



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Constitutional Petition 41 of 2011

IN THE MATTER OF SECTION 84 OF THE CONSTITUTION OF KENYA, 1998 (NOW ARTICLE 22 OF THE CONSTITUTION OF KENYA 2011)

AND

IN THE MATTER OF SECTION 84 (2) OF THE CONSTITUTION OF KENYA, 1998 NOW ARTICLE 165 OF THE CONSTITUTION OF KENYA 2010)

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTION 72 (1) AND (3) AND (2) OF THE CONSTITUTION OF KENYA, 1998 (NOW ARTICLE 49 (1) (F) AND 40 (1) AND (2) OF THE CONSTITUTION OF KENYA, 2010)

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES, 2006 RULES 11, 12, 13, 14 AND 15.

BETWEEN

DANIEL CHACHA MURIRI PETITIONER

AND

ATTORNEY GENERAL RESPONDENT

RULING

The petition before me seeks to invoke the court’s jurisdiction under sections 84 (2) and 72 of former Constitution. It seeks declaratory orders against the respondent as well as damages and costs. The petition dated 28th June 2011 is supported by an affidavit sworn by the petitioner. The petitioner’s claim is that he was wrongly detained and prosecuted by the police who also impounded his motor cycle registration no. KBC 570B.

The facts giving rise to the petition are that on the 6th December, 2009, while driving his motor cycle along Isebania Migori road, the petitioner was arrested and arraigned in court on 7th December, 2009 whereupon he was charged with the offence of driving a motor cycle on a public road without insurance

cover contrary to section 4 (1) of the **Insurance (Motor Vehicle Third Party Risks) Act** (Cap. 405), driving without a driving licence and riding an unregistered motor cycle on a public road. The petitioner pleaded guilty and was sentenced to a court fine which he duly paid but the police nevertheless failed to release the motor vehicle.

The petitioner further depones that on the 8th April, 2010 police instituted criminal proceedings in Traffic case no. 184 of 2010 at Kehancha Senior Resident Magistrates court. The petitioner has averred that he was arrested on the 26th April, 2010 at midday and detained until the following day when taken to court in Kehancha. He was unable to take plea the following day and he was remanded until the 28th April, 2010 when he was taken to Migori Court and charged and later released on a bond of KShs. 20,000/=.

The petitioner further avers that he attended court several times until 29th October 2010 when he was acquitted under section 210 of the **Criminal Procedure Code**. That on 15th December, 2010, the petitioner's advocate issued a notice to the Police Officer Isebania to release the petitioner's motor cycle to no avail. By letter dated 20th April, 2010, the Commissioner of Police directed that the motor cycle be released also to no avail.

The petitioner contends that the police officers attached to Isebania Police Station have refused to release to him the motor cycle. The petitioner pleads for the following reliefs:-

- a. *That the honourable court do exercise its powers of enforcement of constitutional rights of the petitioner by ordering the immediate release of the said motor cycle or payment of its current value.*
- b. *The honourable court be pleased to make orders of declaration to the effect: that the defendant is liable for the tort of wrongful arrest, false imprisonment and malicious prosecution, that the respondent should pay damages for the afore mentioned torts and upon release of motor vehicle pay damages for detinue or conversion.*

The petitioner filed an affidavit of service on 21st July 2011. On 23rd November 2011, the petitioner elected to canvass the petition by way of written submissions. The petitioner alleges breach of his fundamental rights and freedoms. I have considered the petition on the basis of the facts in the petitioner's affidavit and written submissions which I have carefully read. The respondent did not enter appearance nor filed a reply within the stipulated time. On 23rd November 2011 the petitioner elected to canvass the petition by way of written submissions.

The applicant has invoked the jurisdiction of this court under various sections of the old Constitution. He has provided the equivalent sections in the current Constitution 2010 including Article 22 of the Constitution which allows any person to approach this court alleging breach of any of their fundamental rights and freedoms. However, apart from expressing the petition to be brought under those sections, the petitioner has not set out with particularity the provisions alleged to have been infringed, the manner of infringement and by whom.

On the other hand, the petitioner has clearly brought out what would be civil causes. He has particularized various torts and criminal offences. Indeed he has cited a number of authorities on malicious prosecution and tort. He has however not pleaded constitutional issues. He has not even attempted to link the various acts complained of to the specific articles cited. For instance at paragraph 8 of the petition, he states:-

“Your petitioner traverses that the actions done by the police officers on the 7th December 2009 amount to trespass to person by wrongful arrest and confinement and on the 8th December 2009 amount to malicious prosecution and the continued refusal to release the motor cycle amounts to conversion by detinue or the tort of detinue”.

Availability of other available avenues for redress of grievances does not however prevent the petitioner

from approaching this court alleging breach of his fundamental right and freedom. Such claim must however be precisely stated and the particular provision infringed to enable this court, sitting as a constitutional court to address the grievances and frame appropriate reliefs.

It is now trite law that for a contravention of a fundamental right to exist and be enforceable, certain requirements must be met. As was enunciated in the celebrated case of **Anarita Karimi Njeru –vs- Republic (No. 1) 1979 KLR 154**, it was held: “...We would again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to this case), that he should set out with reasonable degree of precision that of which he complains the provisions said to be infringed and the manner in which they are alleged to be infringed...”.

Similarly, in **Matiba –vs- Attorney General HC Misc. App. No. 666 of 1990 (UR)** the court held:-

“...An applicant in an application under section 84 (1) of the Constitution is obliged to state his complaint in the provision of the Constitution he considers has been infringed in relation to him and the manner in which he believes to have been infringed. Those allegations are the ones which if pleaded with particularity invoke the jurisdiction of this court under the section. It is not enough to allege infringement without particularizing the details and the manner of infringement...”.

In the case of Cyprian **Kubai –vs- Stanley Kanyonga Mwenga NBI HC Misc. App No. 612 of 2002 (UR), Khamoni J.** rendered himself on the issue thus: “...An applicant moving the court by virtue of section 60, 65 and 84 of the Constitution must be, precise and to the point not only in relation to the section but also to the subsection and where applicable the paragraph of subparagraph of the section out of 71 and 83, allegedly contravened plus relevant act of the contravention so that the respondent knows the nature and extent of the case to respond to enable the respondent prepare accordingly and also to know the extent and nature of the case it is handling...”. See also **Kenya Bus Service Ltd & 2 Others – vs- Attorney General & 2 Others (2005) eKLR**.

Article 165 (3) (b) of the Constitution (2010) which the petitioner has mentioned confers on High Court jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. The same Constitution provides that justice shall be administered without undue regard to technicality. This does not however mean that a petitioner is allowed to throw the Constitution at the court for the court to decipher the provisions that have been violated so as to grant unspecified reliefs to the petitioner. It is the petitioner’s duty to specify and demonstrate with particularity the constitutional rights which have been violated, in what manner and by whom. He must also frame the reliefs he is seeking from the court. This is more so where a petitioner has the benefit of legal counsel.

For all the foregoing reasons I find and hold that the petitioner has not set out either in the pleadings or argument in the written submissions the constitutional issues to be investigated and determined by this court sitting as a constitutional court.

Consequently this petition is struck out with no order as to costs.

Ruling dated, signed and delivered at Kisii this 21st day of September, 2012.

R. LAGAT-KORIR
JUDGE

In the presence of:

..... for applicant

..... for respondent

..... court clerk

R. LAGAT-KORIR
JUDGE