



**Otieno v Karume, Assistant Chief, Mtangani Sub Location & 3 others (Constitutional Petition E008 of 2022) [2024] KEHC 5519 (KLR) (18 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 5519 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CONSTITUTIONAL PETITION E008 OF 2022**

**OA SEWE, J**

**APRIL 18, 2024**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF  
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES  
22, 23, 25, 28, 29, 47, 48, 49, & 50 OF THE CONSTITUTION  
OF KENYA, 2010**

**BETWEEN**

**BETWEEN**

**FELIX ODHIAMBO OTIENO ..... PETITIONER**

**AND**

**NELSON KENGA KARUME, ASSISTANT CHIEF, MTANGANI SUB  
LOCATION ..... 1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 3<sup>RD</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner, FOO, moved the Court vide his Petition dated 24<sup>th</sup> February 2022 contending that, on the 1<sup>st</sup> September 2021, his 5-year-old daughter, M A, passed on in hospital at Mariakani within Kilifi County after a short illness. He added that, on the 3<sup>rd</sup> September 2021, the 1<sup>st</sup> respondent reported the death to Mariakani Police Station, by falsely alleging that he had defiled his daughter and that the defilement was the direct cause of the deceased's death. He added that, on the basis of that false and outrageous report, the 2<sup>nd</sup> respondent went ahead and arrested him, at a time when he was grief-stricken; mourning the death of his only daughter.



2. The petitioner further averred that he was thereafter taken before the court at Mariakani Law Courts and was remanded for one week pending completion of investigations. Post mortem was thereafter conducted which revealed that the deceased died due to cardio-respiratory arrest. He was accordingly released after being incarcerated for one week. Thus, the petitioner averred that his constitutional rights under Articles 28, 49(1) and 50(j) of the Constitution were grossly violated by the respondents. He accordingly prayed for reliefs as follows:
  - (a) A declaration that the respondents contravened the provisions of Articles 22, 23, 25(c), 28, 29(a), (d), 47, 48, 49 and 50(j) of *the Constitution* were violated.
  - (b) An order of compensation in general damages against the respondents jointly and severally for violating the petitioner's constitutional rights.
  - (c) Costs of the suit and interest thereon.
  - (d) Any other relief that the Court may deem fit to grant.
3. The Petition was resisted by the respondents. They relied on their Reply to the Petition dated 20<sup>th</sup> May 2022. They denied the alleged violations and asserted that the petitioner's incarceration for one week was done on the basis of a valid court order; and that upon conclusion of the investigations, he was promptly released. They further averred that the nature of the allegations against the petitioner fell within the 3<sup>rd</sup> respondent's statutory mandate of investigations. Thus, the respondents prayed for the dismissal of the Petition.
4. The Petition was canvassed by way of written submissions pursuant to the directions given herein on 26<sup>th</sup> October 2022. On behalf of the petitioner, Mr. Magolo relied on his written submissions dated 28<sup>th</sup> October 2022. He was of the view that the petitioner's arrest was wholly unwarranted; and that in order to establish the lawfulness of an arrest without a warrant, the respondents were obliged to show probable cause or reasonable suspicion. He relied on *Mohamed Feisal & Others v Henry Kandie, Chief Inspector of Police, OCS Ongata Rongai Police Station & 7 Others; National Police Service Commission* and urged the Court to find that the petitioner's arrest was out of ill intentions.
5. Hence, counsel made specific submissions in connection with Article 28 on the right of human dignity as well as Article 29 on the right to freedom and security and proposed a total award of Kshs. 10 million for the alleged violations.
6. On behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, written submissions were filed herein on 16<sup>th</sup> January 2023 in which the following issues were proposed for determination:
  - (a) Whether the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents violated the petitioner's constitutional rights; and
  - (b) Whether the petitioner is entitled to the prayers sought in the Petition.
7. It was consequently the submission of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents that the petitioner was arrested and remanded pending investigations according to law; and was duly informed of the reason for the arrest, the right to remain silent and the consequences of remaining silent. Consequently, it was the submission of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents that the petitioner has not presented any evidence to prove the alleged infringements. They relied on *David Mathu Kimingi v SMEC International PTY Limited [2021] eKLR* and *Anarita Karimi Njeru v Republic [1979] KLR 154* in urging the Court to dismiss the Petition with costs.
8. In the 4<sup>th</sup> respondent's written submissions dated 2<sup>nd</sup> December 2022, the following issues were proposed for determination:



- (a) Whether the 4<sup>th</sup> respondent violated the petitioner's constitutional rights;
  - (b) Whether the Petition is meritorious; and
  - (c) Whether the petitioner is entitled to an award of general damages.
9. Counsel for the 4<sup>th</sup> respondent, Ms. Anyumba, made reference to Sections 2 and 107(1) of the *Evidence Act* in support of her submission that it is not sufficient for the petitioner to simply state that a right has been infringed without proof. Counsel was of the view that the petitioner utterly failed to prove any infringement of a right against the 4<sup>th</sup> respondent. She relied on Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & Others [2014] eKLR, Anarita Karimi Njeru v Republic [1979] KLR 154 and David Mathu Kimingi v SMEC International PTY Limited [2021] eKLR on 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.
10. The 4<sup>th</sup> respondent cited Articles 157, 243 and 245 of the Constitution as well as Section 24 of the *National Police Service Act*, No. 11 of 2011 as to the mandate and functions of the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> respondents. Thus, according to the 4<sup>th</sup> respondent, the circumstances warranted the immediate arrest and incarceration of the petitioner pending further investigations. Accordingly, it was the submission of the 4<sup>th</sup> respondent that the petitioner is not entitled to any of the reliefs claimed, having failed to demonstrate that the 4<sup>th</sup> respondent committed any violation against him.
11. Having carefully considered the pleadings filed herein by the parties and their written submissions, there is no dispute that the petitioner was arrested on the 3<sup>rd</sup> September 2021; or that he was put in custody on allegations that he had defiled and thereby caused the death of his 5-year-old daughter. It is also common ground that, after investigations, the police officers from Mariakani Police Station concluded that there was no evidence to charge the petitioner with murder or any other offence. It is noteworthy that, in one of the documents relied on by the petitioner, namely the Postmortem Form, the cause of death of the deceased minor, M A, was ascertained to be cardiorespiratory arrest secondary to peritonitis, namely, inflammation of the lining of the abdomen. Indeed, the Postmortem Form further reveals that the deceased had complained of stomach ache for two days; and that she died while undergoing treatment.
12. In the circumstances, the factual basis of the Petition was not disputed by the respondents; and therefore the issues that emerge herein for determination, as correctly pointed out by learned counsel, are:
- (a) Whether the Petition meets the threshold of specificity as laid down in the case of Anarita Karimi Njeru; and if so,
  - (b) Whether the petitioner has discharged the burden of proving that his rights and fundamental freedoms were violated as alleged; and,
  - (c) Whether the petitioner is entitled to the reliefs sought.

**A. On specificity and the requisite threshold:**

13. It is now settled that a litigant alleging violation of constitutional rights or freedoms, must plead his case with reasonable precision. This principle was enunciated in Anarita Karimi Njeru Case, thus:

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 his case) that



he should set out with a 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.”

14. It is manifest from the Petition that the petitioner complied with this requirement in that he set out the names and description of the parties in Part A of the Petition; while in Part B thereof, he set out the background information and facts of his Petition. At part C of the Petition, the petitioner specified the provisions of *the Constitution* alleged to have been violated and the manner of the alleged violations. I am therefore satisfied that the petitioner pleaded his case with the requisite specificity expected. Indeed, in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR the Court of Appeal expressed the view that:

We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude *ex ante* is to miss the point.”

#### **B. On the burden of proof:**

15. Needless to state that the legal burden of proof, in this matter, rested on the petitioner. Section 107(1) of the *Evidence Act*, Chapter 80 of the Laws of Kenya, is explicit 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.”

16. Moreover, in *Leonard Otieno v Airtel Kenya Limited* (*supra*) it was emphasized that:

It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the proposition he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be in a factual vacuum. To attempt to do so would trivialize *the Constitution* an inevitable 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 unsupported hypotheses.”

17. Accordingly, I have given consideration to the averments set out in the Petition and noted the alleged violations vis-à-vis the evidence in support as deposed to in the petitioner’s Supporting Affidavit. The first violation alleged by the petitioner was that although he was arrested on 3<sup>rd</sup> September 2021, he was not promptly informed of the reason for his arrest as required by Article 49(1)(a). The provision states:

An arrested person has the right to be informed promptly, in language that the person understands, of the reason for his arrest.”

18. This posturing is however in sharp contrast to the petitioner’s averment at paragraphs 7 and 8 of his Petition and paragraphs 7 and 8 of his Supporting Affidavit by which he stated that he was aware that the 1<sup>st</sup> respondent had made the subject complaint to the police on 3<sup>rd</sup> September 2023; and that he



was arrested on the same date of 3<sup>rd</sup> September 2021 at 21:35 on the basis of those same allegations. Rather than prove a violation of Article 49(1)(a) the assertions, in fact, complement the respondents' contention that the petitioner's arrest and handling was in full compliance with the law. I therefore find no basis for concluding that the petitioner's constitutional right under Article 49(1)(a) was violated.

19. The petitioner also complained that his right to dignity as safeguarded under Article 28 of the Constitution was violated. The provision states that:

Every person has inherent dignity and the right to have that dignity respected and protected.”

20. In this regard, the petitioner contended that he was arrested on 3<sup>rd</sup> September 2021 at 21:35 hours despite the fact that he was at the time grief-stricken and was mourning the loss of his only daughter. He added that his image and reputation was thereby damaged.

21. This assertion has to be weighed against the equally important constitutional mandate of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents under Articles 244 and 247 of the Constitution. It is instructive therefore that Article 247 of the Constitution gives the National Police Service the mandate to perform all the functions set out in the *National Police Service Act*. Hence, it is plain that the arrest of the petitioner was pursuant to Sections 24 of the *National Police Service Act* which mandates the police to maintain law and order, preserve peace, investigate crimes and apprehend offenders among other functions. Granted the sudden nature of the deceased's death, it cannot be said that the respondents violated *the constitution* as to the dignity of the petitioner by initiating investigations into the matter or by causing the petitioner's arrest and incarceration.

22. Article 29 of the Constitution was also relied on by the petitioner. His contention in that regard was that he was deprived of his freedom arbitrarily and without any just cause. For the same reason as above, I am satisfied that, granted the allegations of foul play against the petitioner, the respondents were perfectly entitled to arrest him pending further investigations. This is particularly so because the petitioner conceded that his incarceration was sanctioned by a court order issued on 6<sup>th</sup> September 2021. Among the documents he relied on was the Notice of Motion and Supporting Affidavit sworn in that regard by PC Robert Ochola of Mariakani Police Station. The Court takes judicial notice that 3<sup>rd</sup> September 2021 was a Friday; and therefore the earliest date for the petitioner's arraignment would have been 6<sup>th</sup> September 2021; the date on which the subordinate court sanctioned his incarceration for 5 more days. Indeed, Article 49(1)(f) of the Constitution provides that:

An arrested person has the right ... to be brought before a court of law as soon as reasonably possible, but not later than-

- i. twenty-four hours after being arrested; or
- ii. if the twenty-four hours ends outside ordinary hours, or on a day that is not an ordinary court day, the end of the next court day;”

23. I therefore find no basis for forming the conclusion that the petitioner's right to freedom under 29(a), (b) and (f) were violated by reason of his arrest and incarceration.

24. If indeed the petitioner was injured in his reputation, by reason of what he considered baseless and outrageous allegations by the 1<sup>st</sup> respondent, then his cause of action ought to have been for damages in tort as opposed to constitutional violation; for, it is now a cardinal principle that where there exists an alternative remedy through statutory law, then such a remedy should be pursued instead. The doctrine



of constitutional avoidance was well explicated in Patrick Mbau Karanja v Kenyatta University [2012] eKLR Hon. Lenaola, J. (as he then was) held:

I should only say this as I conclude; in Francis Waithaka -vs- Kenyatta University Petition No. 633 of 2011, this Court was categorical that it is imperative that the Bill of Rights and the Constitutional interpretative mandate of this Court should not be invoked where other remedies lie. Further the Court also cited with approval, the decision in Teitinnang -vs- Ariong (1987) LRC (const.) 517 where it was held as follows: -

“Dealing now with the questions, can a private individual maintain an action for declaration against another private individual or individuals for breach of fundamental rights provisions of the Laws? The rights and duties of individuals, and between individual, are regulated by private laws. *The Constitution*, on the other hand, is an instrument of government. It contains rules about the government of the Country. It is my view, therefore that duties imposed by *the Constitution* under the fundamental rights provisions are owed by the government of the day, to the governed. I am of the opinion that an individual or group of individuals, as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or group of individuals. Since no duty can be owed by an individual or group of individuals to another individual under the fundamental rights provisions of *the Constitution* no action for a declaration that there has been a breach of duty under that provision can lie or be maintained in the case before me, and I so hold”.

25. Hon. Lenaola, J. further stated, and I entirely agree with him on this: -

I maintain this position and it is important that simple matters between individuals which are of a purely Civil or Criminal nature should follow the route of Article 165 (3) (a) and be determined as such. To invoke the Bill of Rights in matters where the state is not a party would certainly dilute the sanctity of the Bill of Rights.”

26. Hon. Chacha, J. was of a similar view in Godfrey Paul Okutoyi & others v Habil Olaka & Another [2018] eKLR, thus:

65. It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a court of law in the manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a Constitutional petition. A party should only file a constitutional petition for redress of a breach of *the Constitution* or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure.”

### **C. On whether the petitioner is entitled to the reliefs sought:**

27. In the light of my conclusions and findings hereinabove, it is manifest that the petitioner’s prayers are untenable.



28. In conclusion, I find no merit in the Petition. The same is hereby dismissed with no order as to costs.  
It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 18<sup>TH</sup> DAY OF APRIL  
2024.**

**OLGA SEWE**

**JUDGE**

