

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI, MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 586 OF 2017

In the matter of Article 22 (1)

In the matter of Alleged contravention of Rights of Rights or Fundamental Freedoms under Articles 26, 28, 29, 31, 33, 35

BETWEEN

C N M.....Petitioner

VERSUS

W M G alias H N.....Respondent

JUDGMENT

The Petitioners' case

1. The Petitioner avers that as at the time of filing this Petition, she was five and a half months pregnant. She states that on 24th November 2017, the Respondent using a Face Book Account under the name "H N" published her private information to various groups on the online social media platform. One such post was to "the Kiambu County Government-Kenya on face book, (a public group with 4,923 members) alongside the Petitioners photo. She states that the message allegedly posted read:-

"hello, this is C M, working for county government of Kiambu, Department of Land Housing & Physical Planning. She is a home wrecker. She has broken up my legal marriage of 5 years with 2 beautiful kids. It's a lot of pain the fact she drugged my husband to her house in parklands and had an affair with him. she is now pregnant. My husband says she has no feelings for her or has nothing to do with her. I decided to post this here to get some help on how to get her and sort this out. am willing to take up the kid. on conditions...Please everyone be warned, she will get your men. If you know her tell her to get in touch with the wife of the husband she is pregnant for!!!"(sic)

2. Further, she states that on the same day, the Respondent posted to Kilimani Mum's Undaku Zone KMUZ group on face book alongside the Petitioner's photograph "C M of Kiambu County government, department of land, Housing & Physical Planning...Karma is a real Bitch...home wrecker!!! it doesn't matter how many years it will take but you will pay for the pain you have made me go through. you are now pregnant with my husband's baby. May God see you throu it" (sic).

3. She also states that in the above forum , she posted the following:- **(a)** @ Janet Mwendu, never fall into someone's innocent face...c is pregnant for my husband, she drugged him (sic); **(b)** my husband says he has nothing to do with her tho, he claims he can't even explain what happened (sic). She also posted the Petitioners mobile number.

4. It is the Petitioners case that that posting her mobile number in the above forum prompted unknown people to text her enquiring about the posts. Also, she states, the posts were shared thus widening the circulation. She adds that the Respondent sent to her the messages enumerated in paragraph 15 of the Petition and a voice message stating *inter alia* that she will never have peace in her life. She also stated that the Respondent disclosed to another person that she was always carrying a dagger in her car looking for an opportunity to attack her. Further, the Respondent charged towards her at a police station. Further, she avers, her pleas to the Respondent to pull down the various posts have been ignored.

5. As a consequence of the foregoing, the Petitioner claims that her rights to privacy and dignity have been violated and her life threatened.

Respondents' Response to the Petition

6. The Respondent admits sending the messages stated in paragraphs 15 and 16 of the Petition, but denies that they are untrue, defamatory or threatening. She insists that the Petitioner had an affair with her husband. She avers that her husband confessed to her that the Petitioner, a family friend invited her to her house, drugged her and had unprotected sex with her leading to the pregnancy in question. As a consequence, she felt betrayed, hence, the messages were prompted by the betrayal and psychological pain, and that this case is aimed at muzzling her freedom of speech.

7. Her husband, swore an affidavit stating that the Petitioner invited her to her house, offered dinner and alcohol allegedly laced with substances which sexually aroused him, hence the sexual encounter. This went on for at least 3 to 4 occasions. Subsequently, he avers, the Petitioner informed him she was pregnant and wanted him to marry her and after agonizing, he confessed to his wife, hence the text messages complained of were based on the information he divulged to his wife.

8. The Petitioner admits in her further affidavit that indeed she severally had sexual encounters with the Respondents husband resulting to the pregnancy, but denies the use of any drugs or intention to marry him, and stated that the encounters were all consensual.

Submissions

9. Both advocates filed written submission which I will address in the course of discussing the issue below.

10. The fundamental issue that falls for determination is whether or not this Petition discloses violation of the Petitioners Rights and whether the Petitioner is entitled to the reliefs sought in the Petition.

11. The Petitioners' counsel submitted that the Petitioner's constitutional rights were violated by the Respondent and that the Petitioner is entitled to damages. Submitting that this case raises constitutional issues,^[1] counsel submitted that the Respondents violated the Petitioner's rights to dignity,^[2] privacy and urged the court to award her damages. In particular, counsel submitted that it was wrong to disclose to the public such personal details like her pregnancy and the author of the pregnancy, which she submitted was a violation of her privacy.^[3] Further, counsel submitted, the Petitioner has the right to control the use of her name and photograph.^[4] Counsel also submitted the Petitioners right to security was violated.

12. Counsel for the Respondent cited the principle of constitutional avoidance as enunciated in the South African case of *S vs Mhlungu*^[5] where the court held that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue that course should be followed, a position also reiterated by the our Court of Appeal.^[6] Further, he argued that since the Petitioner states the matter is being investigated by the Police and she also intends to file a defamation suit, why then file this Petition.^[7] Counsel submitted that the Petitioner did not prove her case to the required standard.

13. Article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity respected and protected while Article 31 provides the Right to Privacy of the person. However, the facts of this case raise peculiar issues which cannot be ignored. The authorities cited by the Petitioners counsel need to be appreciated having regard to the peculiar facts of this case discussed below.

14. It should be remembered that it is settled law that a case is only an authority for what it decides. A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. I have severally stated every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides.^[8]

15. The ratio of any decision must be understood in the background of the facts of the particular case.^[9] It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it.^[10] It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.^[11] For example, the case of *NWR & Another vs Green Sports Africa Ltd & Another*^[12] involved use of minor's images in a advertisement without the consent of the minors guardians.

16. Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.^[13] In deciding such cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.^[14] To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.^[15] My plea is to keep the path of justice clear of obstructions which could impede it.

17. A close examination of the facts of this case is necessary. Six points are discernible and worth highlighting. *First*, the Petitioner admits having an affair with the Respondents husband which resulted in a pregnancy. *Second*, the Respondents husband admits the affair, but claims that the Petitioner treated him to a dinner and drinks which were laced with drugs. He claimed that the drugs wildly aroused him leading to the sexual encounter. On the other hand, the Petitioner denies using drugs and insists that the sex was consensual, and even lasted several months. *Third*, all of them were family friends. *Fourth*, the Respondents' husband admits confessing the affair to his wife, the Respondent herein, who was so infuriated, that she posted the messages complained of. *Fifth*, the Respondent admits that her husband made the confession, and that she felt betrayed, hence the reason she posted the messages. *Six*, the parties were all family friends or well known to each other.

18. It is important to address the question whether or not this Petition raises constitutional issues at all. A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.^[16] The affair is not contested. The question of pregnancy is admitted. The information is not *false*. It is *true*. No *malice* has been *alleged* or *proved* in the publication of the information.

19. In my view, the Petitioner ought to have sued for defamation (if at all she was defamed). Even then, the Respondent would be entitled to raise the defence of justification. Since the affair is admitted by all including the Petitioner, the issue of malice does not arise.

20. In my view, this Petition does not constitutional questions at all. When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values.^[17] The issues raised here will only require the Court to examine defamation law.

21. The question of what constitutes a constitutional question was ably illuminated in the South African case of *Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others*^[18] in which Justice O'Regan recalling the Constitutional Court's observations in *S vs. Boesak*^[19] notes that:-mm

“The Constitution provides no definition of “constitutional matter.” What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions ofthe Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State....., the interpretation, application and upholding of the Constitution are also constitutional matters. So too,....., is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.”[20]

22. Put simply, the following are examples of constituting constitutional issues; The constitutionality of provisions within an Act of Parliament; the interpretation of legislation, and the application of legislation.[21] At the heart of the cases within each type or classification is an analysis of the same thing – the constitutionally entrenched fundamental rights. Therefore the classifications are not discreet and there are inevitably overlaps, but the classifications are nonetheless useful theoretical tools to organize an analysis of the nature of constitutional matters arising from the cases before the Court.

23. The alleged publication of the information complained of as stated above and the Petitioner claim falls within the province of defamation law. It does not warrant the Court to determine whether the publication is inconsistent with the Constitution.

24. The key issue here is, the Respondent, acting out of a feeling of betrayal posted information relating to an affair which is admitted by the Petitioner herself and her husband. The truth of the information is not contested. If the information was untrue, then this court could have perhaps entertained the idea of violation of privacy, even then, the appropriate forum would to use defamation law to seek appropriate remedies as opposed to a constitutional Petition.

25. Courts abhor the practice of parties converting every issue in to a constitutional question and filing suits disguised as constitutional Petitions when in fact they do not fall anywhere close to violation to constitutional Rights.

26. The Court of Appeal in *Gabriel Mutava & 2 Ors. vs. Managing Director Kenya Ports Authority & Another*[22] underlined the conventional judicial policy as established by the courts over time and now settled that constitutional litigation is not open for every claim which may properly be dealt with under the alternative existing mechanism for redress in civil or criminal law as follows:-

“Then there is the case of Speaker of the National Assembly v James Njenga Karume [1992] eKLR, where this Court again emphasized:-

“...In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed....”

27. A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done.[23]

28. From the above facts, it is clear that the Petitioner admits having an affair with the Respondents' Husband, and that from the said affair she got Pregnant. She denies ever drugging her husband, and insisted that the sexual encounters were consensual. She admits that the encounters were on various occasions between June and November 2017. The Respondents' husband admits he had sexual encounters with the Petitioner but suspects that she laced drinks with a drug that made him sexually wild. He admits confessing to his wife, the Respondent. The Respondent states that she felt betrayed by Petitioner who she considered a family friend, hence she posted the messages out of betrayal.

29. Given the above set of facts, I am not persuaded that the Petition discloses any violation of constitutional rights as alleged. It is my finding that the truth of the postings complained is not in dispute. It has not been shown that the postings are factually wrong. Further, no malice has been proved.

30. In view of my above analysis and guided by the law and relevant authorities, the conclusion becomes irresistible that this Petition has no merits. Accordingly, I dismiss this Petition with no orders as to costs.

Signed, Dated, Delivered at Nairobi this 22nd day February 2018

John M. Mativo

Judge

[1]Counsel cited *NWR & Another vs Green Sports Africa Ltd & Another* {2017} eKLR

[2]Counsel cited *Marilyn Muthoni Kamuru & 2 Others vs The Hon. Attorney General & Another* PET No. 566 of 2012 and *A.N.N. vs The Hon. A.G, Pet. No. 240 OF 2012*

[3] Counsel cited *Hayes vs Willoughby* {2013}UKSC 17 & *A MP vs Persons Unknown*{2011}EWHC

[4] N W R & Another vs Green Sports Africa Ltd & Others {2017}eKLR

[5] 1995 (30SA 867 (CC)

[6]In Communications Commission of Kenya & 5 Others vs Royal Media Service Limited & 5 Others {2014} eKLR

[7] Counsel cited John Haroun Mwau vs Peter Gastrol & 3 Others {2014}eKLR

[8] This was correctly observed in *State of Orissa vs. Sudhansu Sekhar Misra*, MANU/SC/0047/1967

[9] *Ambica Quarry Works vs. State of Gujarat and Ors.* MANU/SC/0049/1986

[10] Ibid

[11] *Bhavnagar University v. Palitana Sugar Mills Pvt Ltd* (2003) 2 SC 111 (vide para 59)

[12] Supra note 1

[13] In the High Court of Delhi at New Delhi February 26, 2007 W.P.(C).No.6254/2006, Prashant Vats Versus University of Delhi & Anr. (Citing Lord Denning).

[14] Ibid

[15] Ibid

[16]<http://www.yourdictionary.com/constitutional-question>

[17]Justice Langa in *Minister of Safety & Security v Luiters*, {2007} 28 ILJ 133 (CC)

[18] {2002} 23 ILJ 81 (CC)

[19] {2001} (1) SA 912 (CC)

[20] 2001 (1) SA 912 (CC)

[21] Supra note 5 at paragraph 23

[22] {2016} eKLR

[23] See *Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others*, Petition No. 14, 14A, B & C of 2014