



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION 34 OF 2017

HARUN KIPNGETICH CHEPKWONY BETT.....PETITIONER

VERSUS

KENYA COMMERCIAL

BANK KENYA LTD (NJORO)1ST RESPONDENT

CRIMINAL INVESTIGATION

DEPARTMENT (NJORO).....2ND RESPONDENT

JUDGMENT

1. The petitioner herein **Harun Kipngetich Chepkwony Bett** was an employee of Kenya commercial Bank (the 1st Respondent). He worked as a Retail Banking Direct Sales Representative. On or around 6th March 2017, the Petitioner was summoned to Njoro Police station where the 2nd Respondent informed him that an allegation had been made against him by the 1st Respondent that he had authored defamatory material against senior staff of the 1st Respondent in contravention of the Kenya Telecommunications Act. The petitioner alleges that the 2nd Respondent confiscated his mobile telephone and searched his home, acts that intimidated and caused fear to his family.

2. The Petitioner alleges to have suffered infringement of the following constitutional rights reproduced verbatim as:-

- a) "Breach on human dignity contrary to Article 28 of the Constitution, 2010
- b) Breach on freedom from torture and degrading treatment contrary to Articles 25 (a) and 29 (d) & (f) of the Constitution 2010.
- c) Breach on the right to privacy and the right not to have possession seized contrary to Article 31 (b) of the constitution, 2010.
- d) Breach on freedom of opinion and/or expression contrary to Articles 32 and 33 respectively.
- e) Breach on right to access information as against Article 35 of the Constitution, 2010.
- f) Breach on the equal application of the law contrary to Article 27 of the Constitution".

3. As a consequence thereof, the petitioner seeks the following reliefs:-

- i) "Special and exemplary damages incurred and/or rendered for loss of mobile phone as an accessory.
- ii) Declaratory Order to the Respondents that their actions are unconstitutional and any purported investigation of prosecution is null and void.
- iii) An order that the Petitioner Mobile phone be returned forthwith.
- iv) Costs of this Petition be awarded to the Petitioners, and;

v) Any other relief that the Court may deem fit to grant”.

4. In opposition to the petition, the 2nd respondent filed the following grounds of opposition:-

- a) “The Application does not disclose adequate particulars in support of the alleged violations of the constitution to enable the court to grant the reliefs sought.
- b) The investigations being carried out against the Petitioner is an administrative process permitted under the National Police Service Act No. 11 of 2011.
- c) The petitioner is still under investigation and none of his fundamental rights under the Constitution have been violated.
- d) On the foregoing the Application and Petition is misconceived and a proper candidate for dismissal with costs to the defendants.”

5. The 1st respondent filed a Replying Affidavit sworn by one John Kibitok Saina who is their Manager based at Njoro Branch. His averments confirm that the petitioner was an employee of the 1st respondent and that emails purported to have been authored by various bank staff Georgina Methu, Anne Wairi and the deponent addressed to Senior Bank Officers circulated on social Media. He averred that a report was made to the Criminal Investigation Department of the police for investigation in good faith and that the 1st Respondent did not violate any constitutional rights of the petitioner as alleged.

6. Parties took directions to file submissions which I have carefully considered. The issues that emerge from the petition and the rival affidavits and submissions of the parties are:-

- i) Whether the petition discloses violation of the constitutional rights of the petitioner, and;
- ii) Whether the orders sought should be granted.

7. Article 165(3) of the Constitution gives the High Court the jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. It is also an established principle that a person alleging breach of fundamental rights and freedoms must state the provisions alleged to have been infringed, and the manner in which they have been infringed. In **Anarita Karimi Njeru –vs- Republic (No. 1) 1979 KLR 154** the court espoused this principle thus:-

“.....if a person seeking redress from a High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to this case), that he should set out with reasonable degree of precision the provisions said to be infringed and the manner in which they are alleged to be infringed...”.

8. In **Trusted Society of Human Rights Alliance –vs- The Attorney General & 3 Others HC Petition No. 229 of 2012, Nairobi, (UR)** the court explained the test to be applied in admitting a constitutional petition thus:-

“A person claiming constitutional infringement must give sufficient notice of violation to allow her adversary to adequately prepare her case and to save the court from embarrassment of adjudicating on issues that are not appropriately phrased as justiciable controversies The test is a substantive one and inquiries whether the complaints against 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”.

See also **Bernard Murage V. Fineserve Africa Limited & 3 others 2015eKLR.**

9. The petitioner has set out numerous articles of the Constitution which he alleges have been violated by the respondents. He alleges violation of his human dignity contrary to Article 28 of the Constitution ; breach of Article 25 (a),29 (d) and (f) on freedom from torture and degrading treatment; violation of his right to privacy and the right not to have his possessions seized contrary to Article 31(b) of the Constitution. In addition the petitioner alleges breach of his right to freedom of expression contrary to Articles 32 and 33 respectively and denial of right to access information contrary to Article 35 of the Constitution, and; breach of Article 27 with respect to equal application of the law.

10. The factual basis of the petition is not contested. Both the petitioner and the respondents state that the petitioner was an employee of the 1st Respondent and that his contract of employment ended in January 2017. It is also common ground between the petitioner and the respondents that some email communication was authored and circulated on social media at about the same time that the petitioner was suspended from employment on alleged grounds of misconduct. Both the suspension letter (Exhibit JKS 21) and non-renewal of contract letter (Exhibit JKS-3) were annexed to the Replying Affidavit of John Kibitok Saina the 1st respondent’s Njoro Branch Manager. The point of departure is that the petitioner states that he was accused of authoring the emails while the 1st respondent only states that they submitted the emails for investigation by the CID to determine their origin.

11. I have looked at the broad statements of the alleged constitutional violations that the petitioner has set out as against the facts set out by the parties and against the principles of constitutional litigation set out earlier. I have not found any particulars set out by the petitioner to demonstrate violation of almost all the provisions of the Constitution which he has stated. He has not shown the court how his right to human dignity has been violated or any actions of torture and degrading treatment perpetrated against him. The petitioner has also not shown how he has been denied his freedom of expression and access to information and by whom. His allegation of having been denied equal treatment

before the law is also not demonstrated.

12. With respect to the allegation that his right to privacy was violated and seizure of his property, the petitioner states that his home was searched without a warrant and his mobile phone was confiscated. The issue of unlawful search has not been proved. However it is uncontested that the 2nd Respondent acted on the report contained in OB No. 21/4/2/2017 made by the 1st respondent. The Petitioner averred at paragraph 12 of his affidavit that he was ordered to surrender his mobile phone for further investigations. He however submitted that he was summoned to the CID office where he was questioned and ordered to surrender the phone. The 2nd Respondents while admitting that they took the phone submitted that it was needed for further investigations in respect to the complaint made by the 1st Respondent.

13. It is the duty of the police to investigate and prevent crime. In **Republic versus Commissioner of Police and Another ex parte Michael Monari & Another (2012) eKLR** the court underscored this duty thus:-

“The Police have a duty to investigate on any complaint once it is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court..... As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene”.

14. In the present case, the police confiscated the petitioner’s mobile phone for purposes of investigation. I would hold that it was within their mandate to do so. I observe however that the mobile phone was confiscated on 6/2/2017 according to the inventory recorded by one Alex Muinde of the Directorate of Criminal Investigations, Njoro.

15. It is my view that any forensic investigation on the same ought to have been concluded by now and that there would be no justifiable reason to hold it any further and particularly where the petitioner has not been charged with any related offence. I consequently find that the action of the 2nd Respondent of confiscating the petitioner’s phone and holding it for an indefinite period without either returning it to him or charging him with any offence unjustifiable and a violation of the petitioner’s right to his property.

16. In the end except for the prayer to have his mobile phone returned to him, the orders sought by the petitioner are not merited and are dismissed. I order the 2nd respondent to return the petitioner’s mobile phone to him within 30 days of this judgment.

17. Each party shall bear their costs in the petition.

Orders accordingly

Judgment Signed

R. LAGAT KORIR

JUDGE

Judgment Delivered, Dated and Signed at Nakuru this 19th Day of December, 2018

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JANET MULWA

JUDGE

In the presence of:

.....Court Assistant

.....For the Petitioner

.....For the 1st Respondent

.....For the 2nd Respondent