



REPUBLIC OF KENYA

High Court at Kericho

Constitutional Reference 4 of 2012

GEOFFREY KIPNGETICH KORIR.....APPLICANT

VERSES

REPUBLIC.....RESPONDENT

RULING

On the 26<sup>th</sup> July, 2012 Geoffrey Kipngetch Korir, herein after “the applicant” was arraigned before the Resident Magistrate, Ms. J. Kassam, at Sotik. He was charged with two (2) counts.

The 1<sup>st</sup> count was of incitement to violence contrary to **Section 96** of the **Penal Code**.

Particulars of the offence were as hereunder:

*“On the 26<sup>th</sup> day of July 2012 at Litein township, in Bureti District within the Rift Valley Province, jointly with another not before court without lawful excuse uttered words “Hii gari haiendi police station na wananchi msikubali” words which were calculated to incite members of the public against No. 232408 Ip Aggrey Ukiru Base Commander Buret Division.”*

The second count was of obstructing a police officer from performing his duties contrary to **Section 254 (b)** of the **Penal Code**.

Particulars thereof being that

*“On the 26<sup>th</sup> day of July 2012 at Litein township in Bureti District within the Rift Valley Province , jointly with another not before court willfully obstructed No. 232408 IP Aggrey Ukiru, a police officer who at the time of the said obstruction was acting in due execution of his duty.”*

The record indicates that when the applicant appeared before the court the charges were read to him and he pleaded not guilty. Mr. Kitur, advocate who appeared for him then raised an objection to the effect that his client was objecting to the charges as they were unconstitutional as he was arrested while effecting his duties as an advocate.

He prayed for a reference to be made for the High Court to determine whether or not his rights had been violated. The court hence released the applicant on bail pending the reference.

The Hon. Kassam formed questions for determination on 3<sup>rd</sup> September 2012.

The issues raised were as follows:

1. On 26/07/2012, a question arose as to the contravention of Article 49 (i) of the Constitution.
2. The accused person contends as follows:-
  - (i) That he is objecting to the charges herein.
  - (ii) That he was arrested effecting his duties as an Advocate.
  - (iii) That he had visited his client in Litein Police Station to pursue the reason of arrest.
  - (iv) That he has a right to communicate with his client.
  - (v) That his rights and those of his client were violated.
3. It is the opinion of this court that the Accused person was arraigned in Court whilst effecting his duties as an advocate as per Article 49 (i) of the Constitution of Kenya.?
4. The questions for determination by the High Court are:-
  - (i) Was the accused person charged in Court beyond the requisite mandatory of effecting his duty as an Advocate?
  - (ii) Was his fundamental rights and/or of his client abused by this omission?
  - (iii) Should the Accused person be summarily acquitted a consequence of this omission.
  - (iv) On the other hand can this omission be explained away by the state?

The reference to this court is made pursuant to **Article 49 (I) (c)** of the **Constitution of Kenya**.

The applicant swore an affidavit in support of the Constitutional application whereby he averred that he is an advocate of the High Court of Kenya practicing in the firm of M/s Ngetich and Associates. He annexed to the affidavit his practising certificate for the year 2012, No. 003318; Membership No. P105/8312/11. He is also an Executive Director of South Rift Human Rights and Advocacy Centre, a community based organization dealing with Human Rights issues within South Rift Region. This averment was confirmed by an annexure, a letter dated 20/10/2012 authored by the Chairman of the aforesaid organization. He stated the circumstances in which he was arrested having gone to represent his client who had duly instructed him following her arrest for a traffic offence.

When the matter came up for hearing the State Counsel requested for time to seek instructions.

Thereafter on the 12<sup>th</sup> November 2012, an affidavit was sworn by No. 232877 C.I Bernard Ouma Adere the officer who investigated the case. He averred that per the information he received from IP Aggrey Ukiru that the applicant incited the crowd against the police and could not allow the motor-vehicle that was to be impounded not to be driven away. The applicant later led the crowd to the police station and the crowd only calmed down on realizing that the police were handling the issue. The applicant was arrested and thereafter the anti riot squad moved in to quell the situation that is when the lady who had committed a traffic offence was arrested. He cast aspersion on the circumstances leading to the acquittal of the lady who had committed the offence.

The question to be determined by this court would therefore be:

- i) Was the applicant arrested and charged while in execution of his duties as an advocate?

- ii) Was his fundamental rights violated?
- iii) Does it entitle him to an acquittal at this stage?

**Article 49(1) (c)** of the **Constitution** of Kenya stipulate as follows:

**“An arrested person has the right -**

***(c) to communicate with an advocate, and other persons whose assistance is necessary;***

Mrs. Bett the lead Counsel for the applicant submitted that the arrest and prosecution of the applicant was in contravention of the fundamental rights of the applicant as the right of the arrested person to communicate with his advocate could not be limited. She argued that the arrest in the circumstances was an assault on the rule of law an attempt to intimidate the applicant. She argued that the charge against the applicant was unfounded and could not be explained away. She called upon the court to quash the proceedings.

Mr. Kivihya the Senior Assistant D.P.P who appeared for the state did not oppose the application. He notified the court that he did not support the affidavit sworn in an endeavor to explain their case.

The rights of an arrested person is spelled out in the Constitution of Kenya, 2010. Paragraph (c) of Sub Article (1) of Article 49 of the Constitution emphasize the right of an arrested person to communicate with an advocate and other persons who can offer him/her any assistance.

It is deponed in paragraph 4 of the affidavit of the applicant that he received a call from Eunice Chepkemoi Langat, his client who informed him that she had been arrested at Litein Co-operative Bank area. He went there to find a crowd having gathered around her motor-vehicle registration number KBA 873F Toyota Saloon. There was a police officer known to him called Ruth. He sought an explanation from his client as to what had transpired.

In paragraph 9 of the affidavit his explanation was as follows:

**“THAT my client informed me, which information I verily believed to be true, that:-**

- a) When she had driven her aforementioned Motor vehicle she had clearly indicated that she intended to turn left towards a Cooperative Bank A.T.M to withdraw some money, but a “boda boda” joined the main road carelessly forcing her to suddenly brake to allow it pass.**
- b) After the “boda boda” had passed she turned left and packed her vehicle next to Sky Rock Bookshop and wanted to proceed to withdraw the money at cooperative A.T.M next to Sky Rock bookshop.**
- c) Suddenly a male police man approached her car, and reached out for the ignition keys without warning and proceeded to confiscate the car keys without giving any reasons at all.**
- d) The said police man later introduced himself as base commander and left without any other explanation for his actions.**
- e) She tried inquiring from the police man of her crime but the officer just left with her keys and said “hii gari lazima iende police station” as he entered into his vehicle which he had parked at the middle of the road.**
- f) Several members of the public were around and had observe the unfolding events and had built some interest in the whole case hence the large crowd surrounding her and her vehicle.**
- g) The said police man later introduced himself as base commander.”**

Eunice Chepkemoi Langat' swore an affidavit confirming what the applicant stated.

The applicant accompanied her to the police station after his plea to the female police officer to call the Base Commander went unheeded. At the police station the applicant could not be given a hearing because of his activities as a human rights crusader.

He was treated in an inhumane manner and arrested. He was placed in police cells.

An explanation was given by the police that the applicant uttered words to this effect:

***“unless the base commander come here and tell the youth why he was harassing them by arresting riders and drivers, then they must not allow the vehicle to move and that they know their rights. There had been many base commanders whom they had not complained against.”***

A perusal of the words alleged to have been uttered differ with the words stated in the particulars of the offence.

Secondly the fact that the representative of the state does not approve of the averments in the affidavit demonstrates the fact that the allegations were not true.

The applicant herein being a qualified advocate was the person who could speak to Eunice a client who had called him following her arrest. He was the person who could explore options securing her rights pursuant to the law, he was the only person who could represent her appropriately. That right could not be qualified. Subjecting the applicant to humiliation, and eventually prosecuting him in the cause of discharge of his duties as an advocate was wrong as it not only brings indignity to the legal profession but is unjust.

In the premises I find the prosecution having failed to give any explanation as to why the police acted in contravention of the constitution. This was a violation of the fundamental rights of the applicant. As a result the charge preferred against him cannot stand. The charges in Sotik Criminal Case No.1737 of 2012 being in breach of the Constitution are quashed. The applicant who is entitled to an acquittal shall be acquitted forthwith.

It is so ordered.

**DATED at KERICHO this 27<sup>TH</sup> day of November 2012**

**LILIAN N. MUTENDE**

**JUDGE**

**Counsel appearing**

Mrs. Bett, Advocate, for the Applicant  
Mr. Kivihya for the State  
Mr. Koech, Court clerk