



Wafula & 8 others v OCPD - Kwanza & 6 others (Constitutional Petition 9 (E001) of 2020) [2024] KEHC 997 (KLR) (8 February 2024) (Judgment)

Neutral citation: [2024] KEHC 997 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CONSTITUTIONAL PETITION 9 (E001) OF 2020
AC MRIMA, J
FEBRUARY 8, 2024**

BETWEEN

ANTHONY WALELA WAFULA & 8 OTHERS PETITIONER

AND

THE OCPD – KWANZA & 6 OTHERS & 6 OTHERS RESPONDENT

JUDGMENT

1. This Petition was filed against the backdrop of an alleged confrontation between the police and members of public in the afternoon of 16th December 2018 at the Kolongolo market within Kwanza Sub-County in the Trans Nzoia County.
2. It was alleged that clash claimed several lives and left scores of other people injured.
3. The 9 Petitioners in this matter comprised of 4 of those who were injured during the fracas and the rest were personal representatives of the estates of those who succumbed to the injuries allegedly sustained during the skirmishes.
4. The Petition was vehemently opposed.

The Petition:

5. The Petition was dated 21st August, 2020. It was supported by the Affidavit sworn by the 1st Petitioner herein, Anthony Walela Wafula, on the even date. In further support to the Petition, the Petitioners filed written submissions dated 11th July, 2022 wherein several decisions were referred to.
6. The Petition was heard by way of reliance on the pleadings, the affidavit evidence and written submissions. Both parties filed their respective pleadings and submissions.
7. In the main, the Petitioners prayed for the following reliefs: -



- a. A declaratory order to the effect that the right to life, the prohibition of torture, inhuman and degrading treatment, the right to security of the person, the right to protect of the law, the right to equality and freedom from discrimination, the right to information, and the right to remedy were violated in relation to the deceased's and, petitioners No.6,7, 8 and 9 as a result of the police shooting and that the failure to conduct proper and effective investigation and prosecution of police crimes is a violation of the positive obligation to investigate and prosecute violation of the right to life and the prohibition of torture.
 - b. A declaration that the respondents are bound by *the constitution* and are under an obligation to respect, uphold and defend *the constitution* and that failure thereof has infringed the deceased's right to life under Article 26 of *the Constitution* and enquiry into damages be made.
 - c. A declaration that as a result of the breach of rights enumerated above the petitioners and the deceased suffered damages, pain and suffering and they are entitled to special, general and exemplary damages against the respondents herein jointly and severally.
 - d. Costs and interest.
8. The Petitioners then prayed that the Petition be allowed as prayed.

The Response:

9. The Petition was opposed by the Respondents.
10. The Respondents filed a Response to the Petition dated 17th December, 2021. They denied liability and put the Petitioners into strict proof thereto. They further denied that the Petition raised any constitutional issues and posited that the Petitioner sought to have pursued compensation by way of civil claims.
11. The Respondents also filed written submissions dated 4th September, 2023 in buttressing their position.
12. In the end, the Respondents prayed for the dismissal of the Petition with costs.

Analysis:

13. Having carefully considered the Petition, the response thereto, the parties' submissions and the decisions referred to, this Court finds the following two issues are for determination: -
 - i. Whether the Petition raises any constitutional issues.
 - ii. In the event issue (i) above is answered in the affirmative, whether the Petition was proved and if so, whether the Petitioners are entitled to the remedies sought.
14. The Court will deal with the issues in seriatim.

(a) Whether the Petition raises any constitutional issues:

15. As captured above, it was the Respondents contention that the Petition is a non-starter since it raised no constitutional issues for determination. Instead, it was submitted that the Petition was a simple claim for compensation which ought to have been filed in the contemporary civil Courts.
16. Some decisions were cited including the locus classicus Anarita Karimi Njeru vs. The Republic (1076-1980) KLR 1272 in furtherance of the position that the Petition was unsustainable.



17. The Petitioners were of the contrary view. They submitted that the Petition complied with all the requirements precedent to bringing such an action and that it was a holding Petition. The decision in *Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others* (2013) eKLR, among others, were referred to in buttressing the opposition.
18. The parties' positions have been carefully considered. Perhaps the starting point should be a look at what a constitutional issue is.
19. Long before the downing of the new constitutional dispensation under *the Constitution* of Kenya 2010, Courts have variously emphasized the need for clarity of pleadings. This Court echoes the position.
20. *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (commonly referred to as 'the Mutunga Rules') also provide for the contents of Petitions. Rule 10 thereof provides seven key contents of a Petition as follows:-
Form of petition.
 10.
 - (1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.
 - (2) The petition shall disclose the following-
 - (a) the petitioner's name and address;
 - (b) the facts relied upon;
 - (c) the constitutional provision violated;
 - (d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
 - (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
 - (f) the petition shall be signed by the petitioner or the advocate of the petitioner; and
 - (g) the relief sought by the petitioner.
21. Rule 10(3) and (4) of the Mutunga Rules also have a bearing on the form of petitions. They provide as follows: -
 - (3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.
 - (4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.
22. Rules 9 and 10 are on the place of filing and the Notice of institution of the Petition respectively.



23. The Supreme Court in *Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others* case (supra) had the following on Constitutional Petitions: -

Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru vs. Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

24. The Constitutional Court of South Africa in *Fredricks & Other vs. MEC for Education and Training, Eastern Cape & Others* (2002) 23 ILJ 81 (CC), rightly so, delimited what a constitutional issue entails and the jurisdiction of a Constitutional Court as follows: -

The Constitution provides no definition of ‘constitutional matter’. What is a constitutional matter must be gleaned from a reading of *the Constitution* itself: if regard is had to the provisions of... Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with *the Constitution*, as well as issues concerning the status, powers and functions of an organ of State.... the interpretation, application and upholding of *the Constitution* are also constitutional issues. So too is the question of the interpretation of any legislation or the development of the common law promotes the spirit, purport and object of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of *the Constitution*, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly on extensive jurisdiction...

25. In the United States of America, a constitutional issue refers to any political, legal, or social issue that in some way confronts the protections laid out in the US Constitution.

26. Taking cue from the foregoing, and broadly speaking, a constitutional issue is, therefore, one which confronts the various protections laid out in a Constitution. Such protections may be in respect to the Bill of Rights or any other part of *the Constitution*. In any case, the issue must demonstrate the link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened or threatened and the manifestation of contravention or infringement.

27. Further, Langa, J in *Minister of Safety & Security vs. Luiters*, (2007) 28 ILJ 133 (CC) added his voice on what a constitutional issue is and stated thus: -

... When determining whether an argument raises a constitutional issue, the Court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the Court to consider constitutional rights and values...

28. Whereas it is largely agreed that *the Constitution* of Kenya, 2010 is transformative and that the Bill of Rights has been hailed as one of the best in any Constitution in the world, as Lenaola, J (as he then was) firmly stated in *Rapinder Kaur Atal vs. Manjit Singh Amrit* case (supra) ‘... Courts must interpret it with all liberation they can marshal...’



29. Resulting from the above discussion and the definition of a constitutional issue, this Court agrees with the position in *Turkana County Government & 20 Others vs. Attorney General & Others* (2016) eKLR where a Multi-Judge bench affirmed the profound legal standing that claims of statutory violations cannot give rise to constitutional violations.
30. Returning to the matter at hand, this Court has perused the Petition. It has 5 substantive parts. They are the Description of the parties, the Facts in support of the Petition, the Constitutional and Statutory violations, the Claims and the Reliefs sought.
31. The Petition variously challenged the manner in which the Respondents acted which in turn allegedly infringed their rights as protected in *the Constitution* and the law.
32. In other words, the Petitioner sought the intervention of this Court on the basis that the Respondents confronted their rights and fundamental freedoms as guaranteed in *the Constitution*. In such a scenario, the issues transcend the borders of ordinary issues into the realm of and crystallize into constitutional issues.
33. In this case, even by taking the caution in *Hakizimana Abdoul Abdulkarim -vs- Arrow Motors (EA) Ltd & Anor* (2017) eKLR into account, still the Petition, no doubt, reveal that it fully complied with Rule 10(1) and (2) of the Mutunga Rules as well as the requirements in Communications Commission case (*supra*).
34. The Petition raises pure and serious constitutional issues for consideration by this Court. This Court is duty bound under Article 165(3) of *the Constitution* to determine any question as to whether a right or fundamental freedom in a Bill of Rights has been infringed, denied, violated or threatened.
35. The Court, therefore, finds and hold that the contention that the Petition is devoid of raising any constitutional issue cannot be maintained. The same is for rejection.
36. Having held as such, a consideration of the second issue now follows.

(b) Whether the Petition was proved:

37. The Respondents once again fronted a scathing attack on proof of the Petition. On the basis of Sections 107, 108 and 110 of the *Evidence Act*, the Respondents contended that the allegations by the Petitioners were not proved.
38. To the contrary, the Petitioners posited that there was ample evidence in support of the Petition and that the evidence attained the threshold of the proof required in law.
39. The matter before Court is a constitutional Petition. Like other disputes, the conduct of constitutional Petitions is generally governed by *the Constitution* and the law.
40. Article 159(2)(d) of *the Constitution* call upon Courts and Tribunals to administer justice without undue regard to procedural technicalities.
41. Speaking of the essence of Article 159(2)(d) of *the Constitution*, the Supreme Court of Kenya in *Law Society of Kenya v. The Centre for Human Rights & Democracy & 12 Others*, Petition No. 14 of 2013 held that: -

Article 159(2) (d) of *the Constitution* is not a panacea for all procedural shortfalls.



42. And, in *Patricia Cherotich Sawe v Independent Electoral & Boundaries Commission (IEBC) & 4 others* [2015] eKLR the Supreme Court further held that: -

Not all procedural deficiencies can be remedied by Article 159....

43. The practice and procedure in constitutional Petitions are further provided for under the Mutunga Rules.

44. Rule 20(1) of the Mutunga Rules is on the manner in which constitutional Petitions ought to be heard. Such Petitions may be heard by way of affidavits or written submissions or oral evidence. Rule 20(3) of the Mutunga Rules provide that a Court may upon application or on its own motion direct that the Petition or part thereof be heard by oral evidence. Rule 20(4) and (5) of the Mutunga Rules provide for the summoning and examination of witnesses.

45. The conduct of constitutional Petitions is also guided by various laws. For instance, the *Evidence Act* applies to matters generally relating to evidence. The *Evidence Act* is clear on its application to constitutional Petitions and affidavits in Section 2 thereof. The provision provides as follows: -

1. This Act shall apply to all judicial proceedings in or before any Court other than a Kadhi's Court, but not to proceedings before an arbitrator.
2. Subject to the provisions of any other Act or of any rules of Court, this Act shall apply to affidavits presented to any Court.

46. Sections 107(1), (2) and 109 of the *Evidence Act* are on the burden of proof. They state as follows:

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- (1) 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.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

109. Proof of particular fact

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.

47. The burden of proof on a Petitioner in a constitutional Petition was also addressed by the Supreme Court in *Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others* case (supra).

48. As said stated before, the Petition was heard by way of affidavit evidence. The Respondents were categorical from the filing of their Response to the Petition that they were not agreeing with the Petitioners and called for strict proof.

49. Initially, the Petitioners sought to hear the Petition by way of viva voce evidence and like directions were given by the Court. However, the directions were later varied by the parties to reliance on affidavit evidence on the consensus of the parties.

50. The Petition was not a straight-forward one. It raised intricate issues which called for proof by way of oral evidence. For instance, evidence ought to have been called to sufficiently demonstrate what really happened on the material day. That evidence would have aided this Court to ascertain whether



the police acted within the Constitution and the law or otherwise in the unique circumstances of this matter. That evidence is missing.

51. There was also the issue as to whether the causes of the deaths of the persons in issue and the injuries sustained by those who survived the ordeal were caused by the bullets fired from the firearms which had been provided to the police officers who were at the scene during the confrontation. That evidence is again missing.
52. With such a lacuna, this Court finds it extremely difficult to find that the Petition was proved. The Petitioners' affidavit evidence placed against the objections raised the Respondents does not pass the muster of proving violation of the Petitioners' rights and fundamental freedoms as guaranteed in the Constitution.
53. Having found as much, this Court is satisfied that there is sufficient basis to bring this matter to an end.

Disposition:

54. Drawing from the foregoing discussion, the following final orders do hereby issue: -
 - a. The Petition is hereby dismissed on account of failure to prove the alleged violations of the Constitution and the law.
 - b. Each party shall bear its own costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 8TH DAY OF FEBRUARY 2024.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Wanyonyi, Learned Counsel for the Petitioners.

N/A for Miss Cheruiyot, Learned Counsel for the Respondents.

Duke – Court Assistant.

