



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang, J.)

PETITION NO. 286 OF 2009

IN THE MATTER OF SECTION 84 (1) [OF THE CONSTITUTION OF KENYA, 1969]

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER THE CONSTITUTION OF KENYA,**

to wit, **CONTRARY TO SECTION 70, 72 (1) (e), 74, 76, 77, 78, 79, 82**

- BETWEEN –

1. LUCY

NYAMBURA.....PETITIONERS

2. ANNE WANGUI

- AND –

1. THE TOWN CLERK, MUNICIPAL COUNCIL OF MOMBASA

2. THE COMMISSIONER OF

POLICERESPONDENTS

3. THE ATTORNEY GENERAL

JUDGMENT

The petition coming up before the Court was dated and filed on **4th June, 2009**, and it is unsurprising that the legal framework cited is that of the Constitution of 1969 which was, at the time, in force; a new Constitution was promulgated on **27th August, 2010**, though it is clear to me that this Constitution builds upon and does not detract from the proclaimed guarantees of fundamental rights and freedoms under the 1969 Constitution..

The petitioners, who aver that they are both women of sound mind, state that they were arrested and

detained in Police custody on **13th August, 2008**, thereafter being arraigned in Court on the allegation that they had committed an offence of “*loitering in a public place for immoral purposes contrary to section 258 (m) of the Mombasa Municipal Bye-laws*”. The petitioners denied the charge, and were admitted to bail (Mombasa Municipal Court Criminal Reg. No. 3560 of 2008).

The petitioners state that the Police officers who arrested them had no search warrant, and had no reason or basis to arrest them; when arrested they were not preparing to commit, nor were they in the process of committing any cognizable offence for which the Police would be entitled to arrest them; the arresting officers were all male, and no female officer was availed to conduct the search upon them, and this contravened their right to treatment with dignity. The petitioners aver that the Police officers who had arrested them, testified in Court on **6th October, 2008** and “*expressly told them that the petitioners were in possession of condoms, that they thought there was an offence being committed*”, and they state that their “*rights to protection under the law*” as provided for in the Constitution, were violated.

The said violation of rights is also perceived in the context of international law, particularly the law embodied in the African Charter on Human and Peoples’ Rights, and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa [which Protocol, in its Article 14 (c), provides for the right to choose methods of contraception].

The petitioners aver that the action of arresting them and charging them in Court was “*a direct violation and contradiction of the Convention for the Elimination of all Forms of Discrimination Against Women (CEDAW) [which Kenya has ratified]*.” They contend that the arrest and detention in custody aforesaid was discriminatory, oppressive and unconstitutional. They further contend that the bye-laws under which they were charged are unconstitutional, and “*actually and potentially violate the rights of women*”.

The petitioners contend that the 3rd respondent failed in his duty to advise the Municipal Council of Mombasa, through the Minister for Local Authorities, that the said bye-law is unconstitutional and ought not to be approved.

The petitioners have made several prayers:

(a) that, a declaration do issue that the Mombasa Municipal Bye-laws, Section 258 (m) actually and potentially violates the rights and dignity of women;

(b) that, a declaration do issue that the said Section 258 (m) of the Mombasa Municipal Bye-laws is unconstitutional *ab initio*;

(c) that, a declaration do issue that the said Section 258 (m) of the Mombasa Municipal Bye-laws violates the Convention for the Elimination of all Forms of Discrimination Against Women (CEDAW), the African Charter on Human and Peoples’ Rights, and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women;

(d) that, an order do issue to the Attorney-General to advise the Minister of Local Authorities that the said Section 258 (m) of the Mombasa Municipal Bye-laws is unconstitutional and must be repealed;

(e) that, an order do issue that the arrest, arraignment and trial of the petitioners in Criminal Case No. 3560 of 2008 at the Mombasa Municipal Council Court, is an abuse of the constitutional right’s of the petitioners and is to be terminated;

(f) that, an award of exemplary and general damages be made to each of the petitioners;

(g) that, an order declaring the provisions of Section 258 (m) of the Mombasa Municipal Bye-laws to be illegal, “do bind all local authorities in Kenya”.

The evidence to support the claim in the petition was given in the affidavit of 1st petitioner, and of one **Grace Odembo**, a social worker with a Non-Governmental Organization, Solidarity with Women in Distress (SOLWODI).

Whereas 1st petitioner deponed on the specific experience of the two petitioners, at the material times, the second deponent gave a broader background of Police practice in the Coastal area, in relation to persons such as the petitioners; in this regard the deponent produced a recent study of the Federation of Women Lawyers entitled, **Documenting Human Rights Violations of Sex Workers in Kenya: A Report based on the Findings of a Study conducted in Nairobi, Kisumu, Busia, Nanyuki, Mombasa and Malindi Towns in Kenya** (Fida Kenya, 2008), 40pp. The deponent deposes that in all the Police stations investigated, “Police officers conduct swoops as early as six o’clock in the evening until the following morning”; these officers

“then detain the women suspected of loitering for immoral purposes”; “the reason for the arrest common to all the Police stations is by observation of how the women dress and talk or walk”; “the officer in command in the morning will then ask each woman to ‘account’ for their being out at the time and place; those who cannot account ‘properly’ are taken to Court.”

The Town Clerk of the Municipal Council of Mombasa, **Tubmun Otieno**, swore a replying affidavit on **17th July, 2009**. The deponent denied the existence of any offence in the Municipal Council’s Bye-laws described as “loitering in a public place for immoral purposes”; he said the petitioners had been charged under the General Nuisance Bye-law (Bye-law 258 [m] and [n]) which provides:

“Any person who shall in any street or public place [m] loiter or importune for the purposes of prostitution [n] procure or attempt to procure a female or male for the purpose of prostitution or homosexuality shall be guilty of an offence.”

The deponent denied the claim made for the petitioners, “that the arresting officer proceeded to arrest the petitioners only on the basis of their being in possession of condoms”; and he averred that he believed “the [subject] Bye-law in respect of public nuisance does not impair the petitioners’ constitutional freedom and rights of treatment with dignity, [or] the right to choose the type of contraceptive”. The deponent expressed his belief, that the benefits of the subject Bye-law “by far outweighs the alleged narrow interest of the petitioners”.

The deponent stated what he perceived a justification for the Bye-law “aimed at prohibiting prostitution”; this Bye-law “strikes a balance between the rights of the petitioners and the rights and values of the citizenry living in the Municipality of Mombasa who are entitled to have their constitutional guarantees.”

The deponent described prostitution as a vice, which “aids and abets the spread of HIV/AIDS”; and he averred that prostitution does not give fulfilment, “since it is used as a medium for sexual exploitation by perverts and paedophiles”.

The deponent deposed that the subject Bye-law was not discriminatory, since it applied to “any person” found committing the act of loitering with the sole intention of committing prostitution. He deposed that “the Bye-law in question protects the community and in particular the vulnerable girl-child who can be lured into child prostitution”; he believed to be true his Advocate’s advice that the Bye-law “is reasonable and proportionate having regard to the freedom of movement and expression”. The deponent extolled the perceived virtues of the subject Bye-law:

“...the Bye-law ... is carefully tailored as a measured and appropriate response to the harm it addresses, namely, the evil of prostitution and the inherent dangers it poses in the Municipality of Mombasa and the tragic consequences that it carries with it.”

Learned counsel, **Mr. Ndubi** submitted that it would be immaterial that the proceedings herein were brought under the 1969 Constitution; for the **Constitution of Kenya, 2010** *“in no small [measure] addresses nearly all the matters complained of by the petitioner.”*

Counsel urged that the criminal charges brought against the petitioners were founded on a discriminatory law; from the evidence, the arrests had been effected on the basis of a superficial judgment on the actions of the petitioners.

Mr. Ndubi framed several questions which he urged, should be the basis for disposing of the petition; these were as follows:

- (i) is Bye-law 258 (m) in contravention of the guarantees of rights in the Constitution?
- (ii) is the Bye-law discriminatory in its wording or effect?
- (iii) what is the meaning of *“prostitution”*?
- (iv) does the law discriminate against women, in its effect and purpose?
- (v) what is public morality?
- (vi) should legislation on public morality be *“omnibus”*, or ought it to be specific, definite and subject to the Constitution?
- (vii) can the Court enforce treaty law to which Kenya is a party?
- (viii) do the petitioners have rights based on legitimate expectation, that the respondents will treat them *“with dignity and respect even [during] implementation of the law”*?
- (ix) *did the circumstances preceding the trial of the petitioners violate their rights and freedoms?*
- (x) *is the trial of the petitioners in Criminal Case No. 3560 of 2008 rendered an abuse of Court process?*
- (xi) is the trial of the petitioners in Criminal Case No. 3560 of 2008 a violation of their rights under the Constitution?
- (xii) in the event the Bye-laws are unconstitutional, and the petitioners’ rights were violated, can this Court award **damages** as prayed; and if so, what is the specific amount in damages, for each petitioner?

Counsel urged that this petition, though brought in the individual names of the petitioners, is *“in the spirit*

of the larger public interest”; and so, “in [the] event ... the Court [held] that the petition is misplaced ... the petitioners plead that they be not burdened with any order to pay costs”.

Counsel contested the moral basis of the respondents’ case, as set out in the replying affidavit: that the subject Bye-law seeks to protect the public against the spread of HIV/AIDS. Counsel submitted that “*HIV/AIDS is spread more by the failure of the public authorities, including the respondents, to develop sound policies to deal with it and strategically resolve it, rather than through the use of high-handed, unconstitutional practices ... Indeed the petitioners may have been in possession of the sort of protective gear that is encouraged to reduce [the incidence] of infection or re-infection*”.

Relying on the social study by FIDA Kenya, **Documenting Human Rights Violations of Sex Workers in Kenya** (2008), counsel submitted that Police arrests of women at night, as was the case in this instance, is discriminatory and is “*like a curfew at night, specifically against women*”; that it was discriminatory because “*women were not treated the same way as men*”; that the offence created by the Bye-law “*relates only to women*”; that “*it is being said only women can commit the act that falls within the categorization of prostitution*”. Such a Bye-law, counsel submitted, was discriminatory and “*violates the constitutional rights and fundamental rights of the petitioners.*”

Learned counsel sought to rely on certain judicial decisions, in support of his clients’ case; but the essence of his case is founded on just the foregoing arguments, by their own momentum. He urged in particular that Bye-law 258 (m) of the Municipal was contrary to the Constitution, insofar as it accorded privileged treatment to the male gender, while excluding the female gender. Counsel submitted that the arrest and arraignment in Court of the petitioners was wrongful because the arresting offices had not observed any act of prostitution on their part; by **Black’s Law Dictionary**, 8th edition, “*prostitution*” means “*[the] act or practice of engaging in sexual activity for money or its equivalent.*” The argument was that the petitioners were not in the act of prostitution when they were arrested, and their arrest was simply a violation of their freedom of movement, apart from being a discriminatory act.

Counsel cited as the basis of the petitioners’ case, the terms of Article 27 (4) of the **Constitution of Kenya, 2010**:

The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or both.

Counsel urged that the instant case also involves discrimination based on dress and that the act of arresting and conducting a search on the petitioners had contravened their rights to personal dignity.

Learned counsel **Mr. Kibara**, for 1st respondent, contested the petition, on the ground that the Municipal Council had no Bye-law regarding “*loitering for immoral purposes*”, and that Bye-law 258 (m) and (n) bore different language; and moreover, this Bye-law “*does not discriminate against women or any group of persons ... as alleged by the petitioners herein but outlaws the acts set out in the said Bye-law especially if they are committed in a public place.*”

Counsel submitted that the penal provision of the Municipal Council’s Bye-laws is No. 266 (1), and that it was not in its design, oppressive:

“This Bye-law is aimed at prohibiting prostitution and is one that strikes a balance between the rights of the petitioners ... and the rights and values of [the] citizenry living within the Municipality ... who are also entitled to have their personal guarantees ... secured.”

Mr. Kibara invited the Court to draw an analogy with a generically similar case, **Republic v. Sharpe (A-G of Canada & Others Intervening)** [2001] LRC665, in which the respondent was charged with the

offence of possessing child pornography, for purposes of distribution and sale. The respondent petitioned the Canadian Constitutional Court, alleging that the Section of the Penal Code under which he had been charged infringed his constitutional guarantees of freedom of expression. The Court of Appeal set aside the trial Judge's decision on the following grounds:

(i) *there had to be a proportionality as between the rights said to have been limited, and the benefits of the law in question (p. 699);*

(ii) *the law should not impair the rights of freedom of expression, except where such limitation is minimal (p. 697);*

(iii) *the law and its benefits must outweigh the likely detrimental effects of any infringement of constitutional freedoms (p. 699).*

The Court held that the Crown had successfully shown that the possession of child pornography poses a reasonable apprehension of harm to children, and that the goal of preventing such harm was “*pressing*” and “*substantial*.”

Counsel urged the Court to adopt the foregoing principle, and uphold the Municipal Council's position that Bye-law 258 (m) and (n) is “*justified and reasonable ... and does not alienate or erode the petitioners' constitutional rights.*” The said Bye-law, counsel submitted, “*does not target women, neither does it discriminate [against] women since the same applies to any person 'found committing the act of loitering with the sole intention of committing prostitution'.*”

Learned Counsel had relied on s. 70 of the 1969 Constitution, for the proposition that the rights which the petitioners are claiming are subject to “*respect for the rights and freedoms of others and for the public interest*” — a provision now incorporated in varying form in the **Constitution of Kenya, 2010** in the following terms (Art. 24):

“(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including —

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.”

Counsel submitted that the constitutional rights now being asserted by the petitioners, are not absolute but limited, “*where such freedoms could easily harm or threaten vulnerable members of [the] society.*” The Bye-law in question, it was urged, “*protects the community and, in particular, the vulnerable girl-child who can be lured into child prostitution.*” Counsel submitted that the said Bye-law is reasonable and proportionate, having regard to the freedom of movement and [of] expression.”

Learned counsel submitted that Bye-law 258 (m) and (n) passes the test of the constitutional law, because:

(i) that Bye-law is “*carefully tailored as a measured and appropriate response to the harm it addresses ...*”;

(ii) the Constitution is not a general substitute for normal procedures for invoking judicial control of administrative action, and in this case, the proper mode would have been judicial review proceedings;

(iii) the rights-guarantees of the Constitution have permissible restriction;

(iv) the enjoyment of fundamental rights and freedoms by the two petitioners should not prejudice the rights and freedoms of others or the public interest.

Learned counsel contested the petitioners’ prayer (d), regarding the advisory obligation of the Attorney-General to various public agencies including the Minister for Local Government and the Municipal Council of Mombasa. It was held in **Njoya & Six Others v. Attorney-General & Another** [2004] 1KLR 232 (**Ringera, Kubo JJ. and Kasango Ag. J.**) that (p. 234):

“That Court was not invested either by the Constitution or any statute with jurisdiction to give an advisory opinion or to make any recommendations to anyone. The Court’s business is to issue, in appropriate circumstances, orders, declarations of rights and decrees.”

Learned Counsel further submitted that the petition had not been brought in compliance with ***The Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006***; that the petitioners ought to have filed a reference to the High Court, since there were proceedings pending in a subordinate Court.

Counsel urged that the petition be dismissed; and, as there was no statement in an affidavit that the petitioners be allowed to proceed as paupers, counsel asked that they be condemned in costs.

For 2nd and 3rd respondents, learned counsel, **Mr. Muteti** made submissions. He urged that there was no basis for impugning Bye-law 258 (m) of the Municipal Council, the spirit of which is to discourage immoral conduct in streets and public places. Counsel submitted from the affidavit evidence, that the said Bye-law is a true reflection of the public opinion; it was made in 2003 after the input of members of the public had been recorded and taken into account. The principle underlying the Bye-law was clear, as counsel submitted:

“... public decency is a matter of public interest and thus any law intended to protect and promote [it] must be encouraged. It is not and can never be the intention of society to promote acts of indecency and acts that would [ex] facie encourage moral decadence and corruption of public morals. Prostitution is one of such [examples of] conduct that any civilized society would not countenance.”

Counsel urged that Article 24 of **Constitution of Kenya, 2010** permits the limitation of fundamental rights and freedoms where such limitation is “*reasonable and justifiable in an open and democratic society.*” As an element in the democratic context of the Bye-law, counsel urged, the Municipal Council

of Mombasa had made a public advertisement of the legislative project in the **Daily Nation** of Friday, **28th March, 2003** to enable members of the public to express their opinions.

Mr. Muteti contested the petitioners' claim that the said Bye-law 258 (m) actually or potentially violates the rights and dignity of women: for the petitioners did not highlight the specific right under the Bill of Rights which was likely to be violated by the enforcement of the Bye-law. Counsel urged that it was not for the Court to assist the petitioners in identifying the right upon which their case was founded; and besides, even were such a right properly identified, it would have to be weighed as against the public interest: **Article 24 (1) (d) of the Constitution**. Counsel submitted that 1st and 3rd respondents, in enforcing the Bye-law in question, were simply acting to protect the public interest, as provided for in Article 156 (6) of the Constitution: "*The rights and dignity of women are thus to be enjoyed in accordance with the law ... as spelt out ... through the Constitution and by Parliament and Municipal Councils through statutes and Bye-laws respectively.*"

Counsel contested the petitioners' prayer that the Attorney-General be ordered to advise the Minister for Local Government that Bye-law 258 (m) is unconstitutional: for by the Penal Code (Cap. 63, Laws of Kenya) (Chapter XV) and by the Sexual Offences Act, 2006 (Act No. 3 of 2006), prostitution remains unlawful.

Mr. Muteti urged further that the said Bye-law is not discriminatory, as it did not target women, and its prohibition was in relation to "*any person*"; and for this reason, it was urged that the Bye-law did not offend any international legal instruments. In those circumstances, counsel submitted that the petitioners had no basis for asking that the criminal proceedings against them should be terminated.

Counsel urged that the petitioners have failed to demonstrate that they were discriminated against, nor that they are likely to be discriminated against: and so they were not entitled to any damages.

Counsel submitted that the petition had no basis in law, as it related to ongoing trials, and yet no proceedings relating to the said trials, and no charge sheet, were availed: so that this Court was called upon to make orders in the dark. Counsel asked that the petition be dismissed with costs, since the petitioners had brought the respondents before the Court, but without cause.

In several earlier decisions (for instance: **Joseph Kimani Gathungu v. The Attorney-General and the International Criminal Court**, Mombasa H.C. Const. Ref. Application No. 12 of 2010; **Luka Kitumbi and 8 Others v. Commissioner of Mines & Geology and Another**, Mombasa HCCC No. 190 of 2010) it has been noted that the Constitution of Kenya, 2010 has proclaimed certain broad rights. Parties often sense, as is indeed the case in the instant matter, that the broad-based safeguard for fundamental rights is a basis for the constitutional petition as an instant recourse. This may be an item for the agenda or the newly-established Commission for the Implementation of the Constitution (Article 262 of the Constitution; s. 5 of Sixth Schedule to the Constitution). Just as counsel for the respondents have submitted, the petitioners herein preferred to resort to the threshold principles regarding rights-claims, while steering clear of well established entry-point considerations, procedures and details — matters which, in a proper case, will give fulfilment to the constitutional goals in question: for instance, recourse to judicial review of administrative action; observance of proportionalities between guaranteed rights, and the public interest; statutes and Bye-laws as instruments in the application of constitutional principles; specific integration of principles drawn from international law into the redressive set-up of local law; striking a distinction between advisory roles within the Executive Branch, and specific compliance-actions attached to justiciability in Court; acknowledging trial-Court procedure as a forum for canvassing individual rights; importance of **evidence** in a particular case, as a basis of safeguard for a litigant's constitutional rights.

Learned counsel **Mr. Ndubi**, for the petitioners, argued this case essentially on the basis of generality premised, in the first place, on the primacy of the Constitution as a basis of fundamental rights. This approach overlooked the evidentiary aspect of this case; and on this account the petitioners' plea cannot succeed. The far-reaching effects of judicial orders dictate that these orders are to rest on a solid

foundation of law and/or evidence, neither of which has been shown in the petitioners' case. The petitioners have not addressed the question of proportionality between their claims to certain rights, and the claims of the **public interest**; and they have adduced no evidence demonstrating any violation of their guaranteed rights, apart from raising analogies based on an unrelated study entitled **Documenting Human Rights Violations of Sex Workers in Kenya** (2008).

There is no basis for declaring that Mombasa Municipal Council Bye-law 258 (m) and (n) actually and potentially violates the rights and dignity of women, and there is no basis for declaring the same to be unconstitutional.

Although the petitioners sought a declaration that the said Bye-law 258 (m) and (n) violates several **international conventions**, counsel did not address the question whether such a decision fell within the remit of this Court; and without clarity on the question of jurisdiction, it is improper for the Court to make such an order.

The Court cannot, of course, issue orders directing the State Law Office on how to advise the Local Government Minister regarding the making of Bye-laws within the Municipalities: it would detract from a certain measure of separation of powers that is essential for the proper discharge of the judicial function, quite apart from the fact that an order of such a kind would be circuitous, hortatory and not inviting direct compliance.

The Court declines to make an order that the arrest, arraignment and trial of the petitioners in Criminal Case No. 3560 is an abuse of their constitutional rights and must be terminated.

It is obvious there will be no award of damages.

Parties shall bear their respective costs.

DATED and DELIVERED at MOMBASA this 25th day of March, 2011.

J. B. OJWANG

JUDGE

Coram: **Ojwang, J.**

Court Clerk: **Ibrahim**

For the Petitioners: **Mr. Ndubi/Ms. Mwati**

For 1st Respondent: **Mr. Kibara/Ms. Langat**

For 2nd and 3rd Respondents: **Mr. Muteti**