



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL PETITION NO. 15 OF 2018

IN THE MATTER OF: ARTICLES 10, 20, 21, 22, 23, 25, 27, 35, 50, 79, 249(2) (a), 250, 258

AND 259, SECTIONS 19 OF THE SIXTH SCHEDULE OF THE CONSTITUTION

AND

**IN THE MATTER OF: THE ALLEGED ILLEGAL, UNLAWFUL AND UNFAIR TRIAL
OF THE PETITIONER BY THE DIRECTOR OF PUBLIC PROSECUTIONS AND ETHICS**

AND ANTI-CORRUPTION COMMISSION OF KENYA

AND

**IN THE MATTER OF: THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 21, 22 AND 50 OF THE CONSTITUTION OF KENYA**

BETWEEN

SALOME KOSKEI YATICH

(suing in her capacity as the affected person).....PETITIONER

AND

THE ETHICS & ANTI CORRUPTION

COMMISSION & OTHERS.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

CHIEF MAGISTRATES COURT, MOMBASA.....4TH RESPONDENT

JUDGMENT

1. By a Petition dated 16th February 2018 and filed herein on 19th February 2018, the Petitioner states that she was working as a senior education officer in the Directorate of Secondary and Tertiary Education, Ministry of Education and on the 23rd day of September 2009 she was suspended from work on accusations/allegations of abuse of office and corruption, Those allegations were investigated between the period of September 2009 and 2nd May 2012, by the Kenya Anti-Corruption commission then, and now Ethics Anti-Corruption Commission. The Petitioner was subsequently charged on 2nd May 2012 with two counts of fraudulent acquisition of public property and deceiving principal contrary to the Anti-Corruption and Economic Crimes Act No. 3 of 2003. The Petitioner avers that at that time the Commission EACC was not properly constituted in accordance with the Provisions of Articles 79, 249 (2) and Article 250 of the Constitution of Kenya. The Petitioner is still being prosecuted hence the institution of this Constitutional Petition. The Petitioner avers that the investigation and subsequent charges levied against her were unconstitutional and illegal and cannot stand, and that the same should be stopped by this court forthwith to stop further violation of the Petitioner’s fundamental right and freedoms

2. The Petitioner prays for the following orders:

- a) A declaration that the Petitioners' fundamental rights and freedoms to the right to fair administrative action and fair hearing have been breached.
- b) A declaration that subsequent to the investigations, recommendations to the DPP and charging of the Petitioner, the 1st Respondent (EACC) was not properly constituted in accordance with Articles 79, 249 and 250 of the Constitution and Section 4 of the Ethics and Anti-Corruption Commission Act of 2012
- c) A declaration that the Respondent and its agent have acted in breach of Articles 10, 20, 21, 22, 23, 25, 27, 28, 47, 48, 50, 258, & 259 of the Constitution.
- d) A declaration that investigations against the Petitioner by the KACC/EACC and its recommendation for her to be charged were illegal and unlawful.
- e) A declaration that the Petitioner was illegally, wrongfully and unlawfully charged
- f) An order quashing the prosecution of the Petitioner before the 4th Respondent.
- g) Consequently an order prohibiting the Respondents from continued prosecution of the Petitioner.
- h) Costs of the petition be borne by the Respondents.
- i) Any other relief as the Honourable Court deems fit

3. The Petition is supported by an affidavit deposed to by **SALOME KOSKEI YATICH**, the Petitioner herein, sworn on 16. 2. 18 and a further affidavit sworn on 6. 4. 18.

4. The 1st Respondent opposed the Petition by filing a replying affidavit sworn on 26. 3. 18 by Abdi Salat. The 1st Respondent also filed Grounds of opposition on 26. 3. 18. However the 2nd Respondent only filed grounds of opposition on 26. 02. 2018 to the Petitioners' Chamber Summons Application dated 16th February, 2018. Parties filed submissions which were highlighted in court on 11. 06. 2018.

Summary of the Petitioner's Case

5. The Petitioner's case is that on 07/01/2010 and 07/04/2010 when the Petitioner recorded her statements the 1st Respondent was not properly constituted in accordance with the provisions of Articles 79, 249(2) and 250 of the Constitution of Kenya, 2010. According to the Petitioner, from July 2009 to September, 2010, the 1st Respondent was not duly constituted because Justice Ringera as the Chairperson had resigned alongside Ms. Sichale and Dr. Wanjala, all who allegedly were Commissioners of the 1st Respondent. It is the Petitioner's case that in absence of a properly constituted 1st Respondent, the Petitioner's right to fair administrative action under Article 47 of the Constitution of Kenya, 2010 was contravened. The Petitioner holds the view that the recommendation forwarded by the 1st Respondent and approved by the 2nd Respondent, was in contravention of Article 2(4) of the Constitution of Kenya, 2010 and as such a nullity, rendering the intended or pending prosecution a nullity in law.

Summary of the 1st Respondent's Case

6. The 1st Respondent's case is that the Petitioner has not sufficiently demonstrated how the 1st Respondent or any of the Respondents for that matter, has abrogated her rights under the provisions of Articles 3, 6, 10, 20, 21, 22, 23, 25, 27, 28, 29, 31, 32, 39, 47, 48, 50, 258 and 259 of the Constitution of Kenya, 2010 as alleged in the Petition. The 1st Respondent states that the present Petition does not disclose any prima facie cause of action against the 1st Respondent or any of the Respondents for that matter; and is a mere afterthought having been filed after a period of about 8 years after the Petitioner took plea in ***Mombasa Chief Magistrates Court Criminal Case No. 4 of 2012-Republic – vs- Salome Koskei Yatich & Concilia Aoko Ondiek***. The 1st Respondent states that the Petitioner's action in moving this court, frustrates, stifles and has occasioned undue delay in the administration of criminal justice in ***Mombasa Chief Magistrates Court Criminal Case No. 4 of 2012 - Republic –vs - Salome Koskei Yatich & Concilia Aoko Ondiek***. It is the 1st Respondent's case that the present Petition is an abuse of the court process and the same as presented also contravenes the provisions of Article 160(5) of the Constitution of Kenya, 2010 and section 6 of the Judicature Act.

Submissions

7. Parties filed submissions to the petition which I have carefully considered. In my opinion the following issues are to be determined:

- (i) Whether the 1st Respondent was duly constituted at the material time it completed its investigations against the Petitioner and forwarded its statutory Report and recommendations to the Director of Public Prosecutions to the 2nd Respondent; and
- (ii) Whether the Petitioner's rights under Articles 3, 6, 10, 20, 21, 22, 23, 25, 27, 28, 29, 31, 32, 39, 47, 48, 50, 258 and 259 were contravened by the Respondent.

8. **Merss Lumatete and Nalela** Counsel for the Petitioner submitted that the gist of the petition is that the 1st Respondent investigated and recommended the prosecution of the Petitioner while the commission was not properly constituted in accordance with the provisions of Articles 79,249 (2) and 250 of the Constitution. Mr. Lumatete submitted that its within public domain that from the period of July 2009 to September, 2010, the same period when the Petitioner was summoned to the EACC and investigated the EACC had no full commissioners in office and there was no chairperson too as Justice Ringera who was the chairperson then had resigned from office together with Ms. Sichale and Dr. Wanjala leaving the commission with only two commissioners who were later joined by Prof. P.L.O. Lumumba as Chairperson who took office in September, 2010. The EACC summoned the Petitioner on 7th January and 7th April 2010. At that period in time the Commission was not properly constituted due to the earlier resignation of Justice Aaron Ringera together with other two commissioners.

9. Mr. Lumatete cited **Eng. Michael Sistu Mwaura Kamau v. The EACC and 4 others, Civil Appeal No. 102 of 2016**, where the Court Appeal of held that: **“...we have already found that the power to undertake investigations and make recommendations is one of the core functions of the EACC and is undertaken by the commissioners with the help of the secretary and other staff of the EACC as the commissioners may direct from time to time. If the commissioners are not in office, it would therefore follow that the business of EACC as contemplated under paragraph 5 of the Second Schedule to the EACC Act as read with section 11(1) (d) of the EACC Act cannot be undertaken.....”**

10. Consequently Counsel submitted that in the absence of a properly constituted commission, the purported actions of the EACC to conduct investigations and recommend the prosecution of the Petitioner and the actions of the DPP to act on those EACC recommendations and investigation report to charge and prosecute the Petitioner contravened her right to fair administrative action under Article 47 of Constitution. Mr. Lumatete cited **Hon. Sam Kuteesa & Others v. The Attorney General, Constitutional Petition No. 46 and Constitutional Ref. No. 54 of 2011** which the Court of Appeal of Kenya quoted with approval, as very persuasive in **Eng. Michael Sistu Mwaura Kamau v. The EACC and 4 others (Supra)**. In that case the Constitutional Court of Uganda held that a public body that is not properly constituted cannot purport to carry out its mandate under the law. Counsel submitted that at the time the Petitioner appeared before the EACC on above mentioned diverse dates and recorded statements after interrogation, the EACC lacked the capacity to carry out one of its core mandates, of recommending to the DPP to charge the Petitioner with a criminal offence. Thus if such recommendations as were forwarded by the EACC (the 1st Respondent herein) and relied upon by the DPP (the 2nd respondent herein) it was in contravention of Article 2(4) of the Constitution and therefore a nullity, rendering the intended /pending prosecution itself a nullity in law.

11. Mr. Nalela also for the Petitioner submitted that in the absence of a fully constituted commission, the powers vested in the EACC could not be singularly exercised by the secretariat because the secretariat can only carry out its functions when the EACC is properly constituted since it implements the decisions of the EACC. Therefore, if commissioners are not in office, the secretariat alone cannot investigate economic crimes and recommend to the DPP persons to be prosecuted.

12. Mr. Nalela restated the decision in **Eng. Michael Sistu Mwaura Kamau v. The EACC and 4 others, (supra)**, where the Court of Appeal held that:

“It is crystal clear to us that the functions of investigating and making recommendations to the DPP belong corporately to EACC and not to the secretary or the secretariat alone. The investigations and the recommendations to the DPP Must be authorised and sanctioned by the commissioners who are required to exercise oversight over the secretariat and overall, to give strategic direction to EACC in the performance of its actions under the Act. That is the position notwithstanding section 23 of the ACECA, which empowers the secretary or a person authorised by the secretary to conduct investigations on behalf of EACC. A proper reading of ACECA together with EACC Act cannot justify the conclusion that officers to whom specific powers of the EACC have been delegated can purport to bypass the EACC commissioners who are ultimately responsible and accountable to Kenyans for the proper discharge of EACC’s constitutional and statutory authority.”

13. The Petitioner further submitted that there was miscarriage of justice occasioned to the Petitioner because the process leading to her prosecution was in violation of the Constitution and in particular Article 157 (11) of the Constitution which provides that in exercising its powers the DPP shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. Mr. Nalela submitted that this position was restated in **Alfred N. Mutua vs. Ethics and Anti-Corruption Commission & 4 others (2016) e KLR** where the Court held that the Court has a duty to ensure that the DPP exercises its constitutional mandate having regard to public interest, interest of the administration of justice and the need to prevent abuse of the legal process. The office of the DPP is duty bound to interrogate the investigations presented to it and ensure that they comply and meet the constitutional threshold. Counsel submitted that the recommendations made to the DPP by the EACC to charge the petitioner and the decision of the DPP to charge the Petitioner were a nullity in law, illegal, irregular, null and void because no charge can be founded on an illegality in law. For a charge to be valid, it must follow a lawful and legitimate process. Therefore the criminal proceedings pending against the Petitioner are a nullity as they were instituted through a process that was flawed and in contravention of Articles 249 (1) (c), 249 (2) (a), 157(11), 250 and 2 (4) of the Constitution. Counsel cited **Omega Enterprises (Kenya) Ltd v. Kenya Development Corporation Ltd & 2 others (1998) e KLR** and **Paramount Bank Ltd v. Mohammed Ghias Qureshi, Civil Appeal No. 239 of 2001** where the Court of Appeal held that if an act is void, it is a nullity and Courts will not sanction illegalities.

14. Mr. Lumatete further submitted that due to the unconstitutional actions of the Respondents, the Petitioner has been out of employment for nine (9) years and she has been illegally and irregularly arraigned in Court for six (6) years for trial on charges illegally founded. The Petitioner urged the court to permanently bar the criminal proceedings pending before the 4th Respondent and to prohibit any further new charges being brought against the Petitioner in respect of the same facts or allegations. Counsel submitted that Justice delayed is justice denied. The alleged offences are said to have been committed in 2009, almost a decade ago, so it would be very unfair for this Court to allow the 1st and 2nd Respondents the liberty to press new/fresh charges against the Petitioner in connection with the same subject matter because the material on which the prosecution will be based on is frivolous thus it would be unfair to require the Petitioner to undergo a trial for the sake of it. Such a prosecution will achieve nothing more than embarrass the petitioner and put her to unnecessary expense and agony. Any subsequent commencement of new criminal proceedings against the petitioner on the same subject matter would contravene her legitimate expectation to fair trial.

15. On their part the 1st Respondent's Counsel Mr. Makori submitted that Pursuant to the provisions of Article 79 of the Constitution, the Kenya Anti-Corruption Commission was disbanded on 24/08/2011 through enactment of the Ethics and Anti-Corruption Commission Act, 2011; which Act commenced on the **05/09/2011** established the Ethics and Anti-Corruption Commission (EACC).

i) Section 37 of Ethics and Anti-Corruption Commission Act, 2011 amended the Anti-Corruption and Economic Crimes Act, 2003 by repealing Part III, save for Part IIIB for a period or 90 (ninety) days or until EACC was constituted in terms of section 4 of the Ethics and Anti-Corruption Commission Act, 2011 and Article 250 of the Constitution of Kenya, 2010. Mr. Makori submitted that Ms. Irene Keino and Prof. Jane K. Onsongo were appointed as the 1st Respondent's Commissioners on 11/05/2012. Counsel submitted that according to paragraphs 2, 3, 4, 5, and 6 of the Judgment in **Nairobi Civil Appeal Number 280 of 2012-Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR**; it is clear that: **i)** Mumo Matemu was appointed the Chairperson of the 1st Respondent on 11/05/2012 via Gazette Notice No. 6602, **ii)** The said appointment was found unconstitutional and set aside on 24/09/2012 and that the Court of Appeal overruled the Superior Courts judgement on 26/07/2013 paving way for appointment of Mr. Mumo Matemu as Chairman on the 05/08/2013.

ii) On diverse dates between 25/02/2010 and 26/04/2010 the 1st Respondent undertook investigations into allegations of misappropriation of public funds meant for facilitation of workshop in the then Coast Province by Ministry of Education officials; including the Petitioner herein. Upon conclusion of 1st Respondent's investigations, the evidence emerging from the inquiry file was analyzed and a statutory report prepared pursuant to section 35 of the ACECA and forwarded to the Director of Public Prosecutions and that on 03/04/2012 the Director of Public Prosecutions after a thorough and careful consideration of the 1st Respondent's Statutory Report dated 20/03/2012 directed that the Petitioner herein alongside Concilia Aoko Ondieki be charged for offences under sections 41(2) and 45(1)(a) as read with section 48 of ACECA; section 33(1) as read with section 331(2) of Penal Code; and section 127(1) as read with section 127(2) of ACECA.

16. On 02/05/2012 the Petitioner alongside one Concilia Aoko Ondiek were arraigned in court in **Mombasa Chief Magistrates Court Criminal Case No. 4 of 2012-Republic -vs- Salome Koskei Yatich & Concilia Aoko Ondiek.**

17. Mr. Makori submitted that the Court of Appeal in Michael Sistu Mwaura Kamau v Ethics & Anti-Corruption Commission & 4 others [2017] eKLR, at page 10 observed that it is undisputed that the Chairperson, Mumo Matemu and Commissioners Jane Onsongo and Irene Keino resigned on 12/05/2015, 31/03/2015 and 30/04/2015 respectively.

18. It is the submissions of the 1st Respondent, that it was duly and properly constituted at the material time it completed the investigations and forwarded its report and recommendations to the 2nd Respondent in respect to inquiry into allegations against the Petitioner over misappropriation of public funds meant for facilitation of workshop in the then Coast Province by Ministry of Education officials.

The Determination:

19. To address the first issue herein, it is to be noted that Hon. Justice Aaron Ringera, Ms. Sichale, Dr. Wanjala, Prof. P.L.O Lumumba and Mr. Pravin Bowry were not and have never been Commissioners as alleged by the Petitioner since at the time the legal requirement for appointment of Commissioners under **Article 250 of the Constitution of Kenya, 2010** did not exist and was not applicable at the material time since the EACC had not been established as contemplated **under Article 79 of the Constitution of Kenya, 2010 and section 3(1) of the Ethics and Anti-Corruption Act, 2011.**

20. The 1st Respondent submitted, correctly in my opinion, that on 07/01/2010 and 07/04/2010 when the Petitioner recorded her statements the 1st Respondent was properly constituted pursuant to the provisions of **section 37 of Ethics and Anti-Corruption Commission Act, 2011.** This is so because in **Michael Sistu Mwaura Kamau v Ethics & Anti-Corruption Commission & 4 others [2017] eKLR, at page 10 the court held** that: the Ethics and Anti-Corruption Commission Act, 2011 makes provisions, among others, on the functions and powers of the Chairperson and members of the 1st Respondent and that once the said Act was enacted and the 1st Respondent established, then said Respondent acquired the status and powers of a Commission established under Chapter Fifteen of the Constitution of Kenya, 2010.

21. Further Section 7 of the Sixth Schedule on Transitional and Consequential Provisions reserved all laws in force immediately before the effective date to be construed with alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with the constitution. It is clear that the Ethic and Anti-Corruption Commission is a creature of Article 79 of the constitution which required parliament to enact legislation to establish an independent Ethics and Anti-Corruption Commission for purposes of insuring compliance with and enforcement of the provisions of Chapter 15;

22. The Ethics and Anti-Corruption Commission Act 2011 came into force on 5th September, 2011 creating the EACC. The statements of the Petitioner recorded on 7th January, 2010 and 7th April, 2010 were recorded before the coming into force of the Kenya 2010 Constitution whose effective date is 27th August, 2010. The said statement is to be presumed to have been recorded in full compliance with the laws in place at the material time that is the Anti-Corruption and Economic Crimes No. 3 of 2003.

23. Further, the particular provisions creating the EACC under the 2011 Act cannot without breaching the equality of arms clothed in Article 50(1) of the constitution and enjoyed by the public through the prosecution – DPP - be applied retrospectively to strike down investigations conducted in compliance with the 2003 Act. The rights alleged to have been breached by the Petitioner did not accrue to the Petitioner at the time. The Petitioner held no legitimate expectation that the commission as currently established would be the commission under whose mandate the investigation predating its creation would have been conducted. In any event there is no vacuum between the EACC Act No. 22 of 2011 and the ACECA No. 3 of 2003 since Section 7 of the Sixth Schedule falls into play to preserve the integrity of investigations by adoption of the outcome of the investigation which at the very minimum were perused, reviewed and forwarded to the DPP.

24. The Second issue is whether the Petitioner's rights under Articles 3, 6, 10, 20, 21, 22, 23, 25, 27, 28, 29, 31, 32, 39, 47, 48, 50, 258 and

259 were contravened by the respondents.

25. The short answer to this issue is that once the court has found as I have done, that the charges preferred against the Petitioner before the Chief Magistrate were constitutionally conceived, then allegations of violations of the Petitioner's rights are not legally founded. Those allegedly violated rights must now remain to be established in the said Criminal Proceedings, where the Petitioner must submit herself and be vindicated purely on evidence. This court will therefore not go into the merits of the second issue.

26. It is the finding hereof that the 2nd Respondent has acted within his constitutional mandate under Article 157(6) and Article 157(11) of the Constitution 2010 in charging the Petitioner with the said Criminal offence.

27. For the foregoing reasons the Petition herein dated 16. 02. 18 lacks merit and is dismissed with costs to the Respondents herein.

Dated, Signed and Delivered in Mombasa this 20th day of December, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Lumatete for Petitioner

Mr. Makuto for A.G.

Court Assistant Kaunda