



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CONSTITUTION PETITION NO. 8 F 2014

E H K (Minor suing through next of kin

M M K.....PETITONER

=VERSUS=

THE ATTORNEY GENERAL..... RESPONDENT

AND

ABDULRAZAK MUHSIN SHERIFF.....INTERESTED PARTY

R U L I N G

Introduction:

1. What is before me is the Petitioner's Application dated 28th October 2014 in which the Petitioner, a minor, is seeking for the following orders;

(a) THAT directions be given as to the hearing of this Petition whether to refer the Petition to the Chief Justice for appointment of a bench or the same be heard by a single judge.

(b) Costs to be paid

The Petitioner's/Applicant's case:

2. The Petitioner's father deponed that the Petitioner is a new born minor child who is now six months old; that ELC Case NO.104 of 2013 was filed long before the Petitioner was born and that the Petitioner is not a party to the said suit.

3. It is the Petitioner's case that although her mother was committed to civil jail for a term of three months, she cannot be separated from her mother at her age because she is still breast feeding.

4. The petitioner's father deponed that the innocent petitioner ought not to be subjected to a jail term alongside adult and the Petitioner's constitutional rights have been violated.

The Interested Party's case:

5. The Interested Party filed his Grounds of Opposition and a Replying Affidavit in which he averred that the admission of the Petitioner to jail is at the instance of the mother who has not been made a party to the Petition; that in the alternative, the Petitioner's father ought to have made alternative arrangements that would be in the best interest of the Petitioner and that the admission of the Petitioner to jail so as to be with her mother is in the best interest of the Petitioner.

6. The Interested Party finally averred that the Petitioner's mother was cited for contempt pursuant to Section 63(c) of the Civil Procedure Act and Order 40 Rule 3 of the Civil Procedure Rules and yet it has not been pleaded nor proved that the said provisions are unconstitutional.

Submissions:

7. The parties filed their respective submissions.

8. The Petitioner's advocate submitted that the Petitioner has been subjected to cruel and hazardous environment contrary to Article 53(1) (f) and (2) of the Constitution; that the Petitioner has further been subjected to both physical and psychological torture and that this court should stay the orders committing the Petitioner's mother to civil jail.

9. The Interested Party's advocate submitted that the Petitioner was admitted to jail pursuant to the provisions of Section 30 (4) of the Prisons Act; that there is nothing pleaded to suggest that the provision is unconstitutional in itself or in its application in relation to the Petitioner and that each prison has a medical officer in charge of the prison.

10. Counsel submitted that there is no suggestion that the medical officer in charge of the Women Prison in Malindi has in any way breached the rights of the infant and that if the prison is not providing the infant with any particular service that the parents feels she needs, then they should have raised such concerns.

11. On the issue as to whether the matter should be referred to the Chief Justice under Article 165(4), counsel submitted that the question raised in the Petition is simple and straight forward.

12. Counsel submitted that the Petition has not set out the grounds in his application in support of the prayer to refer the matter to the Chief Justice; that in any event, the decision whether or not to refer the matter to the Chief Justice is discretionary based on whether the judge is convinced that a substantial matter of law is raised in the Petition. Counsel relied on the case of County Government of Meru Vs Ethics and Anti Corruption commission (2014) eKLR to buttress his argument.

Analysis and findings:

13. The present application is seeking for a stay of the orders committing the Petitioner's mother to jail in Malindi ELC Number 104 of 2013 and for an order that the Petition be referred to the Chief Justice for the empaneling of a bench of three judges.

14. On 19th March 2014, this Court committed the Petitioner's mother to serve a jail term of three months for disobeying the orders of the court.

15. However, it was not until 30th September, 2014 that the Petitioner's mother was arrested and commenced her sentence. By that time, the Petitioner was about six months old.

16. The prayer for a stay of execution of the jail sentence is now spent considering that the Petitioner's mother has already served her sentence.

17. I shall however address the issue for academic purpose.

18. According to the Petition, the Petitioner is inseparable from her mother due to her age and immediate

needs; that the Petitioner's mother has been convicted and sentenced to serve a three month's jail in Malindi ELC Case Number 104 of 2013 and that the Petitioner has thus found herself in jail serving a three month's sentence alongside her mother.

19. The Petitioner, through her father, has further averred in the Petition that the Petitioner has been subjected to both physical and psychological torture by remaining in jail and that the Petitioner's right not to be detained and if detained should be detained separately from adults has been infringed.

20. The Petitioner's mother was committed to civil jail pursuant to the provisions of Section 63(a) of the Civil Procedure Rules and Order 40 Rules 3 of the Civil Procedure Rules.

21. The said sections of the law should be read alongside Section 30(4) of the Prisons Act which provides as follows:

“Subject to such conditions, as may be prescribed, the infant child of a female prisoner may be received into prison with its mother and may be supplied with clothing and necessities at public expense provided that such a child shall be permitted to remain in prison until it attains the age of four years or until arrangement for its proper care outside prison are concluded, whichever shall be the earlier.”

22. The Petitioner's father has not pleaded now the above provisions of the law infringes on the Petitioner's rights.

23. The Petitioner's prayers in the Petition that her stay in jail is a violation of her fundamental rights is not supported by the constitutional provisions or any other law.

24. Having not shown, prima facie, the unconstitutionality of Section 30(4) of the Prisons Act, I find that the Petitioner has not shown that she has a prima facie case to warrant the grant of conservatory orders.

25. On the issue as to whether the Petition should be referred to the Chief Justice to impanel a bench of three judges, the same is not supported at all.

26. The Application does not have any ground to support the assertion that this court should exercise its discretion to refer the matter to the Chief Justice pursuant to Article 165(4) of the Constitution.

27. Indeed, the Petitioner's advocate did not address me on this issue at all in his submissions.

28. In any event, in the absence of an explanation by the Petitioner on how her constitutional rights have been infringed and the failure to show how the provisions of the Prison's Act are unconstitutional, if at all, I find that prima facie, there is no substantial point of law which has been raised in the Petition to warrant reference of the Petition to the Chief Justice.

29. For those reasons, I dismiss the Application dated 28th October 2014 with costs

Dated and delivered in Malindi this 13th day of February, 2015.

O. A. Angote

Judge