REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CONSTITUTIONAL PETITION NO. 6 OF 2012.

IN THE MATTER OF ARTICLES 22, 23, 24, 26, 27, 28, 32, 37, 39, 40, 42, 47, 50, 56 AND 63 (1), (2) (a), (b), (d) (i) (ii), (iii), 3, 4 AND 5 OF THE CONSTITUTION.

AND

IN THE MATTER OF SECTIONS 52 (1) F AS READ WITH SECTION 52 (2) OF THE FOREST (AMENDMENT) ACT NO. 7 OF 2007.

AND

IN THE MATTER OF CRIMINAL CASE NOS 220 OF 2009, 2201 OF 2009, 2177 OF 2009, 2197 OF 2009 AND 2199 OF 2009 AT THE CHIEF MAGISTRATE'S COURT AT KITALE.

AND

IN THE MATTER OF THE PROVISIONS OF UNIVERSAL DECLARATION OF HUMAN RIGHTS.

AND

IN THE MATTER OF THE UNITED NATIONS DECLARATION OF THE RIGHTS OF THE INDIGENOUS PEOPLES.

AND

IN THE MATTER OF ARTICLES 4, 5, 6, 7, 8, 13, 14, 15, 16, 25 AND 26 INTERNTIONAL LABOUR ORGANIZATION INDIGENOUS & TRIBAL PEOPLES CONVENTION (ILO) NO. 169 OF 1989.

AND

IN THE MATTER OF THE ARTICLES 6, 7, 8, 9, 14, 18 & 27 OF THE INTERNATIONAL CONVENTION ON CIVIL AND POLITICAL RIGHTS (ICCPR) OF 1976.

AND

IN THE MATTER OF ARTICLES 1, 2, 3, 17, 18, 19 & 20 OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS OF 1981.

AND

IN THE MATTER OF THE SENGWER PEOPLE AS THE INDIGENOUS INHABITANTS OF THE KAPOLET FOREST.

JAMES KAPTIPIN & 43 OTHERS :::::::::::::::::::::::::::::: PETITIONERS.

VERSUS

THE DIRECTOR FOREST)

THE CHIEF MAGISTRATE KITALE) :::::::::::::::::: RESPONDENTS.

HON. ATTORNEY GENERAL)

J U D G M E N T.

INTRODUCTION

1. The 44 petitioners claim to be from the Sengwer community, a community known to be hunters and gatherers. The community is said to be in West Pokot, Marakwet and Trans Nzoia Counties. In June, 2009 the petitioners were arrested by Kenya Forest Guards on allegations of cultivating in Kapolet Forest without permission from the Director of Forests or District Forest Officer. The petitioners were subsequently arraigned before the Chief Magistrates Court under five criminal cases namely Kitale Chief Magistrate Criminal Case Nos. 2200, 2201, 2177, 2197 and 2199 all of 2009.
2. On 24/10/2012, the petitioners filed a constitutional petition at Kitale High Court in which they sought the following reliefs:-

1. T***hat there be stay of proceedings of all criminal cases instituted in the Chief Magistrate Court at Kitale being case Nos. 2200 of 2009, 2201 of 2009, 2177 of 2009 and 2199 of 2009 pending the hearing and final determination of the constitutional petition.***
2. ***That there be a declaration that all the criminal cases being numbers 2200 of 2009, 2201 of 2009, 2177 of 2009, 2197 of 2009 and 2199 of 2009 at the Chief Magistrate's Court at Kitale are null and void and unconstitutional as they infringe, deny and violate the fundamental rights as enshrined in the provisions of the constitution of Kenya and other relevant international instruments thereof.***
3. ***That there be declaration that Kapolet Settlement Scheme established in 1997 being 3000 acres established in the year 1997 by the Government of Kenya as community land for the settlement of the Sengwer community as the indigenous peoples of Kapolet forest be allocated to the Sengwer community.***
4. ***That any other declaration which the court may deem suitable and fit to grant.***
5. ***That costs of this petition be borne by the respondent.***

3. The petition is based on the supporting affidavit of the first petitioner James Kaptipin who has the authority of the other 43 petitioners. The petition is also based on the supplementary affidavit sworn on 7/5/2013 and replying affidavit sworn on 6/3/2014.
4. On 25/10/2012 prayer one of the petitioners prayers was granted in that all the criminal charges facing the petitioners were stayed pending the hearing and determination of this petition.

PETITIONERS' CASE.

5. The petitioners contend that they are members of the Sengwer community, a community whose members are mainly hunters and gatherers who depend mainly on honey and bee keeping as their main source of livelihood. They contend that the community has been discriminated and harassed from their original habitat at Kapolet forest and that in 1997, the Government agreed to settle the Sengwer on 3000 acre parcel which was to be hived off Kapolet Forest. They contend that todate only 489 members have been settled on 747.60 hectares which is about 1846.57 acres. The

petitioners therefore contend that they should be allocated 466.97 hectares that is 1,153.41 acres to make it 3000 acres as agreed. The petitioners contend that those who were to benefit from Kapolet Settlement Scheme were to be identified by the local community leaders.

6. The petitioners contend that their arrest has subjected them to frustration, loss of time, finance and psychological trauma and hence violation of their constitutional rights. The petitioners contend that the cases have delayed and that the evidence adduced so far against them is insufficient and that in any case, they were arrested 40 kilometres away from Kapolet Forest.

RESPONDENTS' CASE.

7. The first respondent opposed the petition through grounds of opposition and replying affidavit sworn by Esther Keige on 14/2/2013. The second and third respondents opposed the petition through grounds of opposition filed in court on 27/1/2014. The first respondent contends that the criminal charges against the petitioners are properly before the court and that the issue of whether there is sufficient evidence to sustain the charges is not a matter for this court to decide but it is for the trial court to decide. On the issue of delay in concluding the cases, the first respondent contends that the delay has been caused by some of the petitioners who do not appear in court necessitating the adjournment. The first respondent contends that all the five cases have since been consolidated for faster prosecution.
8. On the petitioners claim to part of the Kapolet Forest, the first respondent contends that Kapolet Forest is a gazetted Government forest which can only be given out in accordance with the law. The first respondent contends that Kapolet Forest is a water catchment area which is the source of a number of rivers which if allowed to be invaded, it will cause an ecological disaster as it will interfere with flora and fauna.
9. The 2nd and 3rd respondent on their part contend that the petition is incompetent and does not disclose any cause of action against them and in any case it contravenes Article 156 and 157 of the Constitution.
10. I have gone through the petition by the petitioners as well as the opposition to the same by the respondents. There are two issues which emerge for determination by this court. Firstly, whether the criminal cases against the petitioners are null and void on account of violation of the constitutional rights of the petitioners. Secondly whether this court should order that the Government gives 1,153.41 acres out of Kapolet Forest.
11. A keen look at the petition herein shows that the main intention of the petitioners was to have their cases terminated on grounds that the same have infringed on their constitutional rights. The issue of Kapolet Settlement came as a result of the criminal cases. The petitioners have not strictly brought this petition on behalf of Sengwer Community. They have brought it on the basis of having been arrested and arraigned in court.

CRIMINAL PROSECUTION.

12. The petitioners were arraigned in court facing criminal charges for cultivating in Kapolet Forest without permission of the Director of forest or District Forest Officer. The charges were brought to court through the police. Under Article 157 of the Constitution, it is the Director of Public Prosecution (DPP) who has the power to institute criminal proceedings against any person before any court other than a court martial. He also has power to take over and continue any criminal proceedings commenced in any court other than a court martial that have been undertaken by another person or authority. The same Article provides that the DPP's powers under this Article may be exercised in person or by subordinate officers acting in accordance with general or special instructions.

Article 157 (10) provides as follows:-

> "***The Director of Public Prosecutions shall not***
>
> ***require the consent of a person or authority for***

the commencement of criminal proceedings and

in the exercise of his or her powers or functions,

shall not be under the direction or control of any

person or authority."

13. In the present case, the prosecution against the petitioners was undertaken by police under the prosecution arm of the police who have authority of the DPP to do so. The authority of the DPP to undertake prosecution can only be faulted if it is demonstrated that the prosecution was commenced for ulterior motives or if the prosecution was capricious and brought in bad faith.

In the present case, the petitioners have already pleaded not guilty to the charges. The cases were going on before they were stayed at the instance of the petitioners. In their petition, the petitioners contend that the evidence adduced so far is insufficient and that the prosecution has not proved that they were found cultivating in the forest. The petitioners contend that they were arrested from their homes which are outside the forest. They also contend that so far the prosecution has only produced two hoes covered in red soil which soil is not found in forests, three slashers and 20 sticks.

14. With respect to the petitioners, it is not for this court to determine whether the evidence adduced is sufficient to sustain the charges. This is a matter for the trial court and if the court were to intervene at this stage and terminate the proceedings on ground of insufficient evidence, it will amount to interference of a prosecution which was validly instituted by the DPP's agents. The petitioners have not demonstrated that they were being discriminated when the prosecutions herein were commenced. The petitioners have not demonstrated that their human dignity was violated either during their arrest or in the course of their prosecution.
15. On the issue of delay to conclude the cases, the firs respondent states that the delay in conclusion of the cases has been due to some accused persons being absent. In the five criminal cases, there are 40 persons charged. On any given date it is very unlikely that all accused persons can attend court. When one or more accused persons do not attend court, in most cases, the prosecution will apply for adjournment on account of the absence of some of the accused persons. Each case should be considered in light if its peculiar circumstances. I do not therefore think that the petitioners constitutional right to speedy trial was violated.
16. The petitioners have not demonstrated that the DPP exercised his powers arbitrarily, oppressively or contrary to public policy. Courts can only intervene where it is demonstrated that the proceedings were brought for other means other than the enforcement of the law. As I have said hereinabove, the petitioners seem to fault the evidence so far adduced. They do not say that their prosecution was brought for ulterior motives. They do not say that the prosecution should not have commenced in the first place. They are only complaining that the evidence is not sufficient. In the case of **Vincent Kibiego Saita vs. Attorney General, High Court Misc. Civil Appl. No. 839 of 1999** (unreported) at page 20, 21 Justice Kuloba stated as follows:-

"If a criminal prosecution is seen as amounting

to an abuse of the process of the court, the court will

interfere and stop it. This power to prevent such

prosecution is of great constitutional importance.

It has never been doubted. It is jealously preserved.

It is readily used, and if there are circumstances of

abuse of the process of court the court will

unhesitatingly step in to stop it."

17. In the present case, there is no demonstration by the petitioners that their prosecution is an abuse of the process of court. In the case of **Meixner & Another vs. Attorney General [2005] 1 KLR 189** the court held that

> "***It is the trial court which is best equipped to deal with the quantity and sufficiency of the evidence gathered in support of the charge. It would be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of the trial court."***

18. Article 27 of the constitution protects the right to equality and prohibits discrimination.

> "27 ***(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.***
>
> 2. ***Equality includes the full and equal enjoyment of all rights and fundamental freedoms.***

The petitioners herein have not cited any single incident which may suggest that they were discriminated against or that their prosecution has been brought discriminatively. The prosecution has brought the proceedings on ground that they were found cultivating in the forest without permission. The prosecution has not been brought on grounds that they come from a minority group of the Sengwer Community. The petitioners have been charged as individuals who are alleged to have violated provisions of the Forest Act. They are presumed innocent until proved guilty. Their prosecution is not a community affair.

CLAIM TO 1,153.41 ACRES OF KAPOLET FOREST.

19. The petitioners are claiming 1,153.47 acres from Kapolet forest. They contend that the Government and the Sengwer Community had agreed that the Government gives 3000 acres of Kapolet forest for purposes of Settlement of the Sengwer community members. They contend that only 486 members were settled on 1846.57 acres hence the balance which they are now claiming. In support of their claim, the petitioners have annexed to their petition letters from the then provincial administration and copy of hansard proceedings in Parliament where the issue of settlement of the Sengwer Community arose. What is not in contention is that Kapolet forest is a Gazetted Government forest.
20. The petitioners are contending that the Sengwer Community is a hunter-gatherer community who mainly depend on honey and bee keeping. If this be the case, then they are claiming this land which according to them should be community land traditionally occupied by hunter-gatherer communities. The question which then comes up is whether the petitioners claim is to be allowed to occupy the 1,153.41 acres as hunter-gatherer community. The petitioners contend that they agreed with the Government to curve out 3000 acres for their settlement. They want the 3000 to be a settlement scheme not because they are intent on living as hunter-gatherer community but as a settlement for other modern farming. This is because they want to own their individual titles to the land. According to the petitioners, the process of ascertaining who were Sengwer people to benefit was to be carried out by the community leaders. There is no evidence whether this process was carried out and whether the number of Sengwer people who were to benefit was ascertained. There is no evidence whether the 44 petitioners herein are members of the Sengwer Community.
21. It is clear that the petitioners want the land they are demanding for settlement. They want the land

to be curved out of Kapolet Forest. If the petitioners demands were to be allowed, the effect of curving out part of Kapolet Forest for settlement will have far reaching ecological consequences. Kapolet forest covers part of Cherangany hills which need protection from possible soil erosion if the forest cover is cleared for settlement.

The concept of developing and applying a rights-based approach to environmental management constitutes a means for addressing the interrelationship of environmental protection and human rights, dealing with its complexity, and ensuring that achieving one goal does not negatively affect the achievement of the other, with the overall aim of ***"promoting the realization of conservation with justice"*** IUCN, Conservation with justice – A Rights-based Approach – IUCN Environmental Law and Policy Paper No. 71, 200, P. vii.

22. Our Constitution contains Articles which ensure rights to a safe, healthy and ecologically balanced environment. In this regard any treaty or convention ratified by Kenya is Part of the Law of Kenya. Some of these treaties and conventions include the United Nations Declaration on the rights of Indigenous Peoples (New York 13 September, 2007) and the African charter on Human and Peoples rights (Banjul, 26 June, 1981) Article 24 of the African Charter on Human and Peoples Rights provides that:-

    "***All peoples shall have the right to a general satisfactory***

    environment favourable to their development."

23. There is no doubt that the Sengwer community is one of the indigenous communities. The community was traditionally known to be a hunter-gatherer community. I am aware that there have been sustained global efforts to have the Sengwer community given its rightful place in society. The constitution of Kenya recognizes community land which was traditionally occupied by hunter-gatherer communities. This is under Article 63 of the Constitution. Parliament was mandated to enact a legislation which will give effect to Article 63 of the Constitution.

Parliament was given 5 years within which to do so from 27/8/2010 the time of Promulgation of the constitution. Parliament has not yet enacted the said Act. I hope that once the contemplated legislation is enacted it will shed light on the position of communities such as the Sengwer.

24. Before that happens, courts have a duty to determine any claim based on the law available What the petitioners are claiming requires a delicate balancing act, an act which requires that granting one right does not negatively affect other rights. The right to a remedy is a fundamental attribute of the rule of law. Without this right, there cannot be rule of law. The Kapolet forest is a very important forest ecologically. It is a catchment area for among others, River Kapolet, River Kapora, River Kaptanit and River Kapsara.

If part of the forest was to be cleared for settlement, it will spell doom for these rivers. The slope areas will be susceptible to landslides. The petitioners are not asking for part of the forest to conserve it as they go on with their traditional way of hunting and gathering. They instead want it for settlement full with titles in individual names. About 100 years ago, it was possible for the Sengwer to live as hunter-gatherer community. The circumstances have now changed. Population has grown and a number of people are fighting for scarce natural resources. The people have adopted modern farming which is not conducive to sustainable development and conservation of forests. Forests are being cleared for firewood and timber. People are putting up permanent structures in the forests. It is therefore not tenable that we can go back to the old days of hunter-gatherer lifestyles. There are legal ways in which the community can be allowed back into the forest to harvest honey without affecting the environment. The Director of Forest is empowered by the Act to allow people into forests to undertake certain regulated activities. The Sengwer community should embrace this in efforts to conserve the environment for the present and future generations.

25. The delicate balancing act dictate that no further forest land should be excised for purposes of

settlement. I am aware that the Government is making efforts to re-settle people removed from forests such as Mau forest. The case of the Sengwer is a unique one. Efforts should be made to settle the Sengwer people in accordance with international pleas to the government to do so particularly from the World Bank which is at the forefront of agitating for recognition of the Sengwer people's rights and their settlement. All is not lost for the Sengwer People. New legislations are coming which will address their historical problems. Some of these laws are in place and more will come.

26. For the sake of protection of the Environment for present and the future generations, Kapolet forest should not be curved out for settlement of the Sengwer community. It is on this basis that I find that this petition cannot succeed. As I had already found that the criminal charges facing the 44 petitioners have not infringed on their constitutional rights, I will dismiss the petition and order that each party shall bear their own costs.

[Dated, signed and delivered at Kitale on this 9th day of December, 2014.]

E. OBAGA.

JUDGE.

In the presence of Mr. Rono for petitioners, Mr. Wafula for Professor Sifuna for 1st respondent and Mr. Wabwire for 2nd and 3rd respondents.

Court Clerk – Isabellah.

E. OBAGA.

JUDGE.

9/12/2014.