



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO 389(A) OF 2014

JAPHET MUROKO.....PETITIONER

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

KENYA BUREAU OF STANDARDS.....2ND RESPONDENT

NATIONAL TRANSPORT

AND SAFETY AUTHORITY.....3RD
RESPONDENT

CABINET SECRETARY MINISTRY OF

ROADS AND TRANSPORT.....4TH
RESPONDENT

NATIONAL POLICE SERVICE5TH RESPONDENT

JUDGMENT

Introduction

1. In his application brought by way of Notice of Motion dated 5th August 2014, the petitioner sought the following orders:

1. THAT this application be certified urgent and admitted for hearing during the court vacation and be dispensed with in the first instance.

2. THAT this court does issue an injunction order against the use of alcohol breathalyzer commonly known as alcoblow and the hand held speed gun used by the 3rd 4th and 5th Respondents until such a time that this suit is heard and determined.

4. THAT in the alternative and without prejudice, this court does issue an order to the 2nd Respondent to produce the certificate of conformation of the

machines, approved certificate of the manufactures, their operation manuals, handbooks object codes for the embedded software and a letter confirming the standard pursuant to the Standard Act, for the same to be benchmarked against the threshold.

5. THAT this Honourable Court does issue an urgent inter-partes hearing for the determination of this suit.

6. THAT costs of this application be provided for.

2. The application was based on the following grounds:

1. THAT the alcohol breathalyzer commonly known as alco blow and the hand held speed gun used by the 3rd, 4th and 5th Respondents do not meet the constitutional threshold of Articles 2, 46, 227, of the constitution and is therefore not fit to be used by the public

2. THAT the 3rd and 5th respondents have been stopping and /or arresting members of the public or motorists using the preliminary breathalyzer and the radar, the hand held speed gun before subjecting the test result to the Evidential Breath Analyzers and or before they are declared safe in accordance to the Standard Act and the International Organization of Legal Metrology Rules and regulations as the same contravenes the provisions of the Kenyan Constitution.

3. THAT the 2nd Respondent has not produced the certificate of conformation of the machines, approved certificate of the manufactures, their operation manuals; handbooks object codes for the embedded software and a letter confirming the standard pursuant to the Standard Act; questioning the standards and safety of the said machines which are being used on unsuspecting Kenyans.

4. That the 3rd Respondent has not at any time produced evidence of advertisement on procurement if any to show that the sale or acquisition of these machines was transparent and competitive yet innocent citizens are being exposed to the same.

5. That the 5th Respondent has never produced certificates of training of its agents and /or the traffic police who are enforcing the machines on the roads.

3. The application was supported by an affidavit sworn by the petitioner on the same day.

4. When the matter came up before me on 11th August 2014, I declined to issue interim orders as requested in view of the decision in **High Court Petition No. 70 of 2014 – Richard Dickson Ogendo vs Attorney General**. I also requested the petitioner to reconsider his petition in light of the said decision. The view of the petitioner as expressed by his Counsel was that the present matter raised different issue from those that were at issue in **Richard Dickson Ogendo vs Attorney General**. This judgment therefore pertains to the petition, which was argued before me on 21st September 2015.

The Petitioner's Case

5. In his petition dated 5th August 2014, the petitioner challenges the constitutionality of the use of the Preliminary breathalyzer to test for excess consumption of alcohol, and the use of the hand held speed gun to check those who exceed the speed limits on roads in Kenya.

6. The petitioner's case as presented by Ms. Abongo is that the breathalyzer in use in Kenya does not meet the standards set under section 9 of the Standards Act and Gazette Notice No 9223 of 21st September 2007 as well as the International Organization of Legal Metrology Rules.
7. In his affidavit in support of the petition, the petitioner describes himself as a Kenyan citizen and a consumer of all public goods and services as provided in the Constitution, and a public spirited person keen to see that the Constitution is fully implemented for the benefit of all Kenyans.
8. He avers that he is aware that the Minister of Transport has enacted rules in the Traffic Act under which the preliminary breathalyzer and the hand held speed gun are introduced. The rules are enacted pursuant to powers conferred upon him by legislation and therefore he is liable for any constitutional violations. Under the said rules, according to the petitioner, the Minister is supposed to obtain advice from the Kenya Bureau of Standards before the machines are approved for public use.
9. It is the petitioner's deposition that the said approval was not obtained in accordance with the law and the machines were therefore unprocedurally introduced to Kenyan roads. He therefore wrote his letter in this regard dated 27th November 2013 to all the respondents but he has never received a response from any of them, yet the machines are still being used, contrary to the law.
10. It is his deposition that there are constitutional provisions regarding qualities and standards; that the Standards Act Cap 496 provides for specifications that must be met before any kind of goods and services are introduced for utilization or consumption by the public; and that Kenya is a signatory to the International Organization of Metrology (OIML) which has model regulations, the International Recommendations (OIML R) applicable in this case, and which establish the metrological characteristics required of certain measuring instruments and which specify methods and equipment for checking their conformity. Further, that the Rules require member states to implement the recommendations to the greatest possible extent.
11. According to the petitioner, Kenya adopted the OIML R commonly known as R 126 of 1998 and OIML R 91 1990 through Gazette Notice No 9223 of 21 of September 2007. The said Gazette Notice introduced and incorporated the OIML Standards into the Kenyan Standards Act Cap 496.
12. The petitioner avers that while Kenya, through the Kenya Bureau of Standards, adopted the standards specification of OIML with regard to the evidential breath analyzers and the speed measurement equipment it has not implemented them in practice.
13. He contends that Kenya has an obligation under the Constitution to respect and apply international instruments to which Kenya is a member, and to fail to apply such rules is to violate both the Constitution and international law.
14. While conceding that the breathalyzer was duly gazetted in accordance with the rules, it is his contention that what was gazetted is not what is currently being used on the roads, and the gadget in use on the roads does not meet the standards of what was gazetted by the Minister both on the breathalyzer or Alco blow.
15. The petitioner is also aggrieved by the manner of acquisition of the speed guns in use on the roads as well as the breathalyzer. He alleges that their acquisition was not done in accordance with the Constitution; and further, that the respondents did not advertise the quality and quantity of breathalyzers or speed guns, or the amount of money spent on them.
16. According to the petitioner, Kenya as a Member of the international organization of Legal Metrology has adopted the standards under the Kenya standards Act and the 2nd respondent, the KBS must show the court what standards it used to certify the breathalyzer and speed gun.
17. The petitioner concedes the need to deal with drunk driving and excessive speed in driving, but he

maintains that his petition raises serious legal issues with respect to the acquisition and use of the breathalyzer and speed gun, which have not been canvassed before, and he prays for the orders that he has sought in his petition, which are hinged on alleged violation of Articles 2, 46, 227, 258 and 259 of the Constitution, as well as sections 9(1)(2) and (4), as well as 15, 17 and 21 of the Standards Act, and the provisions of the Public Procurement and Disposal Act. He asks the Court to allow the petition and to grant the following reliefs:

1. ***For a declaration that the alcohol breathalyzer commonly known as alcoblow and the hand held speed gun used by the 1st, 2nd, 3rd, 4th and 5th Respondents do not meet the constitutional threshold of Articles 2, 46, 227 of the constitution and is therefore not fit to be used by the public.***
2. ***The Honourable court do issue a temporary injunction to the 3rd and 5th respondents restraining them from stopping and or arresting members of the public or motorists using the preliminary breathalyzer and the radar, the hand held speed gun before subjecting the test result to the Evidential Breath Analyzers and radar equipment for measurement of speed of vehicles, before they are declared safe in accordance to the Standard Act and the International Organization of Legal Metrology Rules and regulations as the same contravenes the provisions of the Kenyan Constitution.***
3. ***The 2nd Respondent to produce the certificate of conformity of the machines, approved certificate of the manufactures, their operation manuals, handbooks object codes for the embedded software and a letter confirming the standard pursuant to the Standard Act.***
4. ***That the 4th Respondent do produce evidence of advertisement on procurement if any to show that the sale or acquisition of these machines was transparent and competitive.***
5. ***That the 3rd respondent do produce the costs of public funds used to purchase the aforesaid machines in accordance to Article 35 of the Constitution of Kenya.***
6. ***That the 5th Respondent do produce certificate of training of its agents and or the traffic police who are enforcing the machines on the roads.***
7. ***That the 3rd respondent to produce in court figures of the monies collected since they started using the aforesaid machines***
8. ***That the 3rd respondent to produce one machine – the evidential breath analyzer and speed gun for purposes of this case (make, model, number, manufacturers details, approval certificate operational manual etc) under article 35 of the constitution of Kenya.***
9. ***That the Honorable Court orders the 3rd Respondent to procure the evidential breath analyzer and radar equipment for the measurement of speed of vehicles with advise from the 2nd Respondent within 21 days***

The Case for the 2nd Respondent

18. The Kenya Bureau of Standards filed an affidavit sworn by Brian Kimanyano M'bwanga, its legal officer, on 15th September 2014, and submissions dated 6th January 2015. Its case was presented by Learned Counsel, Mr. Masila.

19. In his affidavit, Mr. M'bwanga avers that the functions of the 2nd respondent include the promotion of standardization in industry and commerce, to make arrangements or provide facilities for the testing and calibration of precision instruments, gauges and scientific apparatus and for the determination of their degree of accuracy by comparison with standards approved by

- the Minister on the recommendation of the Council, and to prepare, frame, modify or amend specifications and codes of practice. It has performed these functions, including functions in respect of approval of breathalyzers and motor vehicle speed testing devices, in accordance with the Constitution and the law and with due regard to the public interest.
20. The 2nd respondent deposes that the petitioner has not pleaded with specificity with regard to the models, names, manufacturer, nature, information and make of the breathalyzers and speed testing devices alleged to be in use, and which he contends do not meet the applicable standards. It is its case therefore that such lack of specificity renders the petition fatally incompetent and hopeless, has thereby limited the 2nd respondent's right of reply, and in effect asks the Court to engage in guesswork.
21. Mr. M'bwanga further avers that all the breathalyzers and speed testing devices certified by the 2nd respondent have undergone testing and intensive scrutiny, and any approval done has been in accordance with applicable law and the Kenya standards in respect of each device. In the submissions made on its behalf, the 2nd respondent observes that with regard to the issue raised by the petitioner relating to the breathalyzer and speed gun, no constitutional violation attributable to it arises.
22. It was also its case that the petition had not met the threshold for constitutional petitions, was *res judicata*, the issues raised in the petition having been the subject of determination in **High Court Petition No. petition no 70 of 2014 No. 70 of 2014 Richard D. Ogendo vs Attorney General & Others**, and that in any event, the 2nd respondent had immunity from legal suit in accordance with section 17 of the Standards Act.
23. The 2nd respondent submits that the petitioner has not met the requirements of pleading with precision the particular provisions of the Constitution violated, or the harm caused to him. Instead, he is inviting the Court to conjecture and speculate on the proper devices or models that should be used on Kenyan roads. He has also not indicated what particular harm he or any citizen has suffered as a result of the use of the devices. It is the 2nd respondent's submission that in the absence of independent tests and competent reports showing harm suffered from use of devices certified by the 2nd respondent, the 2nd respondent does not know what violation is alleged against it.
24. On the issue of *res judicata*, the 2nd respondent submits that the issues that the petitioner raises were adequately addressed in **Richard D. Ogendo vs The Attorney General (supra)**. It contends that the issue in that case was the question of hygiene with regard to the use of the breathalyzer. Its submission was that the issue of health is corollary to the issues of standards; that if a device poses any health risks or is unhygienic, then the issue of standards arises. It was its submission therefore that these issues having been raised and determined in the Richard Ogendo case, they cannot be raised again in a subsequent petition.
25. With respect to its claim to immunity, the 2nd respondent submits that it is granted immunity by section 17 of the Standards Act from any legal action that arises from the exercise of its mandate, including the certification of products or refusal to certify products that do not meet standards. It contends that the products in question are of great public interest, bearing in mind that as has been documented, cases of road carnage have decreased with the use of the gadgets at issue. Its prayer is that the petition should be dismissed with costs.

The Case for the 3rd Respondent

26. The National Transport and Safety Authority opposes the petition and has filed an affidavit sworn by its Director General, Mr Francis Meja on 8th December 2014 and submissions bearing the same date but filed on 3rd March 2015. It agrees with the submissions of the 2nd respondent that the petition is devoid of particulars, and charges the petitioner with embarking on a fishing expedition.

27. According to the 3rd respondent, the petitioner's argument is that the breathalyzer and speed guns are unconstitutional as they do not meet standards. It observes, however, that the petitioner has confirmed that he is not aware of the type of breathalyzer or speed gun being used nor does he say that he has had any interactions with the gadgets or interacted with anyone who has. The 3rd respondent relies on the decision in **Trusted Society of Human Rights Alliance vs Mumo Matemu and 5 Others, Petition No. 12 of 2013** and section 107 of the Evidence Act to support its submission that there should be precision and particulars in pleadings that would allow the Court to interrogate matters before it. It is its case that in the absence of particulars or evidentiary proof of the matters alleged, the Court lacks the necessary ingredients to allow it determine the alleged breaches.
28. The respondent further observes that as conceded by the petitioner, there were rules allowing the use of the breathalyzer, which rules were the subject of the decision in the **Richard Dickson Ogendo case (supra)**. Its submission was that as the said decision had not been reversed on appeal, it remains good law. It prays that the petition be dismissed with costs.

The Case for the 1st, 4th and 5th Respondents

29. The Attorney General filed grounds of opposition and submissions dated 17th October 2014 and 10th December 2014 respectively. Its case was presented by Learned State Counsel, Ms. Ndirangu, who supported the pleadings and submissions made on behalf of the 2nd and 3rd respondents. In the grounds of opposition the AG sets out in some detail, which I need not repeat here, the basis and rationale, as well as the law, allowing the use of the breathalyzer and speed guns on Kenyan roads.
30. In his oral and written submissions, while agreeing with the submissions with respect to the lack of precision in the petition, the AG submitted that the petitioner ought to have specified the models, make, serial numbers and manufacturer's details of the gadgets in issue in order to properly argue that the said gadgets did not meet Kenyan standards. It was his submission that by failing to do so, the petitioner had hindered the respondents' ability to respond adequately to his claim.
31. It was also the AG's position that while the petitioner had mentioned a number of articles allegedly violated by the use of the breathalyzer and speed gun, he had not demonstrated the manner of violation, and had therefore failed in his duty, as required by the principles in **Anarita Karimi Njeru vs Republic** and **Mumo Matemu vs Trusted Society of Human Rights (supra)** to demonstrate the alleged violation.
32. The AG urged the Court to balance the interests of the petitioner against the interests of the public in curbing road carnage, and to dismiss the petition with costs.

Determination

33. I need not belabor the principles established with respect to constitutional petitions by our courts in various cases, notably the case of **Anarita Karimi Njeru vs Republic** and **Trusted Society of Human Rights vs Mumo Matemu (supra)** While it was recognized in the latter case that a party need not plead with mathematical precision the alleged violations, it is expected that a petitioner claiming violation of a right or a provision of the Constitution would do so with a degree of precision that would enable the opposing party answer his claim, and the Court determine the merits of the respective competing claims of the parties before it.
34. In the present case, we have a claim that the breathalyzer machine used on Kenyan roads, as well as the speed gun, do not meet international standards, and their use and acquisition was not in accordance with the law and the Constitution.

35. It is notable that while this is a constitutional petition alleging violation of the Constitution and the Bill of Rights, there has been no attempt made to demonstrate how the use of these two pieces of equipment violates either the Constitution, or indeed any other law, or how they violate the rights of the petitioner or any other person. That is the main weakness of the petition before me.
36. The petitioner's sole reference to constitutional violations is with regard to alleged violation of Article 227. He argues that the acquisition of the breathalyzer was not done in accordance with Article 227 of the Constitution, which requires that public entities procure goods in a manner that is fair, equitable, transparent, and competitive. He assumes that the breathalyzers were obtained through single sourcing, and puts the 3rd respondent to strict proof that this was not the case.
37. Two responses to this argument suffice. First, a party cannot file a constitutional petition alleging violation of the Constitution without a basis, and seek orders from the Court on the basis of what can only be termed as a fishing expedition. He alleges that he had sought information from the respondents, which he did not receive. The prudent option was to seek orders to compel the respondents to give him the information regarding the breathalyzers that he was seeking.
38. Secondly, there is a clear procedure provided in law for challenging procurements by state entities. This procedure is provided for in the Public Procurement and Disposal Act. The petitioner, who states that he is acting in the public interest, ought to have been vigilant and challenged the procurement process in the appropriate forum. The High Court, in exercise of its constitutional jurisdiction, cannot be used to deal with matters for which there are clear processes provided by legislation. In **Speaker of National Assembly vs Njenga Karume [2008]1 KLR 425**, it was held that:

“In our view there is considerable merit....that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

39. See also **Kipkalya Kones vs Republic & Another ex-parte Kimani Wanyoike & 4 Others (2008) 3 KLR (EP) 291** and **Francis Gitau Parsimei & 2 Others vs National Alliance Party & 4 Others Petition No.356 and 359 of 2012**.
40. The petitioner also premises his petition on the grounds that the money spent on the breathalyzer equipment and the speed gun has a direct impact on the taxpayer. He therefore submits that he wishes to know how the supplier was prequalified, stating that he does not know when the tender was advertised.
41. While the petitioner's concerns regarding the use of taxpayers' money are laudable, they are, unfortunately, not the basis for a constitutional petition alleging violation of the Constitution, particularly where, as in this case, they appear to be based purely on suspicion that the tender process in respect of the devices in question was not carried out properly. As observed above, the process for questioning public tenders is clearly provided for in legislation, and the Court cannot arrogate to itself the jurisdiction to take over what legislation places in other bodies.
42. A second weakness in the petition is that the issues that the petition raises with respect to the breathalyzer have been canvassed before a Court of competent jurisdiction, and a determination made. At the commencement of this matter, the Court enquired of Counsel for the petitioner whether, in light of the decision in the Richard Ogendo case, there was a basis for the Court to hear, yet again, a petition challenging the constitutionality of the breathalyzer. The response was that this petition was different in that the issue of the speed gun had not been canvassed in the earlier case.
43. Unfortunately, one gets the distinct impression that the issue of the speed gun was thrown in to make a small distinction between this case and the previous case, and to give the petitioner a lifeline on the basis of which to take a second shot at the issue of the breathalyzer. The petitioner

avers and submits in his written submissions that he acts on behalf of the public and that he raises issues which are of concern to the public and are raised for the common good.

44. Yet, the issue of the breathalyzer, particularly the spirited opposition to its use, is a matter of public notoriety, and it is common ground that it was the subject of litigation where members of the public whom the petitioner now argues he represents sought to challenge its use on the basis that it violates various constitutional rights.

45. In the **Richard Dickson Ogendo** case, the Court had captured succinctly the problem that Kenyan society faced with drunk driving, and the rationale, therefore, for the introduction of the breathalyzer:

[1] The parties in this matter do not dispute the fact that drunk driving is a major cause of road traffic accidents. The loss of life and limb through road accidents caused by drunk driving is a major concern for the State. Families lose loved ones; those who are injured incur substantial medical expense and suffer psychological scars associated with such injuries. The body politic is forced to absorb the large but unnecessary costs associated with road traffic accidents. It is therefore in the State's interest to take steps to minimize accidents caused by drunk driving.

[2.] In 2011, the Minister for Transport, pursuant to powers granted under section 119(1) of the Traffic Act (Chapter 403 Laws of Kenya) ("the Act") enacted the Traffic Breathalyser Rules, 2011 ("the Rules") by Legal Notice No. 138 of 2011 dated 5th October 2011. In the Rules the Minister prescribed, inter-alia, the limit of alcohol and made provision for the use of a breathalyser for the purposes of measuring the concentration of alcohol in a person's blood from a specimen of breath provided by the person, through the use of a device now commonly known as 'alcoblow'.

46. The issues identified for determination in that matter were whether the Minister had power to make the rules under the Traffic Act; whether the Minister can create a new offence under the Rules and whether the Rules create a new offence; whether the Rules were enacted without public participation and whether they should have been laid before the National Assembly; and finally, whether the enforcement of the Rules violate the petitioners' fundamental rights and freedoms.

47. In finding that the petition before him was without merit, the court found that there was no breach of the right to dignity, privacy, property or fair trial. It was also his finding that there was no evidence that the breathalyzer was unhygienic, which goes to the standards of the device used.

48. The petitioner may well argue that he was not a party to the **Richard Dickson Ogendo** case, and the principle of *res judicata* does not therefore apply to him. However, it must be observed that it cannot be open to every member of the public, who deems himself to be public spirited, to re-open every issue on the basis that he has added a twist to a claim brought previously as a private individual claim and raise it as a matter of public interest.

49. It is noteworthy, however, that there is no clear exposition in this petition of what constitutional rights of the petitioner or of any other member of the public has been violated by the use of the gadgets in question. Similarly, aside from the allegation that the gadgets do not meet the requisite standards and their procurement did not accord with the procurement requirements, there is nothing before me that demonstrates a violation of the Constitution.

50. In the circumstances, I find no merit in the present petition. It is therefore dismissed but with no order as to costs.

Dated Delivered and Signed at Nairobi this 28th day of January 2016

MUMBI NGUGI

JUDGE

Ms. Abong'o instructed by the firm of Arati & Co. Advocates for the petitioner.

Mr. Masila instructed by the firm of Nyachae & Ashitiva & Co. Advocates for the 2nd respondent.

Ms. Ndiragu instructed by the State Law Office for the 1st, 4th and 5th respondents.

Mr. Agwara instructed by the firm of Prof. Albert Mumma & Co. Advocates for the 3rd respondent.