



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

PETITION NO. 337 OF 2015

ANDREW KHISA WASIKE.....PETITIONER

VERSUS

THE OFFICE OF THE PUBLIC PROSECUTION.....1ST RESPONDENT

KENYATTA NATIONAL HOSPITAL.....2ND RESPONDENT

JUDGMENT

Introduction

1. The Applicant is a male nursing officer and an employee of the 2nd Respondent.
2. The 1st Respondent is the Director of Public Prosecutions duly recognised under Article 157 of the Constitution of the Constitution of Kenya
3. The 2nd Respondent is a state parastatal, a state organ. It is Kenya's largest referral medical hospital.
4. The Applicant commenced these proceedings by way of a Chamber summons seeking constitutional relief in the form of mandatory orders for the supply of information by the Respondents to the Applicant.
5. The application is contested.

Brief Background facts

6. The facts can be gathered from the Applicant's supporting affidavit as well as his supplementary affidavit.
7. Briefly, the Applicant was arrested on 13th June 2014 for allegedly raping a patient while on duty. He recorded a statement with the police at the Capitol Hill Police station. After investigations by the Capitol Hill Police officers, the Applicant was released on bond and later completely discharged allegedly for lack of sufficient evidence to warrant any criminal culpability.
8. He was also allegedly absolved of any blame by his profession's regulatory body, the Nursing Council of Kenya which carried out investigations shortly after the allegations had been made. The 2nd Respondent also lifted the Applicant's suspension and reinstated the Applicant to his previous job.
9. However, three print media later ran the story of the Applicant. They were; the Nairobiian Newspaper, the Daily Nation and the Star Newspaper. The story as published, the Applicant alleges, was based on the very allegations that the Applicant had been cleared of.
10. This prompted the Applicant to sue the three publishers of the print media in separate suits which

- were later consolidated into one.
11. It is also the civil suit that forms the basis on which the current application is brought before this court.

The Applicant's case

12. The basis of the Applicant's case is Article 35 of the Constitution. The Applicant states that the Applicant's right to access information has been infringed upon.
13. The Applicant avers in his supporting affidavit that, to adequately prove his case in the civil suit, he requires the Professional Report and Psychological Evaluation Report that was made by the Nursing Council, and the Police Report prepared by the 1st Respondent.
14. The Applicant further asserts that despite several written requests to the Respondents to avail this information, they have refused to provide the information.
15. He states that the respondents are public entities and have the obligation under Article 35, to provide information to any citizen who seeks such information.

The Respondents' case

16. The Respondents relied on the replying affidavit of Mr Patrick Amakaka. Mr Amakaka is a police officer employed under the National Police Service Act (Cap 84), and serves under the Directorate of Criminal Investigations.
17. The Respondents contend that the investigations into the alleged offences by the Petitioner are yet to be completed and therefore the instant application is premature.
18. It was further contended that the application is devoid of any merit, legal reasoning or backing and that the Applicant has failed to demonstrate how his rights will be infringed upon or any violations and damages suffered by the alleged infringement.

Preliminary issue

19. No petition has been filed in this matter as should be the procedure stated under Rules 4 and 10 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.
20. The question is whether the court can overlook this apparent mandatory requirement of commencing proceedings for the enforcement of constitutional rights.
21. The procedure prescribed is that of commencing proceedings through a formal petition. The format is also prescribed and the basic content as well.
22. Notwithstanding these clear provisions, the Applicant who has the advantage of legal counsel opted to process his claim through a Chamber summons. No specific reason has been advanced by the Applicants for this approach.
23. I am aware that this court may under Rule 10(3) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and in appropriate instances, invoke the epistolary jurisdiction and accept even an oral application, letter or other formal documentation which discloses violation or denial of rights. The epistolary jurisdiction should however, in my view, be invoked in matters concerning public interest litigation and where a party does not have the benefit of legal counsel. I gather much support for my view from the case of **People's Union of Democratic Rights and Others v Union of India and Others [1982] AIR 1473**.
24. **In the instant case, the Applicant is represented. The enforcement of rights herein is more horizontal and private than vertical and public. There is no reason to overlook the basic requirement that the proceedings ought to have been commenced by way of a petition, notwithstanding the provisions of Article 159 of the Constitution which calls for deference to substantive matters rather than procedural technicalities.**
25. **Besides, I am also not convinced that the Applicant will be unduly prejudiced as the application could be made within the civil claim already filed against the print media houses.**
26. **Assuming that I am wrong and that the application ought to be considered on its merits, then I must point out that in the enforcement of Article 35 rights an Applicant needs to**

satisfy the court that he requires the information he claims he has been denied access to. He also needs to satisfy the court that such information is for the purpose of enabling him enjoy or protect another fundamental freedom or right. Finally, he needs to satisfy the court that he has demanded for the information from the person holding the same and it has still not been availed. These principles were clearly laid down in the case of *Nairobi Law Monthly v- Kenya Electricity Generating Co & Others* [2012]eKLR.

27. The right to access information is critical hence its recognition by various international conventions but the parameters of its enforcement are clear and ought to be strictly followed. It would be appropriate if the Applicant satisfied the requirements laid out above. In particular, there is no evidence that the information has ever been demanded from the Respondents. There is even no allegation that such a demand has ever been made. I would have in any event dismissed the claim even if it had been commenced by way of Petition and if the evidence availed was limited to what is now before me.
28. For the avoidance of doubts, information comes in multiples and nothing shall impede or bar the Applicant from filing a fresh petition if he so deems.
29. The result is that the application is struck out for want of competency as to form and for being an abuse of the court process. There will however be no order as to costs.

Dated, signed and delivered at Nairobi this 29th day February, 2016

J.L.ONGUTO

JUDGE