



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**CONSTITUTIONAL PETITION NO 59 OF 2016**

**In the matter of Articles 22 (1) of the Constitution of Kenya, 2010**

**and**

**In the matter of Enforcement of : The alleged contravention of Articles 1, 2, 10, 12, 19, 20, 27, 28, 33, 38, 45, 47, 51, 81, 174, 232 and 249 of the Constitution of Kenya, 2010**

**and**

**In the matter of Article 19 (3) (a), 20, 21 (1), 23 (1), 258 (1) (2) (3) and 259 (1) (a) (b) (c) (3) (a) of the Constitution of Kenya**

**and**

**In the matter of alleged contravention of Rights or Fundamental Freedom under article 25 (a) (b) (d), 27 (1) (2) (4), 29, 30 (1) (2), 45 (1) (2), 48, 51 (1) (3), 33 (1) (a) (b) (c), 56 (a) (b) (c), 59 (2) (a) (c) (d) (e) (f) (g) (h) and (3), 249 (1) (a) (b) (c) and 252 (2) and (3) of the constitution of Kenya**

**BETWEEN**

**ZUBEDA WAZIRI.....PETITIONER**

**VERSUS**

**THE SPEAKER OF THE NATIONAL ASSEMBLY.....1<sup>ST</sup>RESPONDENT**

**THE NATIONAL ASSEMBLY.....2<sup>ND</sup>RESPONDENT**

**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup>RESPONDENT**

**THE CABINET SECRETARY INTERIOR.....4<sup>TH</sup>RESPONDENT**

**THE COMMISSIONER OF PRISONS.....5<sup>TH</sup>RESPONDENT**

**JUDGEMENT**

1. The petitioner brings this petition under article 258 of the constitution. The crux of the case is that article 51 (1) (3) (a) (b) of the constitution envisages protection of persons detained, held in custody or imprisoned and specifically directs Parliament to enact legislation providing for humane treatment of persons detained, held in custody or imprisoned taking into account the relevant international human rights instruments. The petitioner avers that the Respondents have contravened and are likely to contravene the constitution by failing to put in place, and enact the relevant laws contemplated under the said provision. Unfortunately, this averment is totally incorrect as demonstrated later in this judgement, hence on this ground alone, this petition is a non-starter and is bound to fail.

2. As correctly pointed out by Response by the National Assembly contained in the Replying affidavit of

**Justin Bundi** filed, on 27<sup>th</sup> May 2017, Parliament enacted the Persons Deprived of Liberty Act[1] to give effect to Article 29 (f) and 51 of the constitution and other connected purposes. The said legislation was assented on 24<sup>th</sup> December 2014. It came into force on 14<sup>th</sup> January 2015. Thus, this petition, premised on the allegation that Parliament has failed to enact the said legislation, is unfounded and lacks basis, and is therefore moot and or serves no utilitarian purpose and or raises no justiciable issue.

3. Generally, a case is **not moot** so long as the plaintiff continues to have an injury for which the court can award relief, even if entitlement to the primary relief has been mooted and what remains is small.[2] Put differently, the presence of a “collateral” injury is an exception to mootness.[3] As a result, distinguishing claims for injunctive relief from claims for damages is important. Because damage claims seek compensation for past harm, they cannot become moot.[4] Short of paying plaintiff the damages sought, a defendant can do little to moot a damage claim.

4. A matter is **moot** if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. **Mootness** arises when there is no longer an actual controversy between the parties to a court case, and any ruling by the court would have no actual, practical impact.

5. There is in place a law enacted pursuant to the provisions of the constitution and the said law was in place before the institution of this petition, hence, the petition is premised on pure ignorance of the existence of the said legislation. The petition before me does not challenge the constitutionality or otherwise of the said legislation, hence, there is no real controversy before the court. A case is moot and academic when there is no actual controversy between the parties or useful purpose that can be served in passing upon the merits.[5]

6. The existence of the said law renders this petition a mere academic exercise and /or of no useful purpose. It is trite that as a general principle, the rights and liabilities of parties to any judicial proceedings pending before court are determined in accordance with the law as it at the time when the suit was instituted. Time and again, it has been expressed that a court should not act in vain.[6]

7. No court of law will knowingly act in vain. The general attitude of courts of law is that they are loathe in making pronouncements on academic or hypothetical issues as it does not serve any useful purpose. In the instant case, a consideration of the petition based on an allegation that parliament has failed to enact a legislation which is not true renders the argument academic, cosmetic and of no utilitarian value or benefit as the aim of the petition serves no useful purpose.[7]

8. A suit is academic or of no useful value where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic and useless if it is not related to practical situations.[8]

9. A case or issue is considered moot and academic when it **ceases to present a justiciable controversy** by virtue of supervening events, so that an adjudication of the case or a declaration on the issue would be of no practical value or use. In such instance, there is **no actual substantial relief which a petitioner would be entitled to**, and which would be negated by the dismissal of the petition. Courts generally decline jurisdiction over such cases or dismiss it on the ground of mootness, save when, among others, a compelling constitutional issue raised requires the formulation of controlling principles to guide the bench, the bar and the public; or when the case is capable of repetition yet evading judicial review.[9]

10. Applying the above time tested and refined principles of law in cases of this nature to the instant case, it is obvious that there is no unresolved justiciable controversy in the present petition. Courts generally only have subject-matter jurisdiction over live controversies, when a case becomes moot during its pendency, OR it raises no justiciable issue, the appropriate first step is a dismissal of the case.[10] In view of my findings above, and in particular, considering that there exists a law enacted pursuant to the constitutional requirement, I find no justifiable grounds to proceed to determine this petition on the alleged failure to enact the said legislation, hence this petition fails on this ground alone.

11. The petitioner also claims that prisoner's rights have been contravened due to *inter alia* lack of essential basic needs, good health facilities, congestion, access to information and torture. On record are several affidavits sworn by prisoners in support of the petition and all asking to be called as witnesses. Among them is:-

*a. the affidavit of **Nicholas Ouma Obonyo** alleging torture, cruel/inhuman/degrading treatment, indefinite solitary confinement, dark cells or constantly lit cell, corporal punishment, inadequate food rations/drinking water and collective punishment.*

*b. **Stephen Njau Mbugua** alleging that Persons Deprived of Liberty Act[11] does not recognize the Prisoners rights of expression and communication under article 33 and 35 of the constitution. He alleges violation of articles 51, 51 (2) and 56 of the constitution in that it does not recognize prisoners as marginalized group. Other violations cited are article 41, 48, 49 (e), 45 and forceful transfers.*

*c. **Samuel Githinji Kimaru's** alleges corruption in prison and also attacks the death penalty while **Richard Chemjor Ngeywa** alleges that prison authorities collude with judicial officers to violate their right to access to justice.*

*d. **Michael Wafula Wambani Manyani** alleges that the office of the commissioner of prisons is unconstitutional, that prisoners are not provided with certificates of good conduct, a violation of article 27.*

*e. **Donald Machiwa Achewa** cites the prisoners' views given to the Truth, Justice and Reconciliation while **Thomas Ondieki Migika** claims to have a knee injury.*

*f. **Further Wycliff Walimbwa Simiyu** claims he desires to give evidence on radicalization while **Kaiyok Nkongoni** claims to have been shot by a prison warder but no details have been provided despite the seriousness of the allegation.*

### **Petitioners' submissions**

12. The petitioners submissions dwelt on allegations of corruption and alleged malpractices in prisons, tribalism and forceful transfer of prisoners in prisons and alleged radicalization of prisoners.

### **Submissions by counsel for the third, fourth and fifth Respondents**

13. Counsel for the third, fourth and fifth Respondents submitted that the Respondents have fulfilled their obligations under article 51 (3) (a) & (b) of the constitution in that it enacted the Persons Deprived of Liberty Act[12] which *inter alia* provides for Rights of persons deprived of liberty and duties of persons in charge,[13] it contains provisions on imprisoned or detained persons,[14] provisions on Complaints and disciplinary procedures,[15] and Establishment of consultative committee on persons deprived of liberty.[16] Counsel also submitted that the petitioner has not established that prisoners rights have been violated, hence, the petitioner is not entitled to the reliefs sought.

### **Analysis of the facts, law, issues and authorities**

14. This petition raises a fundamental question, namely, the need for a party alleging violation of constitutional rights to plead with clarity, specificity and state the particulars of the acts or omissions complained of which give rise to the alleged threat or violation of the alleged constitutional rights.

15. There are allegations of torture inhuman and degrading treatment. To me, the allegations lack clarity. The petition falls short of disclosing how, when and where each of the prisoners' rights was violated, the loss or harm (if any) suffered by each petitioner, whether physical or psychological, which in my view amounts to absence of clarity, specificity and particulars necessary to prove claim of this nature.

16. The core issue here is to understand the function of and purpose of good pleadings. In this regard, I recall the words of the Australian Court<sup>[17]</sup> where Vickery J said this of the principles of good pleading:-

*"In a mathematical proof, elegance is the minimum number of steps to achieve the solution with greatest clarity. In dance or the martial arts, elegance is minimum motion with maximum effect. In filmmaking, elegance is a simple message with complex meaning. The most challenging games have the fewest rules, as do the most dynamic societies and organizations. An elegant solution is quite often a single tiny idea that changes everything.*

*... Elegance is the simplicity found on the far side of complexity.*

*While elegance in a pleading is not a precondition to its legitimacy, it is an aspiration which, if achieved, can only but advance the interests of justice. A poorly drawn pleading, on the other hand, which does not tell a coherent story in a well ordered structure, will fail to achieve the central purpose of the exercise, namely communication of the essence of case which is sought to be advanced.*

*Pleading should not be dismissed as a lost art. It has an important part to play in civil litigation conducted within the adversarial system. Crafting a good pleading calls for precision in drafting, diligence in the identification of the material facts marshaled in support of each allegation, an understanding of the legal principles which are necessary to formulate complete causes of action and the judgment and courage to shed what is unnecessary.*

*Although a primary function of a pleading is to tell the defending party what claim it has to meet, an equally important function is to inform the court or tribunal of fact precisely what issues are before it for determination.*<sup>[18]</sup> (Emphasis supplied)

17. The function of a pleading in civil proceedings is to alert the other party to the case they need to meet (and hence satisfy basic requirements of procedural fairness) and further, to define the precise issues for determination so that the court may conduct a fair trial; The cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action (or defence). The expression "material facts" is not synonymous with providing all the circumstances. Material facts are only those relied on to establish the essential elements of the cause of action; a pleading should not be so prolix that the opposite party is unable to ascertain with precision the causes of action and the material facts that are alleged against it.

18. Rule 10 (2) (d) of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013<sup>[19]</sup> provided that a petition shall contain the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit or in a public interest case to the public or class of persons or community.

19. Thus, it was necessary for the petitioner to not only plead with specificity and clarity, but also to adduce clear evidence on the alleged violations, including the alleged torture for the prisoners.

20. Further, most of the allegations/ complaints made are of such a nature that they ought to have been raised with the relevant state agencies and not in this petition. Such allegations include *Samuel Githinji Kimaru's allegations on corruption in prisons. Richard Chemjor Ngeywa's allegations that prison authorities collude with judicial officers to violate their right to access to justice.*

21. Further, *Michael Wafula Wambani Manyani alleges that the office of the commissioner of prisons is unconstitutional.* Unfortunately, the constitutionality or otherwise of the said office has not been raised in this petition nor does the petition pray for a relief to that effect, hence, the said allegation is not grounded on the petition.

22. It is also alleged *that prisoners are not provided with certificates of good conduct, a violation of article 27.* In my view, once convicted by a competent court, unless the conviction is quashed by a competent court, deprivation of a certificate of good conduct cannot amount to a violation of article 27 of

the constitution.

23. *Donald Machiwa Achewa* cites the prisoners' views given to the Truth, Justice and Reconciliation Commission. Again, this is not pleaded in the petition, nor is it among the prayers sought hence its irrelevant to the issues in this petition.

24. *Thomas Ondieki Migika* claims to have a knee injury. He has not attributed it to torture or violation of his rights and in absence of details the court cannot speculate while *Wycliff Walimmbwa Simiyu* talks of radicalization in prison, which to me ought to have been channelled to the relevant state agencies.

25. *Kaiyok Nkongoni* claims to have been shot by a prison warder but no details have been provided despite the seriousness of the allegation, hence, this court cannot speculate.

26. It is alleged that the petitioners rights under article *articles 33, 35, 51, 51 (2) and 56 of the constitution have been* violated. However, article 51(1) is very clear. It reads "a person who is detained, held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned."

27. The petitioner has not demonstrated that the alleged violations of rights under articles 33, 35, 51, 52 (2) and 56 are not "clearly incompatible with the fact that the person is detained, held in custody or imprisoned."

28. Further, one of the affidavits attacks the death penalty, yet the petition does not challenge its legality or otherwise nor is there a prayer in the petition relating to the death penalty. Hence, this allegation is not premised on the petition.

29. On the whole, I am persuaded that the petitioner has not proved her case to the required standard. In view of my findings hereinabove, I find that the petitioner is not entitled to reliefs sought in the petition.

30. Accordingly, I dismiss this petition with no orders as to costs.

Orders accordingly

Signed, Dated at Nairobi this 21<sup>st</sup> day of **September** 2017

**John M. Mativo**

**Judge**

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[1]Act No. 23 of 2014

[2] In *Chafin v. Chafin*, 133 S. Ct. 1017 (2013), the Supreme Court discussed mootness at length in a complex child abduction case and held that the dispute between the parents was not moot because issues regarding the custody of the child remained unresolved. The Court noted that the prospects of success of the suit were irrelevant to the mootness question, and uncertainty about the effectiveness and enforceability of any future order did not moot the case. *Chafin*, 133 S. Ct. at 1024-26. A case is moot, however, when the court cannot give any "effectual" relief to the party seeking it. See *Knox v. Service Employees International Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012); *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992); *Firefighter's Local 1784 v. Stotts*, 467 U.S. 561, 571 (1984); see also *Tory v. Cochran*, 544 U.S. 734, 736-37 (2005) (death of attorney Johnnie Cochran did not moot injunction enjoining plaintiff from defaming Cochran). A case can, of course, become moot when the plaintiff has abandoned their claims, but such abandonment must be unequivocal. *Pacific Bell Telephone Company v. Linkline Communications*, 555 U.S. 438, 446 (2009).

[3] *In re Burrell*, 415 F.3d 994, 998 (9th Cir. 2005).

[4] *Board of Pardons v. Allen*, 482 U.S. 369, 370 n.1 (1987), illustrates the use of a damage claim to avoid mootness. Prisoners who were denied parole without a statement of reasons challenged the denial. They claimed that the state statute mandating release under certain circumstances created a liberty interest in eligibility for parole protected by the Fourteenth Amendment. Plaintiffs sought damages as well as declaratory and injunctive relief. Although plaintiffs were later released, mootness of their individual claims for injunctive relief, their damage claims remained alive. Because the immunity of defendants was not settled, the Supreme Court reached the merits, holding that plaintiffs had a cognizable liberty interest in the processing of their parole applications. The Court remanded the case for further proceedings. *See also City of Richmond v. J.A. Croson Company*, 488 U.S. 469, 478 n.1 (1989). An inability to pay a damages judgment at present does not moot a claim. *See United States v. Behrman*, 235 F.3d 1049, 1053 (7th Cir. 2000). However, if the judgment seemingly could never be paid, a claim might be dismissed on prudential grounds. *See, e.g., Federal Deposit Insurance Corporation v. Kooyomjian*, 220 F.3d 10, 14-15 (1st Cir. 2000).

[5] *Tantoy, Sr. v. Hon. Judge Abrogar*, 497 Phil. 615 (2005).

[6] *Political Parties Forum Coalition & 3 others v Registrar of Political Parties & 8 others* [2016] eKLR

[7] *Oladipo vs. Oyelami* {1989} 5 NWLR (Pt. 120) 210; *Ukejianya vs. Uchendu* }1950} 13 WACA 45

[8] *See Plateau State vs. A.G.F.* {2006} 3 NWLR (Pt. 967) 346 at 419 paras. F-G wherein the Nigerian Supreme court defined an academic suit or petition the above terms

[9] *Osmeña III v. Social Security System of the Philippines* G.R. No. 165272, 13 September 2007, 533 SCRA 313, citing *Province of Batangas v. Romulo*, G.R. No. 152774, 27 May 2004, 429 SCRA 736, 754; *Olanolan v. Comelec*, 494 Phil. 749,759 (2005); *Paloma v. CA*, 461 Phil. 269, 276-277 (2003).

[10] *Mills v. Green*, 159 U.S. 651, 653 (1895)

[11] *Ibid*

[12] *Ibid*

[13] Part 11

[14] Part 111

[15] Part IV

[16] Part V

[17] *In SMEC Australia Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* {2011} VSC 492 at [3]-[6]

[18] *See also Downer Connect Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2008] VSC 77 [1-4]; *Hoh v Frosthollow Pty Ltd and Ors* [2014] VSC 77 at [13] – [20].

[19] Legal Notice No. 117 of 28 June 2014