



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 25 OF 2013

BETWEEN

KAHINDI LEKALHAILE.....1ST PETITIONER
JOSEPH KALAPATA..... 2ND PETITIONER
EZRA MDAM 3RD PETITIONER
JACOB SIROWA TIAMPATI..... 4TH PETITIONER
JAMES LESALOI5TH PETITIONER

AND

INSPECTOR GENERAL NATIONAL POLICE SERVICE.....1ST RESPONDENT
DIRECTOR KENYA WILDLIFE SERVICE.....2ND RESPONDENT
NATIONAL POLICE SERVICE COMMISSION.....3RD RESPONDENT
ATTORNEY GENERAL4TH RESPONDENT

JUDGMENT

1. This petition arises out of the petitioners' concern at the rising incidence of poaching which they state poses a serious threat to tourism in Kenya. Tourism is one of the major sources of foreign exchange for this country, accounting for over 10% of the national gross domestic product. One of the greatest tourist attractions is Kenya's wild life. In the recent past, there has been rising cases of poaching of some of the 'big five' animals of the wild especially the elephants and rhinos. It is in this context that the petitioners bring the present petition in which they challenges the structural composition of the Kenya Wildlife Service (KWS). The petition also seeks to have an audit of the ivory stock and other government trophies held by KWS and other private establishments set up for the conservation of wildlife following reports that such stock may have illegally found its way

into the black market.

2. KWS is a body corporate established under **Section 3 of the Wildlife (Conservation and Management) Act**, Chapter 376 of the Laws of Kenya, (hereafter “the Act”,) whose functions include the management of national parks and national reserves.
3. The 1st petitioner describes himself as a wildlife scientist. The 2nd and 3rd petitioners are residents of Samburu and Taita Taveta Counties respectively, counties that are said to host wildlife and that have experienced unprecedented rampant killing of elephants and rhinos. The 4th and 5th petitioners, who are residents of Narok County, though initially parties to the suit, later withdrew as evidenced by the Verifying Affidavit of Kahindi Lekalhaile, the 1st petitioner dated 1st February 2013 indicating that these two petitioners no longer wished to participate in the proceedings.
4. In the petition dated 23rd January 2013 and supported by the affidavit of Kahindi Lekhale sworn on 23rd January 2013 and a Further Affidavit by the 2nd and 3rd petitioners sworn on 1st February, 2013, the petitioners seek the following reliefs:
 - i. *A declaration that the uniformed and disciplined officers of the Kenya Wildlife Service are officers of “other police officers” envisioned under Article 247 of the Constitution and are therefore under direct supervision of the National Police Service and the command of the Inspector General of Police.*
 - ii. *An Order compelling the Inspector general to urgently mobilize and deploy adequate officers from the National Police Service and Other Police Services to combat the rampant killing of elephants and rhinos for ivory and other trophies.*
 - iii. *An Order directing the Inspector General to institute investigations to determine the extent, scope and magnitude of poaching of Kenya’s wildlife for ivory and other trophies and also, to establish the sources of ivory seizures within and outside the country.*
 - iv. *An Order directing the Inspector General to undertake an audit of the ivory stock pile and other government trophies held in stores of the Kenya Wildlife Service and other Public, private and community establishments involved in wildlife conservation.*
 - v. *An order directing the Inspector General to publish the report on the audit of the ivory stock pile and other government trophies held in stores of the Kenya Wildlife Service and other public, private and community establishments involved in wildlife conservation.*
 - vi. *An Order directed to the National Police Service Commission, the Inspector General and the Director, Kenya Wildlife Service to institute reforms to revamp the uniformed and disciplined department of the Kenya Wildlife Service in accordance with constitutional requirements and the provisions of the National Police Service Commission Act and the National Police Service Act.*
 - vii. *Such further orders as this Honourable Court deems it fit to grant.*
 - viii. *Costs of the Petition be awarded to the Petitioners.*

The Petitioners’ Case

5. The petitioners’ case is presented along three main limbs. The first relates to the right to access to information secured under **Article 35**. The petitioners demand that an audit of government trophies and stockpiles be carried out and the results published. They contend that there is a lack of transparency regarding the value and status of government trophies held by the KWS and private conservatories. They contend that an audit is necessary as concerns had been raised that some of the trophies may have found their way into the illegal market.

6. Mr. Ojiambo, learned counsel for the petitioners, submitted that the right to state information is unqualified. Counsel reiterated that if the government is holding billions of shillings of government stock piles, it was incumbent upon it to carry out an audit and publicize the information. If the information is not publicized, the stockpiles could be disposed of without anyone being the wiser, thus leading to corruption.
7. The second limb involves clarification of the place of the second respondent within the national security framework. The petitioners claim that the current arrangement at the KWS where the Deputy Director Security and all uniformed and disciplined officers are not under the direct supervision of the National Police Service (NPS) is unconstitutional. It is their case that due to the importance attached to the protected animals, in particular elephants and rhinos, the increased incidents of poaching and the constitutional obligations of the National Security organs to promote and guarantee security, all the efforts directed towards the protection of wildlife ought to be done under the supervision of the NPS.
8. The petitioners contend further that the current arrangement under which the KWS is delinked from the direct supervision of the NPS and the command of the Inspector General of the Service offends Articles 239(4) and 245(1)(b) of the Constitution and is therefore unconstitutional. Mr Ojiambo submitted that the KWS was in essence involved in a national security matter and should fall within the national security framework.
9. The third limb of the petition seeks to have concerted investigations carried out on the scourge of poaching. According to the petitioners, the issue of rampant killing of protected animals can only be solved if there are concerted efforts of all the National Security organs which must be under the direction of a constitutionally established chain of command under the direct supervision of the NPS and the command of the Inspector General of the Service.

The 2nd Respondents' Case

10. The 2nd respondent opposes the petition and has relied on two affidavits sworn by **Thomas Ogola**, the Acting Corporation Secretary of KWS, on 18th February and 21st March 2013 respectively, as well as its written submissions.
11. With regard to the issue of the command structure, the contention by KWS is that it is not one of the national security organs set out under Chapter 14 of the Constitution, it does not provide national security, and its role was effected mainly within national parks, national reserves and other protected wildlife sanctuaries. KWS further contends that **Article 247** mandates Parliament to enact legislation establishing "other police services" under the supervision of NPS and the command of the Inspector General of the Service and hence this Honourable Court lacks jurisdiction to declare that the uniformed and disciplined officers of the Kenya Wildlife Service fall under "other police services" within the meaning of **Article 247** of the Constitution as prayed by the petitioners. What the petitioners were asking the court to do is to legislate, a mandate that is vested in Parliament by the Constitution.
12. The respondents aver that KWS, NPS and the National Police Service Commission ("NPSC") each had specific mandates spelt out in the respective pieces of legislation that created them and therefore to require any officer heading the NPS, or the NPSC or KWS to undertake duties outside their individual mandates would be acting *ultra vires* their respective Acts and would be null and void *ab initio*. The objectives of KWS is management and conservation of wildlife in accordance with powers vested in it by section 57(a) of the Act, and the police are involved with KWS to provide firearms not to provide security.
13. The respondents also take the position that since the Commissioner of Police (now replaced by the Inspector General of Police) is a Member of the Board of Trustees of KWS, the petitioners' fears and concerns as raised in the petition could be addressed during KWS Board of Trustees meetings in accordance with **Section 3B** of the Act. It was KWS's case therefore that the petitioners had not demonstrated that the issues they raised in their petition had been raised before the KWS Board and the Board had failed to address them.

14. KWS discounted the petitioners' argument regarding lack of information guaranteed under Article 35 on the issue of trophies. Through its Counsel, Mrs Wachira, KWS stated that there was no evidence that information was requested by anyone and that the request had been declined. Counsel cited Section 39 of the KWS Act that provided that such trophies are the property of the government, not KWS, and that it was not the mandate of KWS to provide audited stockpiles of the trophies.
15. Mrs Wachira further submitted that apart from KWS, there are other conservatories which deal with trophies which are not before the court and that therefore, the request for information was discriminatory.
16. In its Supplementary Affidavit sworn by Thomas Ogola on 21st March 2013, KWS avers that in the ordinary course of government business, the Kenya National Audit office conducts periodic audits of government property. In addition, the Ethics and Anti Corruption Commission has the power to investigate allegations of corruption by public officers and recommend prosecution to the Director of Public Prosecutions.
17. With regard to the issue of poaching, KWS stated that the killing of elephants, rhinos and any other wildlife is a criminal offence punishable under the laws of the land, which the police have power to deal with; and that KWS had nothing to do with security as its mandate was conservation. It was KWS's further deposition that there are state institutions to deal with corruption or prosecution which had not been involved. Counsel submitted therefore that the petition was premature, was asking the court to go outside its mandate under **Article 165**, and should be dismissed with costs.

The Case for the 1st, 3rd and 4th Respondents

18. Mr. Mohamed, Counsel for the 1st, 3rd and 4th respondents, associated himself with Mrs Wachira's submissions and relied on the Grounds of Opposition dated 15th April 2013 and submissions of the same date. In their Grounds of Opposition, the 1st, 3rd and 4th respondents argue that the petition is contrary to various constitutional and relevant statutory provisions, to wit, the **National Police Service Act, No 11A of 2011** and the **Wildlife (Conservation and Management) Act, 1989**
19. Mr. Mohamed discounted the argument advanced by Mr Ojiambo regarding the right to information. He submitted that the right to information had limitations; that Article 35 was not amongst those rights which could not be limited under Article 25; that Article 35 was not self-propelling and therefore one had to ask for information and give reasons, which the petitioners had not done. He urged the Court to dismiss the petition as it lacked merit and failed to disclose constitutional violations.

Determination

20. The issues raised in this petition can be conveniently addressed under two broad sub headings:
 - i. **The structure and mandate of the National Police Service vis a vis the Kenya Wildlife Service.**
 - ii. **The right to access to information**

Structure and Mandate of the National Police Service and the Kenya Wildlife Service

21. The National Police Service is established under **Article 243** of the Constitution which provides as follows:

“243(2) The National Police Service Consists of:-

(a) the Kenya Police; and

(b) the Administration Police Service.”

22. **Article 244** sets out the objects and functions of the NPS in the following terms:

“244. The National Police Service shall—

(a) strive for the highest standards of professionalism and discipline among its members;

(b) prevent corruption and promote and practice transparency and accountability;

(c) comply with constitutional standards of human rights and fundamental freedoms;

(d) train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and

(e) foster and promote relationships with the broader society.

23. **Article 245** provides for the command of the NPS. It establishes the office of the Inspector-General of the National Police Service who is to exercise independent command over the National Police Service, and perform any other functions prescribed by national legislation. The Inspector General of Police is, by virtue of his office, a member of the National Police Service Commission established under **Article 246** and the National Security Council created under **Article 240**.

24. On the other hand, KWS is established under **section 3** of the KWS Act as a body corporate and its functions and management are provided for under the Act. Its functions are spelt out in Section 3A of the Act as follows:

a) formulate policies regarding the conservation, management and utilization of all types of fauna (not being domestic animals) and flora;

(b) advise the Government on establishment of National Parks, National Reserves and other protected wildlife sanctuaries;

(c) manage National Parks and National Reserves;

(d) prepare and implement management plans for National Parks and National Reserves and the display of fauna and flora in their natural state for the promotion of tourism and for the benefit and education of the inhabitants of Kenya;

(e) provide wildlife conservation education and extension services to create public awareness and support for wildlife policies;

(f) sustain wildlife to meet conservation and management goals;

(g) conduct and co-ordinate research activities in the field of wildlife conservation and management;

(h) identify manpower requirements and recruit manpower at all levels for the Service for wildlife conservation and management;

(i) provide advice to the Government and local authorities and owners on the

best methods of wildlife conservation and management and be the principal instrument of the Government in pursuit of such ecological appraisals or controls outside urban areas as are necessary for human survival;

(j) administer and co-ordinate international protocols, conventions and treaties regarding wildlife in all its aspects in consultation with the Minister;

(k) solicit by public appeal or otherwise, and accept and receive subscriptions, donations, devices and bequests (whether movable or immovable property or whether absolute or conditional) for the general or special purposes of the Service or subject to any trust;

(l) render services to the farming and ranching communities in Kenya necessary for the protection of agriculture and animal husbandry against destruction by wildlife.”

25. Under **Section 3B** of the Act, the Service is to be managed by a Board of Trustees headed by a Director and comprising persons set out in the section. Such persons include the Commissioner of Police and a representative of the Permanent Secretary in the Office of the President responsible for Internal Security.

26. It is apparent from the above constitutional and statutory provisions relating to the establishment, composition and management of the NPS and the KWS that the two institutions are expressly established under different legal regime to discharge different functions and under different chain of command structures.

27. The petitioners have anchored their case on **Article 247** which provides that:

“Parliament may enact legislation establishing other police services under the supervision of the National Police Service and the command of the Inspector-General of the Service.”

28. They ask the Court to declare that “*other police services*” in Article 247 includes the KWS so that the service is brought under the umbrella of the national security organs and in particular the NPS

29. This argument cannot stand for three main reasons. First and most important, it would be contrary to the Constitution. **Article 243**, which provides for the composition of the NPS, did not anticipate the KWS which neither falls under the Kenya Police nor the Administration Police Service in line with Article 243. Had the intention been for the KWS to be included as part of the national security framework, then it would have been expressly so provided under Article 243.

30. A second reason, which is connected with the first, is the inescapable fact that the Constitution did not oust other legislation in existence, or do away with the organs they establish. The Constitution is given effect through the legislative framework enacted by Parliament in exercise of the legislative powers conferred under **Article 94**. It must also not be assumed that the people of Kenya, in passing the Constitution in its present form, were oblivious of the existence of other services established under other legislation, in this case the KWS established under the provisions of the Kenya Wildlife Service Act, Cap 376.

31. There is a general presumption that legislative enactments are constitutional unless the contrary is proved. As long as these statutes do not violate the Constitution, which has not been demonstrated in this case, then such must be given full effect in accordance with the intention of Parliament and in fulfilment of the constitutional aspirations and wishes of Kenyans. From a plain reading of the relevant constitutional provisions, it was not the intention of the people of Kenya or Parliament that KWS should be part of the NPS, otherwise nothing would have been easier than to so state. It is also worth observing that **Article 239**, which provides for the National Security organs as the

Kenya Defence Forces (KDF), the National Intelligence Service (NIS) and the National Police Service (NPS), does not include the KWS.

32. The third reason why the arguments by the petitioners are untenable has been alluded to by the respondents. It is that this Court does not have the mandate to fill in legislative gaps and supplant the intention of Parliament and the people of Kenya. This is particularly so where the legislative intent is clear; but more so, where the will of the people is expressly set out in the Constitution and the roles of the two organs as set out in the Constitution and the establishing legislation so far apart. The role of the Court is to interpret the Constitution and the law in line with the intended meaning and not to, as the respondents have stated, 'legislate'. The petitioners seek, not the interpretation of the law, but the supplementing of the legislative role. These proposals for reform are better directed to the right forum, the national legislature, in which the Constitution vests the legislative mandate.

The Right to Access to Information

33. The petitioners have invoked **Article 35** on the right to access to information. They want this court to compel the respondents to carry out an audit and publish the findings on the status of trophies in their possession.

34. **Article 35** reads as follows;

“Access to information.

35. (1) Every citizen has the right of access to—

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.”

(3) The State shall publish and publicize any important information affecting the nation.”

35. The importance of the right to access to information cannot be overemphasized. As the court observed in the case of **Famy Care Limited v Public Procurement Administrative Review Board & another** **Petition No. 43 of 2012 [2012] eKLR**,

“[16] The right of access to information is one of the rights that underpin the values of good governance, integrity, transparency and accountability and the other values set out in Article 10 of the Constitution. It is based on the understanding that without access to information the achievement of the higher values of democracy, rule of law, social justice set out in the preamble to the Constitution and Article 10 cannot be achieved unless the citizen has access to information.

[17] The right of access to information is also recognised in international instruments to which Kenya is party. The Declaration of Principles on Freedom of Expression in Africa adopted by the African Commission on Human and Peoples' Rights (32nd Session, 17 – 23 October, 2002: Banjul, The Gambia) gave an authoritative statement on the scope of Article 9 of the African Charter on Human and Peoples' Rights which provides, “Every individual shall have the right to receive information.” The Commission noted that right of access to

information held by public bodies and companies, will lead to greater public transparency and accountability as well as to good governance and the strengthening of democracy.”

36. Similarly, in **Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 others Nairobi Petition No. Petition No. 278 of 2011**, it was held as follows;

*“... [T]he right to information is critical to and closely interlinked with the freedom of expression and of the media, and indeed with the enjoyment of all the other rights guaranteed under the Constitution. As the Constitutional Court of South Africa observed in the case of **Brummer v Minister For Social Development 2009 (II) BCLR 1075 (CC)** relied on by the petitioner:*

‘access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas.’.....

“[34] The second consideration to bear in mind is that the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the State with regard to provision of information. Thus, the State has a duty not only to proactively publish information in the public interest-this, I believe, is the import of Article 35(3) of the Constitution of Kenya which imposes an obligation on the State to ‘publish and publicise any important information affecting the nation’, but also to provide open access to such specific information as people may require from the State. “

37. However, in order for this right to be justiciable, it must be established that the person seeking the information has sought the information, and access to such information has been denied. As was also observed in the **Nairobi Law Monthly case (supra)** at paras. 40, 84;

“[40] Finally, in order to facilitate the right of access to information, there must be a clear process for accessing information, with requests for information being processed rapidly and fairly, and the costs for accessing information should not be so high as to deter citizens from making requests.

[84] However, this petition succeeds to the extent that I have found that the 1st respondent [Kenya Electricity Generating Company] has an obligation, on the request of a citizen, to provide access to information under Article 35(1)(a) of the Constitution. A natural person who is a citizen of Kenya is entitled to seek information under Article 35(1)(a) from the respondent, and the respondent, unless it can show reasons related to a legitimate aim for not disclosing such information, is under a constitutional obligation to provide the information sought.” (Emphasis added)

38. In the instant case, no request for information has been made to the respondents. The enforcement of the right cannot therefore be said to have crystallized.

39. The final reason why this limb must fail is because, by requiring the Court to compel the KWS to carry out an audit of the ivory stock and other government trophies, it requires the Court to compel KWS to undertake a duty which is not within its mandate. **Section 39** of the Act vests property in trophies in the government. In view of the principle of separation of powers and the fact that these are matters of policy, this Court, in the absence of constitutional or rights violations, has no reason to interfere with the respondents’ respective mandates.

Conclusion

40. It is apparent from the foregoing that the petitioners have failed to establish a violation of the Constitution or breach of any of their fundamental rights. What the petitioners seek is a wide interpretation of various provisions of the Constitution without a bearing on an infringement of a fundamental right or freedom.
41. It is now established that courts do not deal with abstract issues: there must be a real dispute for the Court to exercise its powers under **Article 165** of the Constitution. In the case of **John Harun Mwau and Others v Attorney General and Others, Nairobi Petition No. 65 of 2011 (Unreported)** the Court, while acknowledging the jurisdiction of the High Court to examine the legality of any act done pursuant to the Constitution and any law, nonetheless warned that:

“...this Court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret the constitution conferred under Article 165(3) (d) does not exist in a vacuum and it is not exercised independently in the absence of a real dispute. It is exercised in the context of a dispute or controversy.”

42. A similar holding was made in the case of **Andrew Okiya Omtata Okoiti & Others v Attorney General Nairobi Petition No. 351 of 2012 (Unreported)** where the Court observed as follows:

“[18] The petitioners’ case is that the High Court should intervene to resolve raging controversies surrounding the Presidential power and capacity to be sued and related important questions that would have grave implications on the implementation of the Constitution. The jurisdiction of the High Court under Article 165 is wide but it does not exist in a vacuum to be exercised when a party requests the Court to answer a “question.” The “question” contemplated in Article 165 must arise from a real controversy or case.”

43. For the above reasons, this petition is hereby dismissed. However, it is important to observe in closing that the issues raised by the petitioners with regard to the need to avert the rampant poaching of wildlife and bring about transparency with regard to government-held trophies are not idle issues. Further, the petitioners’ passion for the conservation of the wildlife of our country is to be commended. The conservation and protection of the country’s wildlife for the benefit of both the current and future generations should not only be of great concern to the citizens but especially the arms of government tasked with the duty of protection and conservation such as the KWS. It is the constitutional duty of the national government to protect the country’s environment and natural resources with a view to establishing a durable and sustainable system of development.
44. In view of the matters set out above, and this being a matter of great public interest and concern, there shall be no order as to costs.

Dated, Delivered and Signed at Nairobi this 12th day of November 2013.

MUMBI NGUGI

JUDGE

Mr. Ojiambo instructed by the firm of Ojiambo & Wadeyua Advocates for the petitioners.

Mrs. Wachira instructed by the office of Ombonyo & Company Advocates for the 2nd respondent.

Mr. Mohamed, Litigation Counsel, instructed by the State Law Office for the 1st, 3rd and 4th respondents.