



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CONSTITUTIONAL PETITION NO 5 OF 2016

JAMES MWANGI MACHARIA.....PETITIONER

VERSUS

1. THE INSPECTOR GENERAL OF POLICE
2. THE DIRECTOR OF PUBLIC PROSECUTIONS
3. THE HON. ATTORNEY GENERAL.....RESPONDENTS

J U D G M E N T

1. In the petition herein dated 04/05/2016 the Petitioner has pleaded that on 31/10/2016 he was arrested and charged in *Murang'a CM Criminal Case No 52 of 2016* with the offence of *improper use of a telecommunication system* contrary to **section 29(a)** (since declared unconstitutional in *Nairobi HC Constitutional Petition No 149 of 2015*); that in the course of his arrest the police confiscated his cell phone “registered as Number [Particulars Withheld] and to date he has not had access to the same”; that in this era of digital revolution the cell phone is a mini computer with all the vital information relating not only to his contacts but (also) financial transactions, his businesses, his diary, social life and all digital records of his private life; that indeed the cell phone is his private office and the arbitrary manner in which it was confiscated grossly infringes on his right to privacy guaranteed under **Article 31** of the **Constitution**; that the smart phone today being a tiny computer teeming with highly private data such that sifting through (one) in search of evidence differs fundamentally from sifting through someone’s pockets or purse, and as such should be distinguished from a search on any other bag found on a suspect; that since the cell phone is such a private property/possession, such seizure as in the present case must be sanctioned by a court of law vide a warrant or order; that the continued confiscation of the Petitioner’s cell phone has literally grounded him, such that he does not have contacts to his business associates, friends or family, thus cutting him off from the rest of the world; and that therefore the Petitioner’s right to information under **Article 35** and his right of expression under **Article 33** and his right of freedom of association under **Article 36** have been infringed.

2. The Petitioner has further pleaded that it is unreasonable to carry out a search of a cell phone without a warrant such as in the present case, and without weighing the same against “privacy implications”; that the police while confiscating the Petitioner’s cell phone failed to appreciate the fact that the cell phone has an immense storage capacity that houses an array of information dating far back into the Petitioner’s past, and that detailed information can be revealed about all aspects of his life through the browsing history, thus opening him up to more scrutiny than anticipated; and that without the court’s intervention the police will be straying into private lives with impunity under the guise of searching for evidence, and against the Petitioner’s, and indeed the public’s, will.

3. The Petitioner has therefore sought the following reliefs –

(a) A declaration that the seizure of his cell phone by the police without a search warrant or other court order is unconstitutional by dint of Article 31 of the Constitution.

(b) A declaration that the proceedings in Murang'a CM Criminal Case No 52 of 2016 as commenced, and the evidence sought to be relied upon therein, are constitutionally null and void under Articles 31, 50(2) and 50(4) of the Constitution.

(c) That the Respondents be ordered to compensate the Petitioner by way of general and exemplary damages for the period he has been without his cell phone.

(d) That the Respondent do bear the costs of these proceedings.

4. The 1st and 3rd Respondents filed grounds of opposition dated 21/07/2016 in response to the petition. Those grounds are –

(i) That the Petitioner has failed to demonstrate with precision how his fundamental rights and freedoms under “Articles 31, 50(2) and (4)” have been violated.

(ii) That the Petitioner has not demonstrated how the proceedings in Murang'a CM Criminal Case No.52 of 2016 are a nullity for violating “Article 31, 50(2) and (4)” of the Constitution.

(iii) That in dealing with the Petitioner herein the Respondents lawfully discharged their duty and mandate in accordance with the applicable law and the Constitution.

(iv) That the Petitioner's right under Article 31 is not an absolute right, and is limited as lawfully provided for under section 25(b) of the Criminal Procedure Code and section 60(1) of the National Police Service Act as read with Article 24(2) of the Constitution.

(v) That in the enjoyment of his fundamental right to freely express himself the Petitioner violated Article 33 (2) (b), (c) & (d) of the Constitution.

(vi) That the petition is otherwise an abuse of the due process of the court.

5. On his part the 2nd Respondent filed a replying affidavit sworn by one Cpl. Stephen Muroki, a police officer attached to the **Directorate of Criminal Investigations, Murang'a North Division**, and the investigation officer in **Murang'a CM Criminal Case No 52 of 2016 (Republic -vs- James Mwangi Macharia)**. The following grounds for opposing the petition emerge therefrom –

(i) That on 11/10/2016 one Senator Kembi Gitura of Murang'a County made a complaint regarding the Petitioner herein, to the effect that he had sent to him by mobile phone several annoying and threatening messages.

(ii) That the deponent then commenced investigations in the course of which he arrested the Petitioner on 12/01/2016.

(iii) That the Petitioner admitted to the deponent that the messages to the Senator had been sent from his mobile number, but that the same were neither annoying nor threatening.

(iv) That the deponent then requested that the Petitioner hand over to him his cell phone for further investigations, and that he did so voluntarily, and he kept it in custody as a possible exhibit.

(v) That on 13/01/2016 the deponent prepared an exhibit memo form and by it forwarded the Petitioner's cell phone to the **Cyber Crime Unit at CID Headquarters** for analysis.

(vi) That on the same day the deponent arraigned the Petitioner in court vide Murang'a CM Criminal Case No 52 of 2016 charged with improper use of a licensed telecommunication system

contrary to section 29(a) of the Kenya Communications Act, No 2 of 1998.

(vii) That on 02/03/2016 the deponent received a report from the Cyber Crime Unit confirming that indeed the messages complained of were sent from the Petitioner's Mobile number.

(viii) That in the deponent's view therefore, the evidence was sufficient to lay a *prima facie* case against the Petitioner.

(ix) That further, the deponent considered it in the public interest to charge the Petitioner in view of the then prevailing political climate.

(x) That however, following judgment of 19/04/2016 in Nairobi HC Constitutional Petition No 149 of 2015 that declared section 29(a) of the Kenya Communications Act unconstitutional, Murang'a CM Criminal Case No 52 of 2016 against the Petitioner was withdrawn under section 87(a) of the Criminal Procedure Code on 06/06/2016.

(xi) That the deponent never conducted a search on the Petitioner's person as he voluntarily gave his mobile phone to the deponent.

(xii) That the deponent retained the phone for purposes of production as evidence in court.

(xiii) That the deponent did not in any way infringe the Petitioner's rights except as permitted under the Constitution.

(xiv) That after the criminal case was withdrawn, the deponent has on several occasions called upon the Petitioner to go and collect his mobile phone but he has not.

(xv) That the phone is in the same condition it was in when the Petitioner gave it to him, and he (the deponent) is willing to hand it over to him as may be directed by this court.

6. On 21/09/2016 the learned counsels for the parties agreed that the petition be disposed of by way of written submissions with liberty to orally highlight. Eventually the Petitioner filed his submissions on 28/11/2016. On 19/07/2017 the learned counsel for the 2nd Respondent made oral submissions in court. No submissions at all, written or oral, were made for the 1st and 3rd Respondents. I have considered the submissions filed and made.

7. Disposal of a matter on submissions (without a hearing involving the taking of evidence) will normally be predicated upon there being no dispute regarding the essential or main facts of the case. In the present case, the Petitioner's petition is based upon an alleged illegal search of his person and illegal seizure and detention of his mobile phone.

8. But those essential facts are denied under oath by the 2nd Respondent who says that after his arrest the Petitioner voluntarily gave his mobile phone to him for further investigations and retention for use in court as evidence. The Petitioner has alleged that his phone has been illegally withheld from him; but again the 2nd Respondent has denied this under oath by stating that since the criminal case was withdrawn the Petitioner has been invited a number of times to collect his mobile phone from the investigating officer but has not done so.

9. With these major issues of fact unresolved, I cannot understand why the parties agreed to forgo a trial on *viva voce* evidence, or at least cross-examination of the two deponents of the affidavits on record.

10. The net effect is that the factual basis of the Petitioner's case has not been proved on a balance of probabilities. It was his duty to prove those essential facts set out above to the required standard. He has not discharged that evidential burden.

11. But even without a hearing on the facts, the following appears to be what transpired. Upon the Senator's complaint, the Petitioner was summoned by the police. He presented himself there and was arrested. He was informed of the complaint. He either voluntarily gave to the police his mobile phone or it was taken from him for further investigations.

12. The phone was forensically examined and found to have been used to send the messages the Senator complained about. The Petitioner was then charged with a criminal offence under section 29(a) of the Kenya Communications Act.

13. It will be noted that under **section 85(b)** of the *Criminal Procedure Code*, where a person is arrested without a warrant, the police may search him and keep for evidential purposes anything of interest recovered from him.

14. At the time the Petitioner was criminally charged on 13/01/2016 section 29(a) of the Kenya Communications Act was part of the law of the land. That provision was subsequently declared unconstitutional, null and void in a judgment delivered on 19/04/2016. The criminal charge was therefore withdrawn. After that withdrawal the Petitioner may or may not have been invited to collect his mobile phone from the police. It is a contested issue of fact that has not been properly tried.

15. What is the effect of all this on the reliefs sought on the petition?

16. Regarding the first relief sought, as already observed, it is a contested issue of fact whether the Petitioner's mobile phone was illegally seized by the police or he voluntarily surrendered it. That issue has not been properly tried and the declaration sought cannot be granted.

17. As for the second declaration sought, the Petitioner was criminally charged when section 29(a) of the Kenya Communications Act was part of the law of the land. The subsequent declaration that the provision was unconstitutional and therefore null and void could not have retrospective effective. Once the provision was no longer law, the charge against the Petitioner was rightly withdrawn. But the criminal case, when commenced, was validly commenced upon a then existing law. So, the second declaration sought also cannot be granted.

18. The relief of damages sought would depend on whether the Petitioner's mobile phone was seized from him by the police, or he voluntarily surrendered it himself. That is a contested issue of fact that has not been properly tried, and the claim for damages must fail.

19. In the result, I find no merit in the Petitioner's petition, and the same is hereby dismissed. Parties shall bear their own costs. Those shall be the orders of the court.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MURANG'A THIS 22ND DAY OF DECEMBER 2017

H P G WAWERU

JUDGE