitioners' counsel and those of counsel on the application for bail, this court granted each of the 1st, 2nd, 5th, 6th, 7th, 8th, 9th, 10th and 11th Petitioners a bond of Kshs 100,000/= with one (1) surety or in the alternative a cash bail of Kshs 50,000/=. In view of the fact that the offence the 3rd and 4th Petitioners were facing was more serious, it granted each of them a bond of Kshs 300,000/= with two (2) sureties of similar amount.

7. By the consent of the parties, the proceedings in Taveta **SRMCC No 380, 381 and 382 of 2016** were stayed pending the hearing and determination of the Petition herein. By virtue of the aforesaid orders, the said application became spent and parties proceeded to file their Written Submissions in respect of the substantive Petition herein.

8. The Petitioners' Written Submissions were dated and filed on 4th July 2017. Their List and Bundle of Authorities was also dated 4th July 2017 but filed on 31st July 2017. The 12th Petitioner's Written Submissions annexing the case law it was relying upon were dated 28th July 2017 and filed on 31st July 2017. The 4th Respondent's Written Submissions were dated 26th July 2017 and filed on 31st July 2017. Its Supplementary Written Submissions were dated and filed on 30th October 2017.

9. Save for securing the Petitioners' release on bond, the Interested Party did not file any pleadings or file any written submissions in the matter herein. The above notwithstanding, it was evident that it was supporting the Petitioners' case.

THE PETITIONERS' CASE

10. On 31st October 2016, a group of eight (8) well known Human Rights Defenders (HRDs) (who were the 1st – 8th Petitioners) and members of "Building Africa", a human rights umbrella organisation were working at their office in Taveta when two (2) members of public (who were the 9th and 10th Petitioners) went to seek advise from the said office. The 11th Petitioner was a member of the said Building Africa.

11. The crux of their case was that their prosecution at the Taveta law Courts was thus malicious and instigated for an improper motive with a view to punishing them and was thus in utter contravention of several fundamental rights and freedoms of accused person that were enshrined in the Constitution because the meeting was being held in the offices of the 1st to 8th Petitioners.

12. They stated that they were conducting their usual business lawfully when police officers came to their office, arrested and subsequently charged them with the offence of unlawful assembly.

13. Their contention was that the genesis of their arrest emanated from them speaking out on behalf of thousands of squatters in the Phase I and Phase II against corruption and irregular distribution of land at Taita Taveta by rich businessmen, politicians, civil servants and county officials and that the **Criminal Cases Nos 380, 381 and 382 of 2016** were entirely fictitious, a sham, smokescreen amongst others.

14. They therefore urged this court to grant them the following reliefs:-

1. A declaration that Taveta SRMC Criminal Cases No. 380, 381 and 382 of 2016 were illegal and instituted for an improper motive.

2. A declaration that the several fundamental rights canvassed had been violated.

3. A prohibition restraining the Magistrate Court in Taveta or any court from hearing Taveta SRMC Criminal Cases No 380, 381 and 382 of 2016.

4. A permanent stay in the proceedings in Taveta SRMC Criminal Cases No. 380, 381 and 382 of 2016.

5. An order of mandamus do issue directing the Inspector General of Police to investigate the conduct of the OCS and OCPD Taveta and their role in perpetrating illegality and oppressive and prejudicial acts of abuse of office.

6. General damages.

7. Exemplary damages and costs of and incidental to this suit.

THE 12TH PETITIONER'S CASE

15. According to the 12th Petitioner, the 1st to 11th Petitioners were not involved in any unlawful assembly but that on 31st October 2016, the 5th and 10th Petitioners went to the offices of 1st, 2nd, 3rd, 4th, 6th, 7th, 8th and 9th Petitioners to seek advise when police from Taveta Police Station came and arrested them for unlawful assembly. In addition, they charged the 3rd and 4th Petitioners with the offence of attempted murder.

16. It stated that the work for HRDs was legal and protected under the Constitution of Kenya. It averred that although Section 5 of the Public Order Act Cap 56 (Laws of Kenya) provided that any person who wants to hold any public meeting and procession should notify the regulating officer of his intention to do so and that failure to do so was an offence, the Petitioners did not require to notify the regulator because the meeting was being held in their office.

17. It termed the arrest of the Petitioners as having been accentuated by malice and that the 4th Respondent was abusing its constitutional mandate and powers because the institution of the said cases was merely intended to exert pressure on them to stop advocating for the rights of the squatters in Taveta town to own land.

18. It therefore urged this court to grant the orders that had been sought in their Petition and award the Petitioners damages due to the violation of their fundamental rights.

THE 4TH RESPONDENT'S CASE

19. The 4th Respondent's case was that the 6th Respondent acted within the law when it arrested the Petitioners herein having reason to believe that they had committed a cognisable offence. It termed the Petitioners as ruthless in their pursuit for illegal activities and that they had not provided any evidence to demonstrate that they were HRDs or that their operations were lawful.

20. It was their contention that the issues the Petitioners had raised could only be addressed by the Trial Court and urged this court to dismiss the Petition which was misconceived with costs to it.

LEGAL ANALYSIS

21. It was true as the 12th Petitioner submitted that the purpose of criminal investigations was not to advance ulterior motive against an accused person as was held in the cases of **Republic vs Chief Magistrate's Court at Mombasa Ex parte Ganijee & Another [2002] 2 KLR 703** and **Kuria & 3 Others vs Attorney General [2002] 2 KLR 69** it placed reliance on to buttress its arguments.

22. It was also true as the 12th Petitioner argued that a court has power to interfere with the discretion of the Office of Deputy Public Prosecutor where the office abuses its power as was held in the case of **Republic vs Minister for Home Affairs & Others Ex parte Sitamze [2008] 2 EA 323**, a case it also placed reliance upon.

23. On the other hand, as was also held in the case of **Paul Ng'ang'a & 20 Others vs AG & 3 Others Petition No 581 of 2012** that was relied upon by the 4th Respondent, a wrongdoer of an offence must be punished unless there is some countervailing reason not to prosecute a case.

24. From the facts that were placed before this court, it was evident that the case was hinged on the question of freedom to assemble peaceably while unarmed and freedom to participate in the activities of an association of any kind. In this regard, Article 36 of the Constitution of Kenya, 2010 provides as follows:-

“Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.”

25. Further, Article 37 of the Constitution of Kenya stipulates that:-

“Every person has the right, peaceably and unarmed, to assemble...”

26. It is important to point out that these rights are not absolute and can be limited. Under Article 25 of the Constitution of Kenya, it is stated that :-

“Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

- a. freedom from torture and cruel, inhuman or degrading treatment or punishment;**
- b. freedom from slavery or servitude**
- c. the right to a fair trial; and**
- d. the right to an order of *habeas corpus*.”**

27. The import of Article 25 of the Constitution of Kenya is that other than the four (4) fundamental rights detailed therein, any other right under the Bill of Rights can be limited. Be that as it may, any right other than those that have been detailed in Article 25 of the Constitution of Kenya can only be limited by law as provided in Article 24 of the Constitution of Kenya.

28. Article 24 of the Constitution of Kenya provides as follows:-

“A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- a. The nature of the right or fundamental freedom;**
- b. the importance of the purpose of the limitation;**
- c. the nature and extent of the limitation;**
- d. the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and**
- e. the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.”**

29. In view of the above limitations, before persons assemble, they must comply with the provisions of Section 5 of the Public Order Act failing which, their meeting would be deemed to be an unlawful assembly making them liable to be charged in a court of law.

30. In respect of the 4th Respondent’s powers, this court fully associated itself with the holding of Odunga J in the case of **Republic vs Director Of Public Prosecution (DPP) & 2 Others** where he rendered himself as follows:-

“...under Article 157(10) of the Constitution the Director of Public Prosecutions does not require the consent of any person or authority in order to commence criminal proceedings...”

31. It also follows that, no one can dictate to the Director of Public Prosecutions (DPP) when to terminate a criminal case or which cases should be prosecuted in a criminal court. However, such power is not absolute and must be exercised in accordance with the mandate given to his office under Section 4 of the Office of Public Prosecution's Act No 2 of 2013 that provides as follows:-

“In fulfilling its mandate, the office shall be guided by the Constitution and the following fundamental principles:-

- a. The diversity of the people of Kenya;**
- b. Impartiality and gender equity;**
- c. The rules of natural justice;**
- d. Promotion of public confidence in the integrity of the office;**
- e. The need to discharge the functions of the office on behalf of the people of Kenya;**
- f. The need to serve the cause of justice, prevent abuse of the legal process and public interest;**
- g. Protection of the sovereignty of the people;**
- h. Secure the observance of democratic values and principles;**
- i. Promotion of constitutionalism.**

32. In this particular case, the 1st, 2nd, 5th, 6th, 7th, 8th, 9th, 10th and 11th Petitioners were charged with the offence of unlawful assembly. The 3rd and 4th Petitioners faced a case for attempted murder. While the 12th Petitioner was agreeable to the 3rd and 4th Petitioners undergoing the course of justice to determine their innocence or otherwise, it was emphatic that charging the 1st, 2nd, 5th, 6th, 7th, 8th, 9th, 10th and 11th Petitioners with the offence of unlawful assembly would be a contravention of their fundamental right to assemble peaceably.

33. They had asserted there was bad blood between them and the 4th, 5th and 6th Respondents which resulted in several cases being preferred against them and that the Prosecution had acted maliciously with the intention of putting pressure on them to stop being vocal about the rights of the squatters of Taveta to be allocated land. They also made several allegations in their Petition to demonstrate how the 4th Respondent had conducted itself to ensure that the 2nd Petitioner did not attend a constitutional matter he had filed at Nairobi and that they had contravened an order that had been issued by Lenaola J in **Petition No 325 of 2011 Nairobi** that had challenged malpractices in the distribution of land in Taveta.

34. After carefully considering the facts of this case, this court was clear in its mind that the Petitioners had advanced very material facts for interrogation. They further detailed where the meeting was held and the circumstances under which it was held, circumstances the Respondents vehemently denied.

35. Contentions had been presented before this court to determine who between the parties was being truthful about what really transpired on the material date of 31st October 2016 at Taveta. However, this court had no jurisdiction to take oral and documentary evidence to establish the veracity of the said assertions. Indeed, such evidence would have to be tested through Cross-examination and before a determination could be made.

36. Indeed, it was the view of this court that only a trial court that could determine whether or not the 4th, 5th and 6th Respondents were motivated by malice when they instituted the charges against the Petitioners

herein. It was also the trial court that could determine the innocence of otherwise of the Petitioners as it had power to interrogate the veracity of the Prosecution's case. The question of whether or not the Petitioners were arrested in the offices of Building Africa was a question of evidence. Whether or not the 3rd and 4th Petitioners were guilty of attempted murder was also a matter of evidence. The question as to whether the 1st to 8th Petitioners were HRDs was a matter for the Trial Court to determine.

37. Making a determination that they were not merely because no proof was provided to show that they were would embarrass the trial court in the event it was to come to a totally different conclusion. Indeed, making a determination that the Respondents were accentuated by malice merely because the Petitioners were charged with offences that the 4th Respondent had power to prosecute would be putting the cart before the horse.

38. There were complainants in the cases facing the Petitioners in the courts and they were entitled to having their day in court to ventilate their cases against the Petitioners herein. Indeed, it would be a great travesty and miscarriage of justice to victims against whom an offence is perpetrated to be denied an opportunity to present their case against persons who had been charged in court for criminal offences on the ground that such charges were an infringement of their constitutional rights if taken to court. This would indeed be contrary to the rules of natural justice as the Prosecution witnesses would have been condemned unheard.

39. Whereas this court had original and appellate jurisdiction donated to the high court under Article 165(6) and (7) of the Constitution, this court was apprehensive that granting the Petitioners the orders they had sought was tantamount to sitting as a trial court and determining a matter on scanty documents, which jurisdiction solely belonged to the trial court at Taveta.

40. Without being seized of the evidence the Prosecution had intended to rely upon to prove its case against the Petitioners herein, it appeared to this court that the Petitioners were actually asking it to sit on an appeal court in a matter that had not been ventilated before the Trial Court. It was the view of this court that the issues the Petitioners had brought were best canvassed in a trial court and not in a constitutional court.

41. Hiding behind an assertion clothed as contravention of a constitutional right should not and cannot be allowed. The Trial Court should hear the merits or otherwise of the prosecution's case and determine the innocence or otherwise of the accused persons before it. This is particularly true where a petitioner has not demonstrated that the law under which he is being charged is unlawful or contrary to the grundnorm.

42. Whereas every person has freedom to assemble and join any association because the said rights are enshrined in the Constitution and that they ought not to be prevented to exercise their fundamental rights, the charges that were preferred against the Petitioners herein were lawful as they were not prohibited and could only be decided by the Trial Court.

43. Accordingly, having considered the pleadings, Written Submissions and the case law that was relied upon by the parties herein, this court came to the firm conclusion that the Petitioners had not demonstrated that their fundamental rights had been infringed upon by virtue of the criminal cases having been instituted at Taveta Law Courts. If they were indeed HRDs, then the same will come out clearly in their evidence before that court.

44. Appreciably, the Petitioners did not show that being charged for unlawful assembly or attempted murder would violate or had violated their constitutional right because a right to assembly and belong to an association were rights that could be limited under Article 25 of the Constitution of Kenya.

45. As the Petitioners had not proven that their fundamental rights had been infringed upon, this court was not persuaded to find and hold that they were entitled to any relief they had sought in their Petition. In the event it emerged from the proceedings in the Trial Court that they had been maliciously prosecuted after being acquitted, then still had a window to institute proceedings against the State to be compensated with exemplary and general damages as they had sought in their Petition. From the facts herein, coming to this

court for a constitutional remedy was premature.

46. In conclusion, in interpreting the order of Lenaola J of 17th December 2014 that he issued in **Petition number 325 of 2011 Mathenge Ramadhan Kamozi & 3 Others vs The Hon Attorney General & Other**, this court noted that the same related to disputes relating to **ownership** (emphasis court) of L.R. No 5865/2 (formerly Taveta I.R. 2097). It did not in any way prohibit prosecution of persons facing criminal charges. Prohibiting a court of law from hearing criminal cases that had been brought to it lawfully would be tantamount to interfering with the independence of the police, DPP and Judiciary which would in itself be contravention of the Constitution of Kenya, 2010.

DISPOSITION

47. In the premises foregoing, the upshot of this court's Judgement was that the Petitioners' Petition that was dated and filed on 18th November 2016 was not merited and the same is hereby dismissed with costs to the 4th Respondent only as the other Respondents never attended court for the hearing of the same.

48. For the avoidance of doubt, the order for stay of the proceedings in **Criminal Cases Nos 380, 381 and 382 of 2016** at Taveta Law Courts that had been entered into by consent of the Petitioners and the 4th Respondent herein is hereby vacated and/or set aside. It is hereby directed that the cases shall proceed at Taveta Law Courts for hearing and determination. The bond terms that were granted by this court on 19th December 2016 will subsist pending the hearing and determination of the aforesaid cases at Taveta Law Courts.

49. It is so ordered.

DATED and DELIVERED at VOI this 23rd day of January 2018

J. KAMAU

JUDGE