



**Opande v Director of Criminal Investigations; Media Council of Kenya
(Interested Party) (Petition E157 of 2024) [2025] KEHC 8543 (KLR)
(Constitutional and Human Rights) (19 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8543 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E157 OF 2024

LN MUGAMBI, J

JUNE 19, 2025

BETWEEN

JONATHAN OKOTH OPANDE PETITIONER

AND

DIRECTOR OF CRIMINAL INVESTIGATIONS RESPONDENT

AND

MEDIA COUNCIL OF KENYA INTERESTED PARTY

JUDGMENT

1. The Petition dated 19th March 2024 comes up for judgment after it was almost thrown out following a Notice to Show Cause issued on 29th October 2024.

DIVISION - The Petition

2. The Petition is supported by the Petitioner’s supporting affidavit of even date. This litigation revolves around the Petitioner’s claim that the Respondent in publishing a defamatory Article touching on the Petitioner, not only violated his constitutional rights but also did so blatantly, in abuse its power and in breach of the principle of sub judice. Accordingly, the Petitioner seeks the following relief against the Respondent:
 - a. A declaration that the Petitioner's right to dignity, right to a fair administrative process, right of access to justice, right to fair hearing, and the right to legitimate expectation has been breached.
 - b. A declaration that the Respondent has violated the national values and principles of accountability, transparency and accountability.



- c. An order of Mandamus compelling the Respondent to immediately delete or cause to be deleted the posts published on its X and Face book accounts on 18th March 2024 touching on the Petitioner or his photos or cases in which he is a party.
- d. An order of Prohibition restraining the Respondent and the Interested Party or their agents or employees from publishing in any platform or any media outlet any story or publication touching on the Petitioner or his photos or court cases in which he is a party.
- e. In the event of the failure of the Respondent to comply with the orders of this Court, the Petitioner to report back to Court within 90 days for purposes of this Court to issue necessary and appropriate orders compelling the Respondent to undertake actions necessary for fulfilling the orders of this Court.
- f. Damages to be awarded to the Petitioner for breach of his rights and fundamental freedoms.
- g. Costs of the suit and interest thereon.

Petitioner's Case

3. The Petitioner asserts that the Respondent on 18th March 2024, published an offensive Article on its Facebook page and X platform, which portrayed the Petitioner as a criminal. The Article reported as follows:

“DELVING IN THE UNDERWORLD OF THE MOST INFAMOUS GOLD SCAM SUSPECTS

From the most recent seizure of Sh151 million worth of sand at the port of Mombasa declared as tantalum minerals, to crushed Tri-Circle padlocks and over Sh2.85 billion botched mega gold scam by Nairobi's most dreaded 'Wash Wash' hoodlums, The DCI highlights major cases in the past one year while providing the crucial indicators dealers must to look out for to avoid being scammed.

In the upcoming comprehensive feature published in the 9th edition of The DCI magazine, notorious faces in the world of scam, their criminal history and list of cases they are battling in the Kenyan courts are paraded.

Do not miss out on this read as we seek to enlighten individual merchants, corporates and the international community on the prevalent crimes being orchestrated by well-organized criminal rings, while pointing out measures being adopted by specialized teams in the DCI to stifle the practice.”

4. Alongside the Article, it is averred that the Respondent attached several photographs including one of the Petitioner. Additionally, the Respondent referred to ongoing suits, including two where he is a party. This is Milimani MCCR No. 418 of 2018 -Republic v Jonathan Okoth Opande and Makadara MCCR No. E5217 of 2023. The Petitioner argues that this violates his right to be presumed innocent and invokes the sub judice rule.
5. Likewise, the Petitioner depones that by tarnishing his reputation the Respondent is subjecting him to reputational damage before the society, thus violating his right to dignity. He informs that ever since this Article was published, he has received numerous calls from both friends and foes inquiring about the same.



6. The Petitioner depones that despite his request to have the post deleted, the Respondent has neglected to take any action. He is grieved that the impugned post is malicious and prejudicial against him. In light of the foregoing, the Petitioner argues that the Respondent violated his rights as the offensive post breaches his constitutional rights as is discriminative and violates his right to equality, dignity, privacy, a fair administrative action and a fair hearing. Additionally, that the Respondent's actions are contrary to the principles of leadership and good governance.

Respondent's and Interested Party's Case

7. These Parties responses and submissions are not in the Court file or Court Online Platform (CTS).

Petitioner's Submissions

8. The Petitioner, through Okumu, Miyawa and Wamwara Advocates LLP filed submissions dated 15th May 2024, where the following issues were highlighted for determination: whether the Respondent has breached the Petitioner's right to fair trial, right to dignity, right of access to justice, and the right to legitimate expectation, whether the conduct of the Respondent is in contempt of the lower court and offends the sub judice rule, whether the Respondent has breached the right to fair administrative process, whether the Respondent has violated national values of good governance, transparency and accountability, whether the Petitioner has met the conditions for injunction and whether the Court can compel the Respondent to delete the posts made on Facebook and X accounts touching on the Petitioner.
9. On the first issue, Counsel submitted that the impugned post had indeed violated the Petitioner's rights. First, the right to equality and freedom from discrimination as suspects in other cases are not treated and exposed in such a manner. Further, his right to dignity and privacy owing to the reputation damage of the offensive post and details divulged therein. In addition, being that the matter is subject of an ongoing suit the Petitioner's right to be presumed innocent was breached. Cumulatively, the Respondent's actions are said to have violated the Petitioner's right to a fair hearing being that he has already been adjudged a criminal. Counsel added that the Respondent's conduct had violated the principles and values of leadership under Article 73 of *the Constitution*.
10. Counsel equally submitted that the Respondent in referring to the ongoing suits was in contempt of Court and invoked the sub judice rule. Counsel added that the Article and intended publication of a feature are unconstitutional, unlawful, biased and laced with mala fides on the part of the Respondent. This is since as being a complainant in the cited suits, has a forum in Court to raise all the concerns without resorting to social media while the cases are still ongoing.
11. This move was also argued to be abuse of power on the Respondent's part while interfering with the Petitioner's right to a fair trial. Reliance was placed in *Dry Associates Limited v Capital Markets Authority & Another Interested Party Crown Berger (K) Ltd High Court Constitutional Petition No. 328 of 2011 [2012] eKLR* where it was held that:

“ Access to justice is a broad concept that defies easy definition. It includes the enshrinement of rights in the law; awareness of and understanding of the law; easy availability of information pertinent to one's rights; equal right to the protection of those rights by the law enforcement agencies; easy access to the justice system particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay.”



12. Counsel further argued that the Petitioner’s legitimate expectation that the Respondent would investigate the alleged offences and prosecute the matter in Court and not social media was violated. Reliance was placed in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR where it was held that:

“An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has locus standi to make a claim on the basis of legitimate expectation.”

13. Like dependence was placed in *Republic v Kenya Revenue Authority Ex Parte Cooper K-Brands Limited* [2016] eKLR and *Republic v Principle Secretary, Ministry of Transport, Housing and Urban Development Ex parte Soweto Residents Forum CBO* [2019] eKLR.

14. Furthermore, Counsel submitted that the Respondent had breached the Petitioner’s right to a fair administrative process as failed to respond to the Petitioner’s complaint letter. Counsel asserted that the Respondent is obligated to adhere to a fair and proper administrative treatment which he failed to do thus violating this right.

15. On the fourth issue, Counsel submitted that the Respondent’s conduct had also violated the principles of good governance, transparency and accountability and the required conduct of State Officers. Counsel stressed that the Respondent’s neglect of duty and failure to exercise its power lawfully and with no reasonable justification violated Article 10 of *the Constitution*. Reliance was placed in *Jack Mukhongo Munialo & 12 others v Attorney General & 2 others* [2017] eKLR where it was held that:

“Whereas Article 10 of *the Constitution* provides for national values and principles of governance, including transparency and accountability, and Article 35 guarantees citizens the right to information, these Articles must be read together...”

16. Accordingly, Counsel in the fifth issue submitted that the Petitioner had met the condition for an order of mandamus. To buttress this point reliance was placed in *Chunky Limited v Director of Criminal Investigations* [2022] KEHC 297 (KLR) where it was held that:

“Mandamus will issue to compel a person or body of persons who has failed to perform a duty to the detriment of a party who has a legal right to expect the duty to be performed.”

17. Comparable reliance was placed in *Saisi & 7 others v Director of Public Prosecutions & 2 others* [2023] KESC 6 (KLR), *Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR and *Republic v Attorney General & another Ex parte James Alfred Koroso* [2013] eKLR.

Analysis and Determination

18. It is my considered view, that the issues that arise for determination are:

- i. Whether the Respondent’s actions violated the Petitioner’s constitutional rights under Articles 10(2), 27, 28, 31, 47 and 50 of *the Constitution*.
- ii. Where the Petitioner is entitled to the reliefs sought.



Whether the Respondent's actions violated the Petitioner's constitutional rights under Articles 10(2), 27, 28, 31, 47 and 50 of *the Constitution*.

19. It is the duty of the Petitioner to prove the allegations that are put forward in the Petition. This must be done by marshalling evidence in support of those allegations. The burden of proof has two major components, the evidential burden and the legal burden. Evidential burden is the burden of adducing evidence to support the Petitioner's case while the legal burden is satisfied when the standard of proof is met in any particular case upon the evaluation of the evidence adduced in the entire case. In *Leonard Otieno v Airtel Kenya Limited* [2018] KEHC 9063 (KLR) explained thus:

“ 62. Section 107 (1) of the *Evidence Act* provides that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." Sub-section (2) provides that "when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

63. I have severally stated that all cases are decided on the legal burden of proof being discharged (or not). Lord Brandon once remarked:-

“No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take.”

64. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Britestone Pte Ltd vs Smith & Associates Far East Ltd* :

“The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”

It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize *the constitution* and inevitably result in ill considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.”

20. The Petitioner's grievances as highlighted in the Petition arise from a social media post by the Respondent (DCI) namely, Face Book and X (Twitter) that had the photo of the applicant in connection with two cases Milimani MCCR/418 of 2018 and Makadara MCCR E5217 of 2023 in which the Petitioner is an accused person.

21. According to the Petitioner's affidavit in support; the screen shots of the post which he exhibited as annexures "J00-001, J00-002, J00-003 and J00-00 had the following caption:

“From the most recent seizure of 151 million worth of sand at the Port of Mombasa declared as tantalum minerals, to crushed Tri-Circle padlocks and over 2.85 billion botched mega



gold scam by Nairobi most dreaded ‘Wash Wash’ hoodlums, The DCI highlights major cases in the past one year while providing the crucial indicators dealers must look out for to avoid being scammed.

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Do not miss out on this read as we seek to enlighten individual merchants, corporates and international community on the prevalent of crimes being orchestrated by well organised criminal rings, while pointing out measures being adopted by specialised teams in DCI to stifle the practice...”

22. The Petitioner alleges that he enjoys *the Constitution* right to innocence and the fact that he is facing a criminal case does not permit the Respondent take away his right of innocence or condemning him before the Court of public opinion. He further argued the conduct of the Respondent is discriminative and wondered why out of the many cases the Respondent investigates, it should profile the cases in which the Petitioner is a party and parade them it should subject them to public opinion.
23. The Petitioner further alleged that the Respondent this was reputational damage in the eyes of the right-thinking members of the society. That the Respondent should not be adversely commenting on the ongoing cases against the Petitioner. That the conduct also amounts to contempt of Court and threatens Petitioner’s right to a fair trial.
24. Although the Petitioner complains that the publication amounts to reputational damage, he readily admits that he is an accused in both criminal cases pending before court that the Respondent states it will be reporting on in regard to the subject matter of the alleged offences.
25. The law protects a person’s honour from reputational damage but it also protects statements made by persons with legal, moral or social duty to convey a sincere interest that is reasonably fair and accurate without malice.
26. The Petitioner having conceded in his own pleadings that he is facing the charges relating to the subject matter under reference by the Respondent in the said post cannot thus apply the Court process to muzzle the Respondent from commenting on a matter it is publishing for public good when there is no demonstration that the statements therein are false or misleading. The Supreme Court of India in *Jawaharlal Darda v Manohar Ganpatrao Kapiskar Anr* on 26 March, 1998 AIR 1998 Supreme Court 2117 (Bench G.T. Nanavati, V.N Khare) had the following to say in such cases:

“it is quite apparent that what the accused had published in its newspaper an accurate and true report of the proceedings of the Assembly. Involvement of the respondent was disclosed by the preliminary inquiry made by the Government. If the accused bonafide believing the version of the Minister to be true published the report in good faith it cannot be said that they intended to harm the reputation of the complainant. It was a report in respect of public conduct of public servants who were entrusted with public funds intended to be used for public good. Thus, the facts and circumstances of the case disclose that the news item were published for public good...”

27. The only way the Petitioner would succeed is to demonstrate falsity in regard to the report coupled with malice.



28. On the claim that the making a report of the ongoing cases amounts to contempt of court, contempt of court arises from disobeying a lawful order and it was not demonstrated that the lower court had issued any orders barring the respondent from commenting on the ongoing cases.

29. It was also alleged by the Petitioner that the commenting on the said cases will potentially undermine his right to a fair trial. I do not think so. The Petitioner will be being tried by a competent Court manned by professionally trained and qualified judicial officers that should be above any such manipulation, if any. Such claims have featured in Courts before and the Courts have refused to buy this narrative. In *William S.K. Ruto & Another v Attorney General*, HC Civil Suit No. 1192 of 2005 emphatically asserted:

“... The applicants will be tried by qualified, competent and independent judicial officers who are not easily influenced by statements made by politicians to the press. In our country today, such statements are the order of the day and it is our view that the courts will rise above such utterances. We find no basis for the applicant’s fears...”

30. Claims that the Petitioners have been singled out for disparagement because out of the many cases the Respondent investigates, it is only the cases he is involved that are being exposed to public opinion hence is being discriminated is also not in my view untenable. The Supreme Court in *Gichuru v Package Insurance Brokers Ltd* [2021] KESC 12 (KLR) (Civ) referring to various cases explained that it was incumbent upon the Petitioner to prove claim of discrimination as follows:

“(47) This court had occasion to lay emphasis on the burden of proof in cases of discrimination in the case of *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] eKLR where the Supreme Court applied Section 108 of the *Evidence Act* in requiring the claimant to prove his claim in a matter involving discrimination. The court also grappled with the issue of direct and indirect discrimination. The court observed thus:

“ [49] Section 108 of the *Evidence Act* provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

[50] This court in *Raila Odinga & others v Independent Electoral & Boundaries Commission & others, Petition No 5 of 2013*, restated the basic rule on the shifting of the evidential burden, in these terms:

“...a petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”

(51) In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the superior courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.”



(48) Black’s Law Dictionary, 10th Edition defines discrimination as “failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.” However, it must be appreciated that not all cases of distinction amount to discrimination. Learned author Robert K Fullinwider; in *The Reverse Discrimination Controversy* 11-12 [1980] states; “The dictionary sense of discrimination is neutral while the current political use of the term is frequently non-neutral, pejorative. With both a neutral and a non-neutral use of the word having currently, the opportunity for confusion in arguments about racial discrimination is enormously multiplied. For some, it may be enough that a practice is called discriminatory for them to judge it wrong. Others may be mystified that the first group condemns the practice without further argument or inquiry. Many may be led to the false sense that they have actually made a moral argument by showing that the practice discriminates (distinguishes in favor of or against). The temptation is to move from X distinguishes in favor of or against to X discriminates to X is wrong without being aware of the equivocation involved.”

31. The Court went on further to observe that:

“(50) In equal measure, we adopt the definition of discrimination in the High Court case of *Peter K Waweru v Republic* [2006] eKLR as follows:

“Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions by race, tribe, place of origin or residence or other local conviction, political opinions, colour, creed, or sex, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”

(51) From the above definitions, it is clear that discrimination can be said to have occurred where a person is treated differently from other persons who are in similar positions on the basis of one of the prohibited grounds like race, sex disability etc or due to unfair practice and without any objective and reasonable justification.”

32. To succeed in proving discrimination, the Petitioner should have demonstrated that there are similar cases of equal weight or nature as the cases that he is facing but the Respondent has disregarded reporting on them and only singled out his cases for publishing a fact that was not demonstrated.

33. In the overall analysis, I find that the Petitioner has not discharged the initial evidential burden of proof that would even have required the Respondent to rebut. This Court is unable to make any finding in his favour.

34. The Petition with no orders as to costs.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF JUNE, 2025.

.....

L N MUGAMBI

JUDGE

