



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO. 33 OF 2015

BONIFACE MWANGIPETITIONER

VERSUS

HON RESIDENT MAGISTRATE'S

COURT AT MILIMANI.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT

THE ATTORNEY GENERAL3RD RESPONDENT

JUDGMENT

Introduction

1. By a petition dated 22nd January, 2015 and supported by the affidavit of Boniface Mwangi, the petitioner, the Court is called upon to grant to the petitioner the following orders:
 - a. A declaration that the 1st respondent's decision to order forfeiture of the petitioners cash bail without being heard was a violation of the petitioner's constitutional rights.*
 - b. A declaration that forfeiture of cash bail before the accused is heard is unfair and unconstitutional.*
 - c. The forfeited cash bail is reinstable and earlier are he refunded to the petitioners (sic).*
 - d. An order for damages.*
 - e. Costs of this petition be borne by the respondents.*
2. The respondents oppose the petition. The 1st and 3rd respondents filed a replying affidavit sworn by Ms. E. Riany, (RM) to which affidavit the proceedings before the trial court were annexed, while the 2nd respondent filed grounds of opposition dated 2nd March, 2015.
3. On 9th February, 2015, the Court gave direction on the hearing of the petition and gave the parties timelines within which to file written submissions. The submissions were duly filed and the

petition was canvassed before me on 10th June 2015.

The Petitioner's Case

4. The petitioner contends that he was charged in **Nairobi Traffic Case No. 22832 of 2014** on 24th August 2014. He pleaded not guilty and was released on a cash bail of Kshs2,000,000. On 28th October, 2014, when the case came up for hearing, he was late in coming to court. The case was called in his absence and the court made an order for warrants of arrest as well as the forfeiture of the cash bail.
5. On 11th November, 2014, the petitioner and his advocate attended Court and made an application for the variation of the orders of 28th October, 2014. The Court lifted the warrants of arrest but declined to reinstate the cash bail as the same had been actually forfeited on 7th November 2014. The petitioner was thus forced to provide fresh cash bail. He contends that the order of forfeiture is unconstitutional as it violates his rights under Articles 27, 29, 47 and 50 of the Constitution.
6. The petitioner further contends that again on 23rd January, 2015, the Court made a further order forfeiting his cash bail and issuing fresh warrants of arrest. The order for his arrest were, however, vacated on the petitioner's application.
7. The petitioner complains that prior to the order for forfeiture, he was entitled to a hearing and that he was denied that right. He expresses apprehension that if warrants of arrest are executed, he shall suffer in that he will be arrested, fail to go to work and loss the job on account of absence.

The 1st and 3rd Respondents' Case

8. In the replying affidavit sworn on 24th March, 2015, the Ms. Riany gives the details of the happenings in the trial Court and annexes the charge sheet as well as the handwritten proceedings. She deposes that the petitioner deliberately failed to attend Court in disrespect to the terms of his release on cash bail. She also sets out in her affidavit the repeated failure by the petitioner to attend Court right from the day of plea taking, during the first date for hearing and again on 13th January, 2015. On the three occasions, namely the 29th of August 2014, 28th October, 2014 and 13th January, 2015, the Court ordered issuance of warrants of arrest and forfeiture of cash bail due to the absence of the petitioner. However on the first and the last occasions of the petitioner's absence, applications were made and the Court set aside the orders against the petitioner. The 1st respondent explains that when the application to recall the warrants of arrest and reinstatement of the cash bail was made on the 11th November, 2014, the forfeiture had been effected on 5th November, 2015 and could not be reversed.
9. The 1st respondent thus contends that the Court acted within the law and denies violating the petitioner's rights under the Constitution.

The 2nd Respondent's Case

10. The 2nd respondent, the Director of Public Prosecutions, (DPP) filed grounds of opposition on points of law dated 2nd March, 2015, It contends, first, that the petition seeks to prevent the 1st respondent from executing its constitutional mandate; that no evidence has been adduced to show that the 1st respondent had exceeded its legal powers; that the petitioner's remedy lay in an appeal against the decision of the 1st respondent and that the petition, which lacks particularity on the specific rights alleged to have been violated, was without merit and an abuse of the Court process.

Analysis and Determination

11. Having read the parties' pleadings and submissions as well as the authorities relied on, I have isolated the following as the issues for determination:

- i. *Whether the 1st respondent acted within the law in forfeiting the petitioner's cash bail for failure to attend Court.*
- ii. *Whether the petitioner has demonstrated, to the requisite standard, a violation of his constitutional rights as alleged;*
- iii. *Whether a constitutional petition is the most suitable and convenient remedy available to the petitioner.*

Whether the 1st Respondent acted within the Law in forfeiting the Petitioner's Cash Bail for failure to attend Court

12. The gist of the petition and its only foundation is that prior to an order for forfeiture of his cash bail, the petitioner was entitled to be heard and that in ordering forfeiture prior to such hearing, the Court violated the petitioner's rights to equal treatment before the law under Article 27; right not to be subjected to torture in any way, whether physical or psychological, under article 29; right to fair administrative action under Article 47; right to be presumed innocent under Article 50 and the right to work and to work under favourable conditions under Articles 6, 7 and 8 of the International Convention on Civil and Political Rights.

13. A determination of this issue, which is at the core of the petition, is dependent on a consideration of the law applicable to bail and bond as a right of an accused person.

Constitutional and Legal Provisions on Bail

14. Article 49 (1)(h) guarantees to every arrested person the right to be released on bond or bail on reasonable conditions pending a charge or trial unless there are compelling reasons not to be released. Under section 123 of the Criminal Procedure Code, the Court is empowered to release an accused person, who is prepared at any stage of the trial or proceeding to appear before the Court, on bail. The bail or bond commands the accused person to attend before the Court on a particular day and time. As I understand the law, bail or bond is an undertaking to the Court by the accused person that in consideration of being released on bond or bail, he or she shall attend Court and be present as and when required to so appear before the Court until otherwise directed by the Court. The purpose of bond or bail is therefore to enforce the attendance of an accused person at trial.

15. If that be the purpose of bail, then the next question is what happens when the accused so bound to attend fails to attend Court. I am convinced that a Court is empowered and required to enforce attendance by the accused person not only to compel him to abide by his undertaking to attend Court but also as a way of controlling its own process. I am not persuaded that the Court is helpless in calling the accused to account on his promise to attend Court. It is thus evident that the Court acted in accordance with the law in ordering the forfeiture of the petitioner's bail.

Whether the Petitioner has Demonstrated Violation of His Constitutional Rights

16. It is now trite law that a party approaching the Court with a petition alleging violation or threatened violation of constitutional rights must demonstrate with a reasonable degree of precision, the rights alleged to have been violated or threatened with violation, and the manner of violation with respect to him - see **Anarita Karimi Njeru (Supra) and Trusted Society of Human Rights Alliance vs Attorney General & Others High Court Petition No. 229 of 2012**. The petitioner has alleged violation of Articles 27, 29, 47 and 50 of the Constitution. However, as demonstrated above, it is evident that the Court acted in accordance with the constitutional and legislative provisions with respect to bail. Consequently, the petitioner has not demonstrated a violation or threatened violation of his constitutional rights as alleged.

Whether a Constitutional Petition is the Most Suitable and Convenient Remedy Available to the petitioner.

17. Having determined the first issue as above, I believe the petition is really unsustainable. I will however, for the sake of completeness, address my mind to the last issue: whether a constitutional petition alleging violation of constitutional rights was the most appropriate remedy available to the petitioner in the circumstances of this case.
18. As has been held in several decisions in this and other courts, a resort to a court for a remedy by way of a constitutional petition must be a remedy of last resort if we are to maintain our Constitution as the supreme law to govern our social order. Indeed, it has been held in several decisions that where a process or procedure is provided in law, that process must be followed, as to convert every issue into a constitutional issue deserving adjudication under the constitutional jurisdiction is to undermine the importance of that process.

19. In **Kisii High Court Petition No. 3 of 2010 Peter Ochara Anam & 3 Others vs Constituency Development Fund Board & 3 Others (2011) eKLR** Asike – Makhandia J. (as he then was) stated:

“... of what use will be constitutional petitions or references if they are turned into a panaceas for all legal problems that the citizens of this Country may have or imagine? I don't think the Constitution was meant to replace statutes that provide remedies to those concerned.”

20. In that case, the Court was dealing with the question whether or not it was appropriate and permissible for a litigant to question the actions of a Member of Parliament and his Constituency Development Committee in executing projects by way of a petition rather than by a complaint to a dispute resolution mechanism established under an Act of Parliament, the Constituency Development Fund Act. The Court found that the litigant was bound to exhaust the alternative dispute resolution mechanism provided under the Act.

21. In the matter before me, the petitioner had a remedy by way of an appeal or revision under section 132 of the Criminal Procedure Code. He did not resort to that statutory remedy but opted to bring this petition that clearly seeks to address what procedure ought to have been or ought not to have been followed in ordering forfeiture of his cash bail. I hold the view that the remedy under the Criminal Procedure Code was not only efficient and sufficient but also the most appropriate recourse for the petitioner, but he chose to ignore it and file the present petition.

22. In **Ben Kipngeno & 6 Others vs Attorney General & Another (2007)eKLR**, the Court, when faced with similar circumstances, held that recourse to Court by way of a constitutional petition:

“...is not meant for every contravention falling under other statutes otherwise the EMC Act or any other procedure provided under other statute would be rendered useless if parties were to transfer every contravention into a constitutional issue“

23. I am persuaded that the grievance by the petition was and remains a simple and straight forward determination of whether or not the cognizance he gave should or should not have been forfeited. To determine that question, there exists a straight forward procedure under the statute. Granted that we shall only develop and entrench our Constitution by seeking its interpretation by the courts, it must, however, be appreciated that simple and straight forward problems demand simple and straight forward solutions. This court sitting as a constitutional and human rights court should not take it upon itself to collapse all known judicial processes into its realm. It shall not only be arrogating to itself that which does not belong to it but shall also be rendering other courts and processes irrelevant and unnecessary, a most undesirable development.

24. This view is in tandem with a series of decisions by this Court which discourage invocation of the constitutional process where there exist parallel or alternative statutory remedies. In **John Harun Mwau vs Peter Gastrow & 3 Others (2014) eKLR** the Court made the following observation:

“Courts will not normally consider a constitutional question unless the existence of a remedy depend on it; if a remedy is available to an applicant under some other legislative provision or some of the basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights.

It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be involved at all.”

25. In the result, and as is evident from the analysis and conclusions set out above, my determination of the three issues set out above is as follows:

- i. ***The 1st respondent, as the trial Court, was validly within the law when it ordered that the petitioner’s cash bail be forfeited after he failed to attend Court;***
- ii. ***The petitioner has not demonstrated a violation of his constitutional rights as alleged;***
- iii. ***There exists a remedy by way of an appeal or revision under section 132 of the Criminal Procedure Code, which renders the petitioner’s approach to the Court through this petition inappropriate and undesirable.***

26. In the circumstances, I am constrained to find that the present petition has no merit, and it is hereby dismissed but with no order as to costs.

Dated Delivered and Signed at Nairobi this 30th day of July 2015

MUMBI NGUGI

JUDGE

Mr. Ongoto instructed by the C. M. Ongoto & Co. Advocates for the petitioner.

Ms. Muchiri instructed by the State Law Office for the 1st and 3rd respondent.

Ms. Spira instructed by the Director of Public Prosecution for the 2nd respondent.