Mwangeka v Director of Criminal Investigations & 2 others; Mwailengo & 2 others (Interested Parties) (Constitutional Petition E057 of 2022) [2024] KEHC 7111 (KLR) (23 May 2024) (Judgment)

Neutral citation: [2024] KEHC 7111 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CONSTITUTIONAL PETITION E057 OF 2022

OA SEWE, J

MAY 23, 2024

IN THE MATTER OF ARTICLES 19, 20, 21 AND 22 OF THE CONSTITUTION 2010 – ENFORCEMENT OF BILL OF RIGHTS OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ARTICLE 50 AS READ WITH ARTICLE 159 OF THE CONSTITUTION AND BILL OF RIGHTS

AND

IN THE MATTER OF ARTICLE 41 OF THE CONSTITUTION AS READ WITH ARTICLE 47(1), (2) AND (3) AND ARTICLES 73(2) (A), (B), (C), (D) AND (E) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF PURPORTED COMPLAINT AND INVESTIGATIONS AGAINST ALEXANDER MWANGEKA

BETWEEN

ALEXANDER MWANGEKA .... PETITIONER

AND

THE DIRECTOR OF CRIMINAL INVESTIGATIONS .... 1ST RESPONDENT

THE SUB-COUNTY CRIMINAL INVESTIGATION OFFICER KISAUNI .... 2ND RESPONDENT

THE INSPECTOR GENERAL OF POLICE .... 3RD RESPONDENT

AND

JOSEPH MWALILI MWAILENGO .... INTERESTED PARTY

ETHICS AND ANTI-CORRUPTION COMMISSION .... INTERESTED PARTY

THE DIRECTOR OF PUBLIC PROSECUTION .... INTERESTED PARTY

JUDGMENT

1. The Petitioner described himself in his Petition filed on 18th November 2022 as a businessman doing business for gain in the County of Mombasa as well as in Taita Taveta County. He averred that, as a businessman he owns several parcels of land both in Mombasa County and in Taita Taveta County with market value of approximately Kshs. 630,000,000/=, namely, Plot No. 4045/VI/MN in Changamwe, Plot No. 21/XIII/MI along Mwangeka Road, Mombasa Island and Land No. 10002 along Malindi Lamu Road in Malindi Town.

2. The petitioner further averred that the 1st interested party approached him with business ideas as to which investments could be done on the aforementioned pieces of land. He added that the interested party also mentioned that a foreigner was willing to invest up to Kshs. 6,000,000,000/= in his aforementioned properties. He however got suspicious because he was being asked to sign the last pages of certain documents without being given an opportunity to read the documents. He further stated that the interested party tried to interest him in another business involving the Postal Corporation of Kenya but he similarly declined the invitation.

3. The petitioner further deposed that upon declining his proposals, the 1st interested party started intimidating and harassing him on the phone, name-calling him on the streets, and filing fake and malicious reports against him at the 1st respondent's office. He further averred that, on or about the 2nd October 2022 at around 10 p.m. the 1st respondent sent a squad of police officers to raid his residence in Changamwe; which raid was unlawful as his residence was within the territorial jurisdiction of Changamwe Police Station, and therefore any search ought to have been done by Changamwe Police Station. He added that, in any event, the differences between him and the interested party are civil in nature and therefore should not concern the police at all.

4. The petitioner consequently filed this Petition to halt the violation and threats of violation of his constitutional rights by way of an order of Prohibition, prohibiting the respondents from proceeding with his arrest. He also prayed for an order commanding the respondents to return to him all the documents taken from his residence to enable him prepare for his defence in Mombasa ACC No. 5 of 2020.

5. The respondents opposed the Petition. They relied on the Replying Affidavit sworn by Mr. Alexander Makau, SCCIO. They averred that the petitioner is simply out to circumvent the wheels of justice and evade criminal prosecution in respect of Inquiry File No. 5 of 2021. Mr. Makau explained that they received a complaint from one Joseph Mwalili Mwailego that the petitioner had obtained Kshs. 700,000/= from him by false pretences; and that the matter was properly and lawfully investigated and the file forwarded to the ODPP for perusal and advice. Upon perusal of the file, the DPP advised that an additional charge of making a false document contrary to Section 347(a) of the Penal Code be preferred against the petitioner.

6. Thus, the respondents denied having conducted a raid at the petitioner's residence as alleged. They consequently prayed for the dismissal of the Petition with costs.

7. The 2nd interested party also filed a Replying Affidavit in answer to the Petition. The affidavit was sworn by Daniel Tipape Loomu, the lead investigator in the investigations that culminated in Mombasa Anti-Corruption Case No. 5 of 2020: Republic v Alexander Kubo Mwangeka. The 2nd interested party

confirmed that, on 19th August 2020, the petitioner was charged with the offences of providing false information, forgery and uttering false documents; and that a plea of not guilty was entered. Mr. Loomu explained that the charges were brought pursuant to the provisions of the *Leadership and Integrity Act*, No. 19 of 2012 and the Penal Code, Cap 63 of the Laws of Kenya. The case is pending hearing and determination before the Anti-Corruption Court, Mombasa.

8. The interested party postulated that the Petition is nothing but an attempt by the petitioner to circumvent the criminal proceedings with a view of subverting the course of justice. The 2nd interested party pointed out that the pending case has nothing to do with the investigations being undertaken by the respondents. The 2nd interested party added that the issue of documents that the petitioner raised herein can be handled by the trial court.

9. Directions were given on the 11th May 2023 as to the filing of written submissions. It appears only the respondents complied and filed written submissions dated 15th September 2023. The respondents proposed the following issues for determination:

   (a) Whether the petition is merited.

   (b) Whether the arrest and investigation complained of was constitutional.

10. The respondents relied on Anarita Karimi Njeru v Republic [1979] eKLR, David Mathu Kimingi v SMEC International Pty Limited [2021] eKLR and Mumo Matemu v Trusted Society of Human Rights Alliance [2013] eKLR to support their argument that the Petition does not meet the precision threshold; and therefore ought to be struck out on that account.

11. On whether the investigations and arrest of the petitioner was warranted, the respondents made submissions as to the law enforcement mandate of the National Police Service. Accordingly, they submitted that the orders sought by the petitioner would be in direct conflict with the constitutional, operational and autonomous capacity of the Inspector General as per *the Constitution*. They cited Article 245(4) of *the Constitution* and Section 35 of the *National Police Service Act*. To augment the submission that the Court cannot interfere with the exercise of the respondents' constitutional mandate, counsel relied on Justus Mwenda v Director of Public Prosecution & 2 Others [2014] eKLR.

12. Granted the averments in the Amended Affidavit and its Supporting Affidavit, the responses thereto by the respondents as well as the written submissions filed herein on behalf of the parties, the issues for determination are:

   (a) Whether the Amended Petition satisfies the test of specificity; and if so,

   (b) Whether the petitioner has demonstrated the violations or threats of violations alleged by him against the respondents to the requisite standard.

   (c) Whether the petitioner is entitled to the reliefs sought.

A. On the test of Specificity:

13. In the case of Anarita Karimi Njeru v Republic [1979] eKLR, which the respondents relied on, it was held:

> ...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. The principle was affirmed by the Court of Appeal in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR as hereunder:

(42) ...the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under sections 1A and 1B of the *Civil Procedure Act* (Cap 21) and sections 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:

> "The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."

15. On the face of it, the contention that the Petition does not meet the requisite threshold appears to be ill-founded in so far as the petitioner set out the provisions of *the Constitution* that are pertinent to his Petition. In the body of his Petition, he made reference to the alleged violations, especially at paragraphs 21, 23, 23 and 24. Indeed, Rule 10(3) and (4) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, recognizes that:

(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."

16. Accordingly, I fully endorse the expressions of Hon. Odunga, J. (as he then was) in Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & Another [2016] eKLR that:

> "On the issue whether this Court can determine the constitutional issues raised without compliance with the requirements stipulated in Anarita Karimi Njeru vs. Attorney General (supra), it is my view that the said decision must now be read in light of the provisions of Article 22(3)(b) and (d) of *the Constitution* under which the Chief Justice is enjoined to make rules providing for the court proceedings which satisfy the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation and that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. Whereas it is prudent that the applicant ought to set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed, to dismiss a petition merely because these requirements are not adhered to

would in my view defeat the spirit of Article 22(3)(b) under which these proceedings may even be commenced on the basis of informal documentation…"

17. Moreover, in Mumo Matemu v Trusted Society of Human Rights Alliance [2013] eKLR, the Court of Appeal pointed out 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."

18. In this respect, the Court of Appeal reiterated the viewpoint taken by a 3-judge bench of the High Court in Trusted Society of Human Rights Alliance v Attorney General & 2 Others [2012] eKLR. Here is what the Court had to say:

> "We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication: a person claiming constitutional infringement must give sufficient notice of the violation to allow her adversary to adequately prepare her case and to save the Court from embarrassment of adjudicating on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are so insubstantial and so attenuated that a Court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the respondents in a constitutional petition are fashioned in a way that gives proper notice to the respondents about the nature of the claims being made so that they can adequately prepare their case…"

19. Thus, it is my considered finding that the Amended Petition is indeed compliant as to specificity.

B. On whether the petitioner has demonstrated the violations or threats of violations alleged by him against the respondents to the requisite standard:

20. There is no gainsaying that the legal burden of proving the alleged violations herein rested on the petitioner, as provided for in Sections 107(1), (2) and 109 of the *Evidence Act*, Chapter 80 of the Laws of Kenya. Accordingly, in Wamwere & 5 Others v Attorney General (Petition 26, 34 & 35 of 2019 (Consolidated)) [2023] KESC 3 (KLR) (Constitutional and Human Rights) (27 January 2023) (Judgment) the Supreme Court held:

> "A petitioner bore the burden to prove his/her claim of alleged threat or violation of rights and freedoms to the requisite standard of proof, which was on a balance of probabilities. Such claims were by nature civil causes. The onus of proof was on the 1st appellant to adduce sufficient evidence to demonstrate that she owned or erected or live in the alleged properties; and that State agents interfered or deprived her of the subject properties. That was the import of section 107 of the *Evidence Act* on the burden of proof."

21. Likewise, in Leonard Otieno v Airtel Kenya Limited [2018] eKLR it was emphasized that:

65. 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."

22. The Supreme Court in the case of Odinga & 5 others *v Independent Electoral and Boundaries Commission & 3 others (Petition 5, 3 & 4 of 2013* (Consolidated)) [2013] KESC 6 (KLR) (16 April 2013) (Judgment), also succinctly stated:

> "...a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden..."

23. All the petitioner alleged was arrest and prosecution; which as pointed out by the respondents falls within the constitutional mandate of the respondents. The respondents demonstrated that the Petitioner herein was being investigated on allegations that he obtained money from the 1st Interested Party by false pretense that prompted the opening of an inquiry file No. 5 of 2021. The Court can only interfere with the exercise of such mandate if malice or some ulterior motive is demonstrated. Hence, in Isaac Tumunu Njunge v Director of Public Prosecutions & 2 others [2016] eKLR, it was held:

> 42. ...the police are clearly mandated to investigate the commission of criminal offences and in so doing they have powers inter alia to take statements and conduct forensic investigations. In order for the applicant to succeed he must show that not only are the investigations which were being done by the police being carried out with ulterior motives but that the predominant purpose of conducting the investigations is to achieve some collateral result not connected with the vindication of an alleged commission of a criminal offence. It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the predominant purpose is to further some other ulterior purpose and as long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene."

24. And, in Republic v Commissioner of Police & Another, Ex Parte Michael Monari & Another (supra), it was emphasized that:

> "The police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said not to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene."

25. Similarly, in the case of Pauline Adhiambo Raget v DPP & 5 Others [2016] eKLR, the court held:

> "I have also been unable to see how in investigating an alleged criminal conduct or activity there could be discrimination or a practice of inequality before the law. The respondents are enjoined to investigate any allegations of criminal activity or conduct both by statute as well as by *the Constitution*. The investigations may take them to anyone including the petitioner. They could investigate on their own prompting or upon being prompted by any member

of the public as did the interested party in this case. In so doing, it is a legal mandate they would be undertaking."

26. Consequently, authorities abound to show that the best forum for testing the validity of a charge including the sufficiency of evidence is the trial court itself. For instance, in Erick Kibiwott & 2 Others v Director of Public Prosecution & 2 Others [2014] eKLR it was held that:

> "...In determining the issues raised herein the Court will therefore avoid the temptation to unnecessarily stray into the arena exclusively reserved for the criminal or trial court. In dealing with the merits of the application, it is trite that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of *the Constitution*. There mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings..."

27. Additionally, and more importantly, Article 50(1) of the Constitution provides that:

    (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

28. Needless to mention that the essence of Article 50(1) of *the Constitution* is the concept of a fair hearing; and that it envisages the context of the fair hearing to be a public hearing before "...a court or, if appropriate, another independent and impartial tribunal or body..." in which the accused is afforded all the safeguards set out in Article 50(2) of the Constitution. It is for the foregoing reasons that it is always preferable that disputes about facts, such as those raised herein by the petitioner, be ventilated before the trial court, which is itself a creature of *the Constitution* pursuant to Article 162 and 169 of the Constitution.

29. Lastly, it cannot be validly argued that simply because a matter presents itself as a civil claim no criminal investigations ought to be carried out in respect of the same facts with a view of prosecution. Section 193A of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya, is explicit that:

> Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings."

30. In Michael Sistu Kamau & 12 Others v Ethics and Anti-Corruption Commission & 4 Others [2016] eKLR, a three-judge bench held that:

> The trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words, unless the Petitioners demonstrate that the circumstances of the impugned process render it impossible for them to have a fair trial, the High Court ought not to interfere with the trial ... "

31. For the foregoing reasons, it is my considered view that the Petition dated 15th November 2022 is devoid of merit. The same is hereby dismissed with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23RD DAY OF MAY 2024

OLGA SEWE

JUDGE