



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL PETITION NO. 51 OF 2018**

**BETWEEN**

**MIGUNA MIGUNA.....PETITIONER**

**VERSUS**

**DR. FRED MATIANG'I,**

**CABINET SECRETARY MINISTRY OF INTERIOR AND**

**CO-ORDINATION OF NATIONAL**

**GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

**RTD MAJOR, GORDON KIHALANGWA**

**DIRECTOR OF IMMIGRATION.....2<sup>ND</sup> RESPONDENT**

**JOSEPH BOINETT,INSPECTOR GENERAL OF POLICE**

**NATIONAL POLICE .....3<sup>RD</sup> RESPONDENT**

**GEORGE KINOTI,**

**DIRECTOR OF CRIMINAL INVESTIGATIONS.....4<sup>TH</sup> RESPONDENT**

**SAID KIPROTICH,**

**OFFICER IN-CHARGE THE FLYING SQUAD KENYA**

**POLICE SERVICE OCPD.....5<sup>TH</sup> RESPONDENT**

**JOMO KENYATTA INTERNATIONAL**

**AIRPORT.....6<sup>TH</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....7<sup>TH</sup> RESPONDENT**

**AND**

**KENYA NATIONAL COMMISSION**

**ON HUMAN RIGHTS.....1<sup>ST</sup> INTERESTED PARTY**

**LAW SOCIETY OF KENYA.....2<sup>ND</sup> INTERESTED PARTY**

## RULING

1. On 28<sup>th</sup> March, 2018, after hearing the parties in this matter, I found that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were in contempt of Court.

2. I therefore proceeded to issue the following orders:

**1. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have by their conduct been contemptuous of the orders of this Court and are convicted accordingly.**

**2. The said Respondents to personally appear before this Court tomorrow at 10.00 am for sentencing and further orders. In default of their appearance the Court will proceed to mete out appropriate sentences their absence notwithstanding.**

**3. It is hereby directed that the Petitioner is not under any circumstances to be removed from the jurisdiction of this Court. Instead the Petitioner is to be unconditionally released forthwith to appear before this Court tomorrow at 10.00a.m. This order binds not only the Respondents but also the officers under them in whose custody the Petitioner has been placed.**

**4. The petitioner's lawyers are to be granted access to the petitioner.**

**5. It is however directed that unless the Petitioner is released forthwith, the said Respondents will not be granted the right of audience by this Court tomorrow.**

3. It is therefore clear that what is coming before me is sentencing arising from the finding of contempt against the said Respondents yesterday.

4. When the matter was called out, **Mr Mutinda** learned counsel for the Respondents informed the Court that despite his attempts to get through to the said Respondents he had failed to do so. I must say that I am surprised that in such an important matter that has been widely publicised in the media the Respondents would not only avoid the Court but also avoid getting in touch with their legal counsel. If that is the position, then it is clear that the said Respondents have displayed an arrogance of an in-imaginable magnitude.

5. I have been urged to also find **Mr Mutinda** in contempt and punish him accordingly. That this Court has the power to do so is not in doubt. Section 56 of the *Advocates Act* provides as hereunder:

***Nothing in this Act shall supersede, lessen or interfere with the powers vested in the Chief Justice or any of the judges of the Court to deal with misconduct or offences by an advocate, or any person entitled to act as such, committed during, or in the course of, or relating to, proceedings before the Chief Justice or any judge.***

6. In my view that power must be exercised sparingly and only where the Court is satisfied that a misconduct has been committed. In this case it is clear that **Mr Mutinda's** position has been made difficult by the conduct of the clients he represents. Whereas I agree with **Dr Khaminwa** that **Mr Mutinda** ought to have gone an extra mile in ensuring that his clients were properly appraised of the orders of this Court, I am not prepared in the circumstances of this case to elevate **Mr Mutinda's** actions or inactions to that of professional misconduct.

7. However, I am not prepared to believe that the 1<sup>st</sup> to 3<sup>rd</sup> Respondents are unaware of the orders of this Court. The said Respondents are in charge of the security systems in this Country and if they are unable to have knowledge of the reports widely covered in the media then they do not deserve to occupy the position they do occupy since their positions are at the heart of this Country's security and safety.

8. Contempt of court is no doubt an affront to judicial authority and therefore is not a remedy chosen by a party but is invoked to uphold the dignity of the court. The Court found that the Respondents herein have no doubt conducted themselves in a most despicable manner not expected in this constitutional era. I reiterate what I said in the earlier ruling that those who disobey Court orders risk being declared by the Court to have breached Article 10 of the Constitution which prescribes national values and principles of governance with the attendant consequences among other appropriate sanctions.

9. In deciding what sanction to mete this Court must reflect on the need to maintain the rule of law and to ensure that the authority and the dignity of our Courts are upheld at all times and to stamp the Court's authority and uphold the values and principles of governance enshrined in Article 10 of the Constitution. In this case the 1<sup>st</sup> to 3<sup>rd</sup> Respondents have not adhered to the oath of office which they took to *inter alia* protect the Constitution of this country including the national values and principles of governance. To the contrary the manner in they have conducted themselves in these proceedings does not inspire confidence at all. This is contrary to Article 74 of the Constitution which provides that a State officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that *inter alia* avoids demeaning the office the officer holds. The provision proceeds to state that such an officer may, in accordance with the disciplinary procedure be dismissed or otherwise removed from office and where the officer is so removed, he or she is thereby disqualified from holding any public office.

10. I have been urged to impose very stiff sentence against the contemnors herein. However due to reasons which this Court cannot fathom Parliament, in its wisdom, limited the powers of this Court to imposition of a sentence of not more than six months in prison of Kshs 200,000.00 or both.

11. In this case, it is clear that the Respondents are the ones in charge of security in this Country. They are in effect in charge of execution of warrants of arrest. They have clearly shown that they have no respect for the rule of law and will not comply with the orders of this Court. To my mind even if the citizens were to arrest them, they would still be placed at the disposal of their juniors and if they can disobey and

disregard the orders of this Court with such impunity, I do not see how any of their juniors will execute the warrants against them or even hold in custody if arrested by the citizens.

12. This Court, like any other Court of law, ought not to make orders in vain. It must make sure that its orders “bite” as **Kimaru, J** said. It must not only make effective orders but orders whose execution can be carried out swiftly and efficiently and orders which it can supervise. It must not issue orders which from the circumstances of the case, there is high likelihood that they will not be implemented whether rightly or not.

13. In the premises it is my view that the most appropriate orders to make are declaratory orders and orders in the nature of a fine. Regrettably, I reiterate this Court’s pecuniary limit in cases of fine is limited to Kshs 200,000.00. Whereas it was submitted that there are several acts of contempt and I agree each act ought to carry its own penalty, the matter before me concerns the contempt found to have been committed by the contemnors yesterday. If there are other acts of contempt, the petitioner is at liberty to pursue the same. Similarly, the petitioner or any other Kenya is at liberty to take any other or further action pursuant to the orders of his Court.

14. Therefore the orders which commend themselves to me and which I hereby issue are:

**1. A declaration that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have violated Article 10 of the Constitution by failing to adhere to the rule of law in the sense that they have brazenly disobeyed the orders of this Court. It is however not appropriate in these proceedings to declare them unsuitable to hold public offices. That is a matter for another forum.**

**2. Each of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are hereby penalised to pay Kshs 200,000.00 personally. The said sum will be deducted directly from their next month’s salaries and the Deputy Registrar of this Court is directed to transmit the order of this Court to their respective employers forthwith.**

15. It is so ordered.

**Dated at Nairobi this 29<sup>th</sup> day of March, 2018**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Dr Khaminwa, Hon. James Orengo, Hon Daniel Maanzo, Ms Julie Soweto, Mr Cliff Ombetta, Prof. Wajackoyah, Mr Nelson Havi, Mr Waikwa Wanyoike for the Petitioner.***

***Mr Mutinda, Mr Odhiambo and Mr Mutinda for the Respondents***

***Mr Kamau for the 1<sup>st</sup> interested party.***

***Mr Harun Ndubi for the 2<sup>nd</sup> interested party***

**CA Ooko**