



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**  
**PETITION NO. 444 OF 2015**

**ALOISE ONYANGO ODHIAMBO.....PETITIONER**

**VERSUS**

**MINISTRY OF IMMIGRATION.....1<sup>ST</sup> RESPONDENT**

**PRINCIPAL REGISTRAR OF PERSONS.....2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. Aloise Onyango Odhiambo, the Petitioner herein, is a convict. He is currently incarcerated at Kenya's only maximum prison. He is serving a life sentence. He states that he deals with and litigates on matters of public interest as well as violations of fundamental freedoms and rights of fellow inmates.

2. The Petitioner has brought this Petition alleging that the Respondents have violated the provisions of Article 12(1) of the Constitution by failing to register and issue inmates who are Kenyan citizens with identification documents.

3. The Petitioner seeks orders to compel the Respondents to issue all Kenyan citizens currently in detention as lawful prisoners with registration and identification documents. Further the Petitioner also seeks orders to compel the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to open registration offices or centres in all the 106 prisons in Kenya. Finally an order is also sought to have the 3<sup>rd</sup> Respondent advise the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on how to issue inmates with identification cards.

4. The Petition is resisted.

**Facts**

5. The facts are scanty.

6. The Petition says little. The affidavit in support of the Petition, likewise says almost nothing in so far as the facts are concerned.

7. The Petitioner's affidavit however states that contrary to Articles 12 and 13 of the Constitution the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have failed to register and issue persons detained or held in prison with identification cards.

8. The Respondents however resist this position of fact as stated by the Petitioner.

### **The Petitioner's case**

9. The Petitioner's case which was orally urged by the Petitioner himself is that every Kenyan citizen is entitled to a Kenyan passport and any other registration or identification documents to be issued by the state. The Petitioner contends that the 1<sup>st</sup> Respondent is a State organ enjoined to ensure that identification documents are issued to all Kenyans. The Petitioner states further that it is the duty of the 2<sup>nd</sup> Respondent to ensure that identification documents are issued to all Kenyan's including the prison inmates.

10. It was the Petitioner's case that in failing to open and establish a registration center in each of Kenya's prisons, the Respondents had failed in and abdicated their duties. In this regard too, the Petitioner contends that the 3<sup>rd</sup> Respondent has failed in his duties to advise the 1<sup>st</sup> and 2<sup>nd</sup> Respondents appropriately.

### **The Respondents' case**

11. The Respondents' case is simple and straight forward.

12. The Respondents state that there is no violation at all of the Constitution and that the Petitioner has not proven his case. The Respondents also state that there is no evidence of the alleged violations.

### **Arguments in court**

13. The Petition was urged through oral submissions made by the Petitioner and Ms. Anne Mwangi who appeared for the Respondents.

#### *Petitioner's submissions*

14. The Petitioner's arguments were tailored on the basis that several citizens were suffering. The Petitioner argued that he had filed the Petition on behalf of the said citizens who were all serving jail terms. The Petitioner further argued that the violations would only end once the Respondents opened registration centers within the 106 prisons in Kenya. The Petitioner also admitted that the Respondents' officers occasionally go to the prisons to register the inmates but at a fee.

#### *Respondents' submissions*

15. Ms. Ann Mwangi's brief submissions were to the effect that the Petitioner had failed to prove his case. Ms. Mwangi added that the orders sought were not tenable and that the fact that the Petitioner had admitted that the Respondents offices occasionally visit the prisons to register inmates was enough to demonstrate that there was no violation.

### **Analysis and Determination**

16. The sole question in this Petition is whether the Respondents have violated the rights of a cadre or group of Kenyans known as prison inmates in so far as the issuances of identification documents are concerned. The Respondents state that the Petitioner has not satisfied the requisite burden of establishing violation of constitutional rights.

#### *Burden of prove*

17. The burden of prove in constitutional litigation, like in ordinary civil litigation, lies upon the person who asserts the violation to show on a balance of probabilities that there has been an actual violation of any specific right(s). This position of the law has been clearly established in a series of cases including **Anarita Karimi Njeru –v- Republic [1979] KLR 154** as well as **Matiba –v- Attorney General [1980] KLR 666**.

18. In **Githunguri Dairy Farmers Co-operative Society Ltd –v- The Attorney General & 2 Others HCCP No. 257 of 2015 [2016] eKLR**, this court stated as follows:

*“The complainant has to satisfy an evidential burden to show or establish that the specific right existed and that it had been restricted or violated and then the burden fell upon the State to prove on a balance of probabilities that such violation or alleged violation was secured by the constitution”*. (emphasis added)

19. As was also stated by Gubbay C.J in the case of **Catholic Commission for Justice & Peace in Zimbabwe –v- Attorney General [1993] 2 LRC (Const) 279 at 290**

*“I consider that the burden of proof that a fundamental right, of whatever nature has been breached is on he who asserts it...[it] is essentially a matter of fact and some evidence would have to be adduced to support the contention. The Respondent is not obliged to do anything until a case is made out which requires to be met”*

20. The Respondents have alleged that the evidential burden has not been satisfied to the required standard or at all.

21. There is no doubt that there exists a specific right under the Constitution that Kenyan citizens are entitled to be issued with Kenyan passports and other identification documents. Article 12 of the Constitution states as follows:

**12. (1) Every citizen is entitled to —**

**(a) the rights, privileges and benefits of citizenship, subject to the limits provided or permitted by this Constitution; and**

**(b) a Kenyan passport and any document of registration or identification issued by the State to citizens.**

**(2) A passport or other document referred to in clause (1) (b) may be denied, suspended or confiscated only in accordance with an Act of Parliament that satisfies the criteria referred to in Article 24.**

22. With a view to promoting Article 12, Parliament has enacted and or amended various statutes. Of particular relevance are the **Kenya Citizen and Foreign Nationals Management Service Act (Cap 174)**, the **Kenya Citizenship and Immigration Act (Cap 172)** and the **Registration of Persons Act (Cap 107)**. These statutes provide for the medium and modes of acquiring not only citizenship but also the documents identified under Article 12 of the Constitution. The statutes also provide for instances when a passport or other document of registration or identification may be denied, suspended or otherwise confiscated. Thus far the statutes have not met any legal rebuke or challenge. The statutes must be taken to be in constitutional and also in compliance with the provisions of Article 24 of the Constitution as to the criteria when various rights and freedoms may be limited, in this instance the right of a citizen to acquire a passport or an identification or registration document.

23. The statutory framework is certainly in place and provision has been made as to when and where as well as how a citizen may apply for the documents referred to under Article 12 of the Constitution.

24. Controversy in this case however emerges when the Petitioner contends that this right (the right of a

citizen to acquire a passport and an identification or registration document) in so far as prisoners in Kenya are concerned has been violated and the Respondents state otherwise.

25. There is certainly little doubt that the statutes and the regulations thereunder provide for application for passports and identification/registration documents to be made at designated stations or registration centers. It is made in writing to a registration officer and the applicant has to present himself to the officer. Rule 4 of the Registration of Persons Rules made under the Registration of Persons Act, expect applicant to make the application to the registration officer at his place of domicile or place of ordinary residence. The application must be made within ninety days of attaining the age of eighteen. In prison, movements are restricted and therefore it is not possible for them to attend the registration centers or stations. The Petitioners states that as the application can not be made outside, the rights of the inmates who turn eighteen (18) are impinged. I would state that the essence of imprisonment which is lawful and constitutional is to deny one freedom of movement.

26. The Petitioner has however also not availed any evidence to show that the Respondents have curtailed the prisoners' rights to apply for passports and or identification documents or registration. The allegation was general in both the Petition as well as the supporting affidavit and even though the Petition proceeded as undefended in relation to facts, the factual position tendered by the Petitioner does not in my view meet the threshold. I state so further on the reason that the Petitioner also contradicted himself when he submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' officers often attend to prison-inmates at the prisons but that the prisoners are so inconvenienced and are always asked to pay a fee.

27. The Petitioner in my view has not proven on a balance or preponderance of facts that any prisoners' rights to attain a passport or identification document have been violated. The evidence was completely wanting. On the basis of the failure by the Petitioner to discharge the evidential burden, the Petition should fail.

28. The Petitioner also sought an order that the Respondents do open up offices within the 106 prison precincts in Kenya.

29. First, it is not lost to the court that prison areas are restricted and only Government departments and organs with assignments and compulsions related to prison work ought to be allowed access to prison precincts. Secondly, it is also not lost to the court that most prisoners who are yet to attain the age of 18, which is the majority age as well as the legal registration age, are not detained in such facilities. Rather they belong to and are expected to be detained in Borstal institutions or juvenile remand centers. It would be unreasonable to expect the State to expend resources in setting up registration centers in prisons where 18 year olds are unlikely to be found. I would consequently not grant such orders even if the view taken was that establishment of such registration centers' would assist some prisoners in realizing their right under Article 12 of the Constitution. The occasional visits by the Respondents' officers should certainly suffice and alleviate any inconveniences for now.

30. Finally, with regard to the orders sought as against the 3<sup>rd</sup> Respondent, my view is that the Office of the Attorney General as established under Article 156 of the Constitution is an independent office which exercises the functions of that office independently. It is not for the court to proffer advice to the Attorney General on how and when to act.

## **Conclusion**

31. It is evident that this Petition must be dismissed for want of evidence. It is also evident that the orders sought are not tenable or reasonable in the circumstances.

32. The Petition is consequently dismissed. There will however be no order as to costs.

**Dated, signed and delivered at Nairobi this 30<sup>th</sup> day March, 2016**

***J.L.ONGUTO***

JUDGE