



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

PETITION NO. 2 OF 2014

KEVIN MUCHEMI.....PETITIONER

VERSUS

HON ATTORNEY GENERAL.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

CHIEF MAGISTRATE, NYERI.....3RD RESPONDENT

JUDGMENT

The petitioner was charged in **Nyeri Chief Magistrates’ Court Criminal Case No. 497 of 2013** with the offence of cultivating and possessing cannabis contrary to **section 3(2)(a) and 6(1) of the Narcotic Drugs and Psychotropic Substances (Control) Act, Cap 245**. It is not clear from his petition the exact date he was charged in court but it would appear to be somewhere around early July, 2013. A year later, more particularly on 3rd June, 2014, he filed this petition in which he sought several prayers which I have understood to be as follows:-

- a. A declaration that the charges in the criminal case against him are unconstitutional and ought to be quashed;
- b. A declaration that all the provisions relating to cannabis in the Narcotic Drugs and Psychotropic Substances Act violate his fundamental rights and freedoms, are unconstitutional and ought to be annulled;
- c. An order authorising the petitioner to conduct scientific research on cannabis in pursuit of sustainable development as provided for under **article 10(2) (d) of the Constitution**; and
- d. Protection of the petitioner’s ‘naturalistic religion and culture’ on behalf of all ‘naturalists’ in Kenya.

The petitioner invoked at least twenty eight articles of the Constitution in pursuit of his petition; in particular, he cited articles **2(1) (2) (3), 3(1) (2),8,10 (1) (2),11 (1) (2) (3),12 (1),19 (1) (2) (3),20 (1) (2), 21(1) (2) (3), 25 (a) (b), 27 (1) (2) (4), 28, 29 (a) (b), 27(1) (2) (4), 28,29 (a) (b) (c) (d) (e) (f), 31 (a) (b),32 (1) (2) (3) (4), 33 (1), 35 (2), 40 21 (1) (2)(3),24 (1) (2) (3), 25 (a) (b), 27 (1) (2) (4), 28, 29 (a) (b) (c) (d) (e) (f), 31(a) (b) (c),32 (1) (2) (3) (4),33 (1),35(2), 40(2) (3) (5), 42, 43(1) (a),44(1),47(1)(2),50 (1) (2) (a) (b) (k) (4),56,69(1) (2), 258, 260 and 262 of the **Constitution**. The petitioner also invoked**

section 7(1) (2) of the 6th Schedule to the Constitution.

In the petition, the petitioner described himself as a horticultural scientist and a manager who grows various crops that include bhang or cannabis. According to him, this particular crop is an indigenous multipurpose vegetable; for instance, it can be consumed as food, it is also a cure for various illnesses and generally it is economically and environmentally beneficial.

As if to demonstrate how valuable this particular plant is to him, this is how the petitioner described it in parts of his petition.

40. Cannabis produces high quality paper and matures in a few months, hence, and considering the fact that the tree take (sic) years to mature, cannabis offers the best solution in achieving a minimum of ten per cent tree cover in Kenya by replacing the trees used in paper industry, a national obligation duly established in the constitution. The high quality biodegradable paper from cannabis would replace polythene for packaging; hence eliminate polythene that is causing havoc to the environment, one of the obligations set in the Constitution.

41. Cannabis contains high quality fibre which can be processed in textile industries to produce a variety of products, including cloths, carpets, blankets, towels , curtains, ropes, roofing materials, and so on, hence employment for many Kenyans at different production levels. Cannabis contains oil in the seeds which can be extracted to make a range of cosmetics, for medicine and also as fuel energy, thereby providing more employment. This is set out in the Constitution as an obligation of the state.

42. Cannabis is an efficient carbon sink and also extracts toxic substances from the atmosphere as well as from the soil, therefore cannabis is crucial in fulfilling the obligations of the state relating to the environment.

43. Cannabis is food and herbal medicine for human and also feed for livestock.

Besides the importance he attached to this particular crop, the petitioner contended that he earned an average of Kshs 500/= daily apparently from selling it.

The law enforcement agencies were not so amused by what they thought was the petitioner's weird passion; they instead saw an illegality in the petitioner's cultivation, consumption and sale of cannabis. In particular, they thought that the petitioner's venture amounted to a criminal offence for which the petitioner was liable under **sections 3(2) and 6(1) of the Narcotic Drugs and Psychotropic Substances (Control) Act**. It is for this reason that the petitioner was arrested and charged accordingly.

While opposing the petition, the respondents agreed with the petitioner that indeed he was arrested and charged as alleged; however, contrary to the petitioner's allegations, they contended that both the charge and the ensuing proceedings against him in the magistrates' court were regular, legal and in any event, constitutional. In their respective replying affidavits opposing the petition, they denied the existence of any organisation known as 'naturalistic religion and culture' to which the petitioner is alleged to subscribe. If it existed, so the respondents deposed, such an organisation was illegal and its alleged activities of scientific research were inconsistent with the Constitution.

It was the respondents' case that the petitioner's arrest by police officers was not only consistent with the powers and duties of the police as stipulated in **section 51 of the National Police Service Act, Cap. 84**, but also that his subsequent prosecution in court by the 2nd respondent had a statutory backing in the **Office of the Director of Public Prosecutions Act, 2013**. Further, the charges against the petitioner were properly founded in the **Narcotic Drugs and Psychotropic Substances Act**.

The respondents also urged that the petitioner's petition was untenable for the reason that the petitioner had not in any way demonstrated how any of the his constitutional rights had been violated when he could

not demonstrate that he was authorised to procure or advance what he referred to as ‘scientific research and naturalistic religion and culture’ whose mainstay was cannabis.

Both the petitioner and the respondents agreed to have the petition disposed of by way of written submissions; I have considered those submissions and noted that parties have largely reiterated the depositions made in their respective affidavits. As noted the petitioner does not deny that he grows and supplies cannabis; as a matter of fact, he admitted that several rolls of this drug were found in his house at the time of his arrest. The respondents on the other hand do not dispute that the petitioner was arrested and charged for the offence of cultivation and possession of cannabis. The material facts are thus not in contest; the only point of departure is the constitutionality of the law that proscribes and criminalises the cultivation or possession of cannabis which is the **Narcotic Drugs and Psychotropic Substances Act**. While the petitioner’s position is that it is unconstitutional to the extent that it proscribes the cultivation or possession of cannabis, the respondents are of contrary view; their position is that the petitioner’s activities offends the **Narcotic Drugs and Psychotropic Substances Act** and even the Constitution itself. It is necessary at this juncture to consider this Act in some detail.

The preamble to the Act provides that it is an **“Act of Parliament to make provision with respect to the control of the possession of, and trafficking in, narcotic drugs and psychotropic substances and cultivation of certain plants; to provide for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs and psychotropic substances and for connected purposes.”**

It is apparent from this preamble that the possession of or trafficking in drugs and psychotropic substances is subject to the control of this Act; also controlled is the cultivation of certain plants from which drugs or psychotropic substances are derived. The drugs and psychotropic substances the possession and trafficking of which are controlled by the Act are respectively listed in the 5th and 6th Schedules to the Act; cannabis is listed in the 5th schedule as amongst the drugs that are subject to this control. This particular drug is defined in **section 2** of the Act to mean, **“the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by tops) from which the resin has not been extracted, by whatever name they may be designated”**. The same section defines ‘cannabis plant’ as **“any plant of the genus cannabis by whatever name called and includes any part of that plant”**; cannabis plant is listed as a ‘prohibited plant’ in the **3rd Schedule** to the Act.

Possession of and trafficking in cannabis, amongst other drugs listed in the 5th Schedule, is prohibited under **Part II** of the Act; according to **section 3 (1) and (2)** thereof, it is a criminal offence to possess or traffic in cannabis. That particular section reads:-

3. Penalty for possession of narcotic drugs, etc.

(1) Subject to subsection (3), any person who has in his possession any narcotic drug or psychotropic substance shall be guilty of an offence.

(2) A person guilty of an offence under subsection (1) shall be liable—

(a) in respect of cannabis, where the person satisfies the court that the cannabis was intended solely for his own consumption, to imprisonment for ten years and in every other case to imprisonment for twenty years;

Apart from criminalising possession of and trafficking in drugs, the Act also prohibits the cultivation of prohibited plants which, as noted, includes cannabis plant; this is so expressed in **Section 6** of the Act which states:-

6. Penalty for cultivation of certain plants

Any person who—

(a) cultivates any prohibited plant; or

(b) being the owner, occupier or concerned in the management of any premises, permits the premises to be used for the purpose of the cultivation, gathering or production of any prohibited plant, shall be guilty of an offence and liable to a fine of two hundred and fifty thousand and shillings or three times the market value of the prohibited plant, whichever is the greater, or to imprisonment for a term not exceeding twenty years or to both such fine and imprisonment.

It is admitted in the petitioner's own pleadings, that he does not only grow or cultivate cannabis plant but that he also sells it. He also admitted that several rolls of cannabis were found in his house at the time of his arrest and thus he was in possession of the drug as understood under **section 3(1)** of the Act. In these apparent admissions, the petitioner paints himself as a person who, at the material time, cultivated, trafficked in and possessed cannabis; subject to the prosecution proving its case against him in the criminal trial, the petitioner would be criminally liable under **section 3(1) (2)** and **section 6(a)** and **(b)** of the Act.

The petitioner does not dispute the fact that the cultivation, possession of and trafficking in narcotic drugs such as cannabis is controlled and in certain instances criminalised; his major bone of contention, as I understand him, is that the control and the criminalisation of these activities are inconsistent with what he thinks are his constitutional rights to enjoy and research on the perceived benefits of cannabis or its plant.

I have read the entire **Bill of Rights** in **Chapter IV** of the Constitution and in my humble view, none of the rights enshrined in that part of the Constitution suggests that an individual is guaranteed the right to either cultivate, use or traffic in cannabis. It is only in the Act itself that limited use of the drug is permitted and accordingly specifies instances where one may be exempted from the provisions of **section 3(1)** and **(2)** of the Act which as noted, criminalise and penalise the possession of narcotic drugs such as cannabis. **Section 3(3)** is particular that:-

(3) Subsection (1) shall not apply to—

(a) a person who has possession of the narcotic drug or psychotropic substance under a licence issued pursuant to section 16 permitting him to have possession of the narcotic drug or psychotropic substance; or

(b) a medical practitioner, dentist, veterinary surgeon or registered pharmacist who is in possession of a narcotic drug or psychotropic substance for any medical purposes; or

(c) a person who possesses the narcotic drug or psychotropic substance for medical purposes from, or pursuant to a prescription of, a medical practitioner, dentist or veterinary surgeon; or

(d) a person authorized under the regulations to be in possession of the narcotic drug or psychotropic substance.

The petitioner has not demonstrated that his case falls under any of these exemptions; he has not shown that he is licensed to possess cannabis; or that he is a medical practitioner, a dentist, a veterinary surgeon or a registered pharmacist who is in possession of the drug for medical purposes. Neither has he demonstrated that he possessed the drug as a prescription by a medical practitioner, a dentist or a veterinary surgeon nor that he is a person authorised to be in possession of the narcotic drug. The requirement for a licence or some form of authorisation cannot be said to infringe on the right of any person who desires to possess a narcotic drug. The restriction of possession of that drug to persons of particular professions for medical purposes or the restriction of its use to a particular purpose does not also infringe one's constitutional rights. Without belabouring the point, the petitioner has not demonstrated how his fundamental rights and freedoms have been violated or infringed by the provisions of the **Narcotic Drugs and Psychotropic Substances (Control) Act**.

There is no doubt that unregulated consumption of any drug, let alone a narcotic drug, is harmful not only to one's health but also to the socio-economic development of any society; it is partly for this reason that the legislature came up with **Narcotic Drugs and Psychotropic Substances (Control) Act**. As noted in its preamble, its regulatory regime is targeted towards controlling the possession of, and trafficking in, narcotic drugs and psychotropic substances and cultivation of particular plants from which such drugs or psychotropic substances and which are potentially destructive are derived. I do not find anything in the petitioner's petition that would be allowed to overshadow the otherwise noble object of this Act; the petitioner has neither demonstrated that his unlimited access to cannabis is a constitutional right nor that even if it was, it is beyond any form of limitation.

While emphasising the importance of the object and effect of a statute in evaluating its constitutionality the court in **Queen versus Big M. Drug Mart Limited (1985) 1SCR 295**, said:-

“...both purpose and effects are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's objects and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislations object and thus the validity.”

As far as the **Narcotic Drugs and Psychotropic Substances (Control) Act** is concerned, it cannot be said with any measure of persuasion, at least it is not apparent in the petition, that the assailed provisions of the Act are unconstitutional either in purpose or in effect as to invalidate the Act or any of its provisions.

My assessment of the petitioner's petition is that it has not measured up to the threshold set out in **Anarita Karimi versus Attorney General (1979) KLR 154 (No.1)** in which the judges (Trevelyan and Hancox JJ, as they then were) reiterated the need for precision in a petitioner setting out, *inter alia*, the manner in which the provisions of the Constitution have been infringed in relation to his rights.

We would however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to have been infringed. (See page 156).

In any event, any of the rights under the Bill of Rights can be limited by law to the extent that that the limitation is reasonable and justifiable in an open and democratic society. According to article **24(1) of the Constitution**, a right may be limited upon considering such factors as the nature of the right or fundamental freedom; the importance and purpose of the limitation; the need to ensure that the enjoyment of rights and fundamental freedoms by the individual does not prejudice the rights and fundamental freedoms of others; and the relation between the limitation and its purpose and whether there are less restrictive means to achieve that purpose. Even if the petitioner was to stretch to the greatest extent possible what he thinks are his constitutional rights to include, cultivation, possession, use of and trafficking in cannabis, those rights would not be absolute since their enjoyment is fettered by the Constitution itself and also by the Act.

In the final analysis, I am satisfied that contrary to the petitioner's prayers, the charges against him in the **Chief Magistrates' Court Criminal Case No. 497 of 2013** are regular and constitutional; whether the prosecution will ultimately prove its case against the petitioner beyond reasonable doubt is a question that I would rather leave to the trial court. I am equally persuaded that the impugned provisions of the **Narcotic Drugs and Psychotropic Substances (Control) Act** are constitutional.

As for the prayer for authority to conduct the so called scientific research on cannabis and sustainable development, it has not been demonstrated that the petitioner has hitherto made any efforts to seek such

authorisation or licence from the Board established under **section 16** of the Act and whose functions include issue of licences to applicants who merit such licences to deal in narcotic drugs and psychotropic substances. Neither can this court order for 'protection of naturalistic religion and culture' whose existence or registration has not been established. The petitioner's petition is, in my humble view, not merited. It is hereby dismissed. Parties will bear their own respective costs.

Dated, signed and delivered in open court this 12th day of February, 2016.

Ngaah Jairus

JUDGE