



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**PETITION NO 276 OF 2015**

**DAVID NGUNJIRI THEURI.....PETITIONER**

**VERSUS**

**THE COMMISSIONER FOR SPORTS.....1<sup>ST</sup> RESPONDENT**

**NATIONAL OLYMPIC COMMITTEE OF KENYA.....2<sup>ND</sup> RESPONDENT**

**CNRISTOPHER NYASAKA.....3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. *David Ngunjiri Theuri*, the petitioner, was at the time of filing this petition the chairperson of the National Squash Racket Association (KSRA) that is responsible for the game of squash in the country. He had been a squash player for about three decades during which period he says he received a number of international accolades and recognition.
2. By virtue of this position, the petitioner says he received an invite from the National Olympic Committee of Kenya (NOCK) to prepare and participate in the 2014 Commonwealth games which were scheduled to be held in Glasgow, Scotland.
3. According to the petitioner, each Sports Association in the country including KSRA, conducted preparation in readiness for the forthcoming Commonwealth games that year. The petitioner stated that KSRA conducted its own preparations and invited the 1<sup>st</sup> and the 2<sup>nd</sup> respondents, the Commissioner of Sports and National Olympic Committee of Kenya respectively to witness KSRA's National Team selection. The petitioner was to be the squash Team Manager during the games.
4. It was stated that the 2<sup>nd</sup> respondent was responsible for getting visa and air tickets for players which it did including that of the petitioner. The petitioner stated that he was even shown his online air ticket. The petitioner averred that he made travel arrangements including obtaining permission from his employer, the Nairobi City County, to practice and travel to Scotland. He also informed his family accordingly.
5. The petitioner averred that he concentrated on his team's training and preparations for the games and had the team accredited and kilted and also tickets obtained in readiness to leave for Glasgow. However, he stated that when he went to collect the national uniforms for the team, he was directed to collect his uniform from a shop in the city centre but when he went there he discovered that his name was missing

from the list of those selected, accredited, kitted and given tickets in readiness to leave for the games. That is when he learnt that the 1<sup>st</sup> respondent had directed the 2<sup>nd</sup> respondent to exclude him from the National team contingent to Glasgow but no reasons had been given to him.

6. The petitioner stated that the action of excluding him from the Kenyan team contingent to Glasgow stigmatized him that he felt discriminated against, ostracized and devastated. He stated that he sought to know from the Minister of Sports and the 1<sup>st</sup> respondent why he was arbitrarily removed from the Kenyan team to no avail. He stated that his removal from the team was not only arbitrary and capricious but also unreasonable. As a consequence, he stated, has suffered financial, emotional and reputational loss which have left him ridiculed and stigmatized.

7. The petitioner stated that his rights under Articles 47 and 50 of the Constitution were violated as a result of the above sated facts. He therefore filed the petition dated 10<sup>th</sup> July 2015 and sought the following reliefs:-

*i. A declaration that the decision that led to the cancellation of Petitioner's name to go for the trip by the 1<sup>st</sup> and 2<sup>nd</sup> respondent was arbitrary, unilateral, capricious and contrary to articles 27, 28, 35, 47 and 50 of the constitution of Kenya 2010.*

*ii. A declaration that the unfair cancellation of the Petitioner's name and or dismissal of the petitioner was done without any colour of legal right whatsoever, without affording the petitioner any hearing, was arbitrary, without any basis, unlawful, null and void ab initio and contravened Article 35, 47 and 50 of the Constitution.*

*iii. A declaration that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents are in violation of the principles of natural justice in relation to the petitioner.*

*iv. This Honourable Court be pleased to issue an order of CERTIORARI quashing the arbitrary decision made by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.*

*v. This Honourable Court be pleased to issue an order of compensation to the petitioner for all the psychological reputational loss against him caused by the respondents.*

*vi. This Honourable Court be pleased to issue any other order or relief as it may deem fit and just to ensure that law, order and constitutionality is observed.*

*vii. Costs of the petition and interest thereon.*

*viii. Any other and further relief that this Honourable court may deem fit an just to grant in the circumstances 1<sup>st</sup> and 4<sup>th</sup> Respondents Response*

8. The 1<sup>st</sup> and 4<sup>th</sup> respondents filed a replying affidavit by **Gordon Oluoch**, the 1<sup>st</sup> respondent sworn on 27<sup>th</sup> August 2015 and filed in court on 20<sup>th</sup> September 2015. **Mr. Oluoch** deposed, that while in a trip to France in 2013, the Petitioner was involved in an incident of a disciplinary nature with the 3<sup>rd</sup> respondent, an issue that was yet to be resolved.

9. **Mr., Oluoch** deposed that KSRA was invited to send senior officials to discuss the matter with a view to bringing it to a conclusion but they did not despite acknowledging receipt of the letter. It was deposed that notwithstanding that failure, the Department of Sports went ahead to investigate the matter since it related to government money and some case of indiscipline which was not permitted in sports.

10. It was further deposed that since the issue of the petitioner's discipline remained unresolved, when it became known that the petitioner would be the team leader for KSRA to the Games, the steering committee which is the decision maker on Kenya's participation in games, declined to have him as part of

the team to Glasgow.

11. **Mr. Oluoch** deposed that he was instructed to write a letter to the 2<sup>nd</sup> respondent informing them that the petitioner should not be part of the team adding that discipline is of utmost importance in sports hence the decision to exclude the petitioner was justified.

### ***2<sup>nd</sup> Respondent's Response***

12. The 2<sup>nd</sup> respondent filed a replying affidavit by **James Chacha** sworn on 28<sup>th</sup> August 2015 and filed in court on 2<sup>nd</sup> September 2015. James Chacha deposed that the 2<sup>nd</sup> respondent is the body mandated to handle sporting affairs on behalf of the International Olympic Committee (IOC) and the Commonwealth Games Federation (CGF).

13. He deposed that in that capacity, the 2<sup>nd</sup> respondent is mandated on behalf of the country to oversee and handle organization, participation and composition of teams to represent Kenya.. James Chacha further deposed that it is the government's discretion to decide which teams and persons to represent the country in various International games which is then communicated to the 2<sup>nd</sup> respondent to assist in logistics.

14. It was also deposed that 2<sup>nd</sup> respondent received the team list from KSRA and it played its role including securing accreditation of players including the petitioner for the games. Later the 2<sup>nd</sup> respondent received a letter from the Ministry of Sports instructing that the petitioner should not be included in the team. There was further deposition was to the effect that KSRA as an affiliate of NOCK is subject to NOCK's constitution which states that all disputes be referred to Sports Arbitration Commission for resolution. It was deposed that NOCK as a society could only be sued through its officials and that at best the petitioner should have filed judicial review proceedings and not a constitutional petition. The 2<sup>nd</sup> respondent maintained that no constitutional rights were violated hence the petition discloses no cause of action.

### ***Petitioner's Submissions***

15. **Mr. Mokuu**, learned counsel for the petitioner, relied on their written submissions and urged the court to allow the petition. It was submitted through the written submissions that the petitioner's rights were violated in that the decision to remove his name from the team travelling to Glasgow was arbitrary. According to the petitioner's counsel, the letter raising the incident that allegedly happened in France in 2014 was responded to by the Secretary General of KSRA who had also confirmed the petitioner's availability for the meeting.

16. It was contended that the decision to deny the petitioner a chance to travel to Glasgow was malicious since the petitioner learnt of it when he went to collect the uniform and further that the decision was taken without him being heard. It was submitted that even before the petitioner's name was removed from the list, the petitioner was not given a notice of that intention.

17. It was argued on behalf of the petitioner, that the respondents being state officers, any decisions made ought to be in tandem with national values and principles of good governance under Article 10 of the constitution. The petitioner contended that the respondents failed to apply the minimum standard of compliance with Article 10 thus violated the constitution.

18. The petitioner further contended that having participated in all meetings and preparations for the games, it was unfair and unreasonable for the 1<sup>st</sup> respondent to remove the petitioner's name from the Kenyan team just two days to the date of travel. It was submitted that the 1<sup>st</sup> respondent did not observe Articles 27(1) and (2) of the Constitution on equality, equal benefit of the law and freedom from discrimination and fair administrative action under Article 47 (1)

### ***1<sup>st</sup> and 4<sup>th</sup> Respondents Submissions***

19. **Miss Wawira**, learned counsel for the 1<sup>st</sup> and 4<sup>th</sup> respondents, submitted that the petition is not merited. Learned counsel contended that the petitioner was left out of the team on disciplinary grounds in that he had misbehaved while in France an act that is unacceptable in sport.

20. Counsel also contended that under section 58 of the sports Act, there is a procedure for resolving sports related disputes hence the dispute herein should have been referred to the sports tribunal. Learned counsel prayed that the court should decline to assume jurisdiction in this matter.

### ***2<sup>nd</sup> Respondents Submissions***

21. Mr. Rombo, learned Counsel for the 2<sup>nd</sup> respondent, submitted that the 2<sup>nd</sup> respondent is not a state organ and that it is the duty of the government to decide who should make the national teams and thereafter leaves the 2<sup>nd</sup> respondent to organize for the team's travel and accommodation. For that reason, Mr. Rombo submitted, the 2<sup>nd</sup> respondent is a stranger to the allegations in petition.

22. Learned counsel contended that there was no violation of either Article 27 or 47 of the Constitution. He therefore submitted that the prayers in the petition cannot be granted in the circumstances of this case. Mr. Rombo argued that the Olympic Charter and NOCK's constitution (Articles 37) is clear on how to handle sports disputes and asked the court to decline jurisdiction and dismiss the petition.

### ***Determination***

23. I have considered this petition, responses thereto submissions by counsel for the parties and the authorities relied on. This petition raises only one issue for determination that is; whether the petitioner's rights and fundamental freedoms were violated.

24. The petitioner was a sportsman and leader of KSRA, one of the National Sports Associations in the country. He stated that he had been a squash player for over three decades and is recognized both nationally and internationally. He contended that he had been selected to attend the 2014 commonwealth games in Glasgow, Scotland and had duly prepared for the games and even obtained permission from his employer, the City County of Nairobi apart from finalizing travel. Arrangements. He was to double up as leader of his squash team.

25. It was contended that the petitioner's name had been included in the delegation and even an air ticket secured for him but when he went to collect his uniform, he learnt that his name had been removed from the list of those travelling without his knowledge and no reason was given.

26. The 1<sup>st</sup> respondent on his part contended that the petitioner's name was removed from the list due to an earlier incidence relating to discipline, a matter the government could not entertain in ports. The 2<sup>nd</sup> respondent on its part argued that the issue of who travels is a government decision, its mandate only being logistics once they have been given names of the team.

27. The petitioner argued that his rights and fundamental freedoms were violated by the respondents' actions. He contended that he was removed from the team without being given a reason and for that reason his rights under Article 47(1) of the Constitution were violated. He also argued that he was discriminated against in breach of Article 27(1) and (2) of the Constitution.

28. For the petitioner to succeed in his quest, he must first and foremost show that he had a right capable of being violated and, second, that that his rights and fundamental freedoms were indeed violated. A constitutional right properly so called is that basic and inviolable right that is granted or recognized by the constitution and or the law or one that can be implied under the constitution and such other law. A right and fundamental freedom is inalienable because it is neither granted nor grantable by the state and therefore, cannot be limited or violated by the state.,

29. It is only where a right is recognized under the constitution or the law that it can be protected and in case of violation, can it sustain a constitutional claim for redress. And only those rights that accrue by virtue of the constitution or those that are recognized or implied are protected by the constitution. Fundamental rights therefore, are those basic human freedoms that every person has the right to enjoy by virtue of being human.

30. These are the rights and fundamental freedoms enshrined in the constitution and more particularly in Bill of Rights. That is why Article 19 of the constitution provides that (1) ***the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies***, and that (2) ***The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings***. And further states that (3) ***the rights and fundamental freedoms in the Bill of Rights— (a) belong to each individual and are not granted by the State; (b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter; and (c) are subject only to the limitations contemplated in this Constitution.***

31. In short, rights and fundamental freedoms must be recognized by the constitution or other law and can only be limited in a manner that is consistent with the constitution. That is what makes rights and fundamental freedoms unique and therefore subject to constitutional protection.

32. In the present petition, the petitioner's complaint is that he was denied a chance to represent his country in the commonwealth games because his name was removed from the list of those in the contingent without a reason being given. In that case can a chance to represent a country in sports be said to be a constitutional right and fundamental freedom capable of violation? In my respectful view, the answer is in the negative. A chance to represent the country in sports is available to all sportsmen and women in equal measure so long as they are capable of performing to the required standard and to the satisfaction of sports managers.

33. The fact that one has been chosen to represent the country does not, in any way confer a right or benefit to the sportsman or women capable of being violated. It is not an individual's right. It is for all those that have the talent and ability in the particular sport. And only those that are selected may make the team. In that regard, I am not persuaded that the petitioner had a right in the circumstances of this case that could be violated and or was violated and which this court, exercising its constitutional jurisdiction under Article 165(3)(b) can redress.

34. The petitioner further argued that the removal of his name amounted to discrimination in violation of Article 27(1) and (2) of the Constitution. Article 27 of the Constitution, where relevant, provides that (1) ***Every person is equal before the law and has the right to equal protection and benefit of the law*** and that (2) ***Equality includes the full and equal enjoyment of all rights and fundamental freedoms.***

35. The constitution is clear that all persons are equal in the eyes of the law and must be treated equally. The law protects all human beings regardless of their social status and other natural differences. In that regard, the state is not supposed to ***discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.***

36. Anyone who alleges discrimination has the onerous duty to prove that he was or has been discriminated against. Discrimination means much more than just alleging that there is discrimination. Discrimination was defined in the case of ***Nyarangi & 3 Others v Attorney General [2008] KLR 688***, as-

***“the effect of law or established practice that confers privilege on a class or that denies privileges to a certain class because of race, age, sex, nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when reasonable distinction can be found between those favoured and those not favoured.”***

37. In the case of ***John Harun Mwau v Independent Electoral and Boundaries Commission & Another [2013] eKLR***, the Court stated with regard to Article 27 of the Constitution that;

***“[i]t must be clear that a person alleging a violation of Article 27 of the Constitution must establish that because of the distinction made between the claimant and others the claimant has been denied equal protection or benefit of the law. It does not necessarily mean that different treatment or inequality will per se amount to discrimination and a violation of the constitution.”***

38. That being the position in law, the petitioner did not adduce evidence to show that he was indeed discriminated against and that he was treated differently from others. The 1<sup>st</sup> respondent stated that the petitioner’s name was removed from the team travelling to Glasgow due to a case of indiscipline which had not been resolved. The petitioner himself appeared to agree that there had been an incident that took place in France although he argued that he has been always been ready to resolve the issue but the intended meetings never took place.

39. It would appear therefore, that it is true that there is an outstanding issue that may have contributed to the petitioner’s name being removed from the team travelling to Scotland for the Commonwealth Games and the petitioner acknowledged that fact. For one to successfully plead discrimination, he must show to the satisfaction of the court that he was in fact treated differently compared to others under similar circumstances.

40. What I have in this petition, is an allegation that the petitioner was discriminated against in violation of Article 27(1) and (2) of the constitution without evidence of a different treatment accorded to him from that accorded to other sportsmen or women under similar circumstances. Without evidence, the court cannot make a finding of discrimination under Article 27 of the Constitution.

41. The petitioner also contended that Article 47(1) of the Constitution was violated. Article 47(1) provides that (1) ***Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*** (2) ***If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

42. In his submissions, the petitioner contended that he was not accorded fair administrative action because he was not given reasons on why the action was taken to omit his name and therefore there was no procedural fairness. It is important to note the words used in Article 47 of the constitution. The Article is clear that one is entitled to a fair hearing that is ***expeditious, efficient, lawful, reasonable and procedurally fair.*** And that that if ***a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action the person has the right to be given written reasons for the action.***

43. Article 47 speaks to one of the rights and fundamental freedoms in the Bill of Rights. Only when a right or fundamental freedom is or is likely to be affected by an administrative action, does it call Article 47 into play. The petitioner’s argument as I perceive, it is that he was not given a fair administrative action in that no reasons were given to him why his name was removed from the list of team members to Glasgow.

44. As I have stated elsewhere in this judgment, any claim or alleged violation of constitutional rights must be demonstrably pegged on a right or fundamental freedom recognized or recognizable under the constitution or the law. That is why Article 47(2) states that ***“if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action”***. Unless the petitioner shows that what was violated was a right or fundamental freedom which he has not, Article 47 is inapplicable to his case. This is because as, I have already found, the chance to represent ones country in some sport does not confer on one an individual fundamental freedom. The nature of the right to take part in sport is a right to every citizen in equal measure as opposed to a fundamental right which is enjoyed by an individual.

45. I have stated, and I repeat, that the petitioner had a right to represent the country but that right was not a constitutional right accorded to him only. It is a right to all citizens who meet required standard. It was not a right and fundamental freedom in terms of Article 47(2) that had to be treated as though he was above everyone else.

46. Furthermore, the petitioner was aware of the issues surrounding his removal from the list which had remained unresolved. Discipline in sports cannot be underrated and, in my respectful view, there was no violation of Article 47(1) or (2) of the Constitution. N the circumstances of this case.

47. I must also point out here that it is not every claim of violation of fundamental rights and freedoms that should be filed by parties in court as a constitutional petition for redress of such violations. There should be a clear distinction between mere inconvenience and violation of rights and fundamental freedoms. The petitioner alleges that he had been given permission to train and represent the country in the Commonwealth games and had even informed his family of that chance. He claims that his removal from the list traumatized him and left him dejected. To my mind, this was a mere inconvenience as opposed to a violation of rights and fundamental freedoms.

48. The court while addressing the issue stated in the case of **Benard Murage v Fine serve Africa Limited & 3 others** [2015] eKLR that **not each and every violation of the law must be raised before the High Court as a constitutional issue.** In the case of **Harrikinson v Attorney General of Trinidad and Tobago** [1980] AC 265, the court observed;

***“The notion that wherever there is a failure by an organ of government or a public officer to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed for individuals by... the constitution is fallacious. The right to apply to the High Court under... the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action... The mere allegation that a human right has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the Court...if it is apparent that the allegation is frivolous, vexatious or abuse of the process of Court as being made solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”***

49. I entirely agree with the above observation as it aptly speaks to the position I find in this petition. the petitioner filed this petition not because his fundamental rights and freedoms had really been violated but because almost many people now believes any failure by a state organ or a public officer to comply with the law necessarily entails contravention of some human rights or fundamental freedoms guaranteed by the constitution thus rush to file constitutional petitions alleging violations which should be discouraged. I find no such violation in this petition.

50. The 2<sup>nd</sup> respondent also contended, referring to the National Olympic Committee’s constitution, that the court does not have jurisdiction over this matter I do not think that is correct. This court was moved pursuant to its jurisdiction as a constitutional court on the allegations of violation of rights and fundamental freedoms. Article 165 (3) (b) of the constitution gives this court jurisdiction to **determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;** And Article 165 (3) (a) is clear that this court has unlimited original jurisdiction in criminal and civil matters. For that reason the jurisdiction of this court to hear petitions alleging violation of rights and fundamental freedoms just like the present petition is never in doubt.

51. In conclusion therefore, it is my finding that this petition was not well founded. There was no violation of rights and fundamental freedoms capable of redress by this court exercising its constitutional jurisdiction. There was no violation of national values and principles of good governance under Article 10 of the constitution either. Consequently, the petition dated 10<sup>th</sup> July 2015 is declined and is dismissed

with costs.

Dated, Signed and Delivered Nairobi this 18<sup>th</sup> Day of December 2017

**E C MWITA**

**JUDGE**