



Hashim & another v County Government of Kajiado & 4 others; Kenya National Commission on Human Rights (KNCHR) (Interested Party) (Constitutional Petition 17 of 2019) [2024] KEHC 9668 (KLR) (2 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9668 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CONSTITUTIONAL PETITION 17 OF 2019**

SN MUTUKU, J

JULY 2, 2024

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 1(4),
10(1), (2)(A), (B), (C) & 27 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 20, 21, 25, 27(1) (2) (4) & (5), 28, 29(1)(A), (C), (D), (E),
(F), 32(1), 33, 37, 39 (A), 43(B),(C),(D), 49 AND 50 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF CONTRAVENTION OF THE COUNTY GOVERNMENT ACT

AND

**IN THE MATTER OF CONTRAVENTION OF ARTICLES 5 OF
UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)**

AND

**IN THE MATTER OF VIOLATION OF ARTICLE 7 OF THE INTERNATIONAL
COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)**

BETWEEN

LONGTON JAMIL HASHIM 1ST PETITIONER

REGINA SYOKAU MUSYOKI 2ND PETITIONER

AND

THE COUNTY GOVERNMENT OF KAJIADO 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT

ROSE WANJIKU KAMAU 3RD RESPONDENT



KINAIYA MOLONKET NKINYI 4TH RESPONDENT

ANTHONY MUNGAI WANJIKU 5TH RESPONDENT

AND

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS
(KNCHR) INTERESTED PARTY

JUDGMENT

The Petition

1. The two petitioners have filed this Petition alleging violation of their rights as enshrined in various articles of *the Constitution* as pleaded in the Petition dated 4th December 2019. The petitioners state that they have sued the 1st Respondent in its own capacity as the County Government for violating the fundamental rights and freedoms of the petitioners, and as an Organ of State for engaging in illegalities by authorizing and directing the torture, illegal detention and arrest of the petitioners.
2. The 3rd, 4th and 5th Respondents have been sued as employees of the 1st Respondent in the Inspectorate Service Department mandated to enforce County Bylaws.
3. The petitioners claim the following:
 - a. That in beating, assaulting and battering the petitioners, the 1st, 3rd, 4th and 5th Respondents acted in excess of their powers and violated the petitioners' right to human dignity contrary to Article 28 of *the Constitution*.
 - b. That by refusing to accord the petitioners right to counsel and failure to notify them of the intended adverse action that was being taken by the respondents and by failing to give them reasons for taking that action, the 1st, 3rd, 4th and 5th respondents violated the petitioners' rights under Articles 47, 48 and 51(1) of *the Constitution*.
 - c. That by allowing police to detain the petitioners without justification and without informing them of the reasons for the detention and by holding the petitioners in deplorable and inhumane conditions and threatening the petitioners with death, the 1st, 3rd, 4th and 5th respondents violated the petitioners' rights under Article 29 of *the Constitution*.
 - d. By torturing the petitioners and denying them medical attention while being held in police cells, the 1st, 3rd, 4th and 5th respondents violated the petitioners' right to freedom from torture under Article 25 of *the Constitution*.
 - e. That the 1st, 3rd, 4th and 5th respondents violated Articles 3 and 10 of *the Constitution* by their illegal and arbitrary actions enumerated above.
4. The Petitioners are seeking the following reliefs:
 - i. A declaration that the petitioners' fundamental rights and freedoms guaranteed under Articles 19, 20(1), 21(1), 25, 27, 28, 29 and 33 of *the Constitution* of Kenya 2010 have been violated by the 1st, 2nd, 3rd, 4th and 5th respondents by their unlawful arrest, beating, assaults and subsequent detention, torture, inhuman and degrading treatment.



- ii. That order of Certiorari be and is hereby issued to quash the entire charge sheet dated 24th September 2019 and proceedings against the 1st Petitioner in Criminal Case No. 1334 of 2019 Republic v. Longton Hashim Jamil.
 - iii. A declaration that the petitioners are entitled to the payment of compensation by way of damages and costs by 1st, 3rd, 4th and 5th respondents for the violation of their fundamental rights and freedoms guaranteed under the above-mentioned provisions of *the Constitution*.
 - iv. This Honourable Court be pleased to order the 1st, 3rd, 4th and 5th to pay general and exemplary damages on an aggravated scale to the petitioners for gross violation of their fundamental rights and freedoms.
 - v. Judgment be entered for the petitioners as against the 1st, 3rd, 4th and 5th respondents for the enumerated classes of damages above, costs and interest.
 - vi. Any other relief and or remedy that is deemed just and fit be issued by this Honourable Court.
 - vii. Costs of the Petition.
5. The 1st, 3rd, 4th and 5th respondents did not respond to the Petition. They did not attend court despite the service of mention and hearing notices as the record shows. The 2nd Respondent attended court.
 6. This court was informed that the parties were engaging in negotiations with a view to settling the matter. The negotiations did not bear fruit except on the part of the 2nd Respondent who withdrew the criminal charges against the 1st Petitioner. After the withdrawal of the criminal charges, counsel for the petitioners informed the court, on 20th June 2022, that the petitioners have no claim against the 2nd Respondent. I understood this statement to mean that the petitioner's case against the 2nd Respondent is withdrawn.

The 1st Petitioner' case

7. The 1st Petitioner described himself as a businessman operating Kitengela Cyber Connect, an Information Technology (IT) business within Kitengela Town and a Human Rights Defender trained by Kenya National Commission on Human Rights. His case is contained in his affidavit in support of the Petition sworn on 30th December 2019. He has deposed that on 19th September 2019, he arrived in Kitengela Bus Park from Nairobi at about 14.20 hours. He had been shopping in Nairobi that day and he had with him stationery and computer accessories worth Kshs 21,000, a computer placed inside a brown envelope, Samsung Phone J70 Pro valued at Kshs 25,000, Huawei Y9 Prime phone valued at Kshs 27,000 and cash Kshs 72,000 in his pocket.
8. He deposed that after alighting from the vehicle he saw a group of 4 Kajiado County askaris, two men and two women, beating three women on the ground. Among the women was the 2nd Petitioner. He stated that the police were present and the superintendent of the County Inspectorate, but they did nothing to stop the assault on the women. He stated that one of the two women and the two men brutalizing the 2nd Petitioner were known to him by name as Rose Wanjiku Kamau, Kinaiya Molonket Nkinyi and Anthony Mungai Wanjiku, the 3rd, 4th and 5th respondents respectively.
9. He deposed that he decided to record the events using his Huawei phone; that the 3rd Respondent snatched the phone from him and in the scuffle, his Samsung Phone fell from the pocket damaging the screen; that the respondents stopped beating the 2nd Petitioner, arrested her and put her into the County vehicle parked near the scene; that the same respondents followed him as he was leaving the scene and started beating him with rungun and kicking him; that the 3rd and 4th Respondent pulled



him to a corner at the bus park and continued beating him and that the 3rd Respondent snatched the envelope, while another officer who was not known to the 1st Petitioner by name took Kshs 50,000 from his pocket. He was pushed inside the county vehicle and driven around Kitengela town for hours. He was eventually taken to Kitengela Police Station at about 1800 hours and booked under Occurrence Book (OB) No. 58/19/09/2019.

10. He asked to be taken to hospital for treatment and was later charged with the offence of incitement to violence contrary to section 96 of the Penal Code in Criminal Case No. 1334 of 2019 to which he pleaded not guilty when he was taken to court to answer to the charges.
11. The 1st Petitioner deposed, further, that he later reported loss of his laptop and cash Kshs 50,000 at Kitengela Police Station under OB No.70/19/09/2019 but no action has been taken to date to recover his items. He claims that his rights as enshrined under the constitution were violated.

The 2nd Petitioner's case

12. The 2nd Petitioner is a small business vender selling fruits within Kitengela Market. Her case is that on 19th September 2019 at about 1400 hours, she was vending her fruits at Kitengela Bus Park when she saw a group of Kajiado County Government Inspectorate askaris dressed in khaki uniform. They surrounded the market and started attacking members of the public and market vendors using batons.
13. The 2nd Petitioner ran to escape the wrath of the officers. One of the askaris yelled at her to abandon her business stock. She dropped it and ran towards the market. She was confronted by the 3rd Respondent and another female askari approached and grabbed her causing her to fall down. They started beating her ruthlessly. She was arrested and pushed into the motor vehicle without telling her what she had done wrong.
14. The two women askaris were joined by 4th and 5th respondents in beating and assaulting the 2nd Petitioner with sticks, pulling her hair. It was at this stage that the 1st Petitioner asked the askaris why they were beating the 2nd Petitioner. The askaris turned on the 1st Petitioner and started beating him. They pulled him to a corner and continued beating him. Both petitioners were put into the County vehicle and driven around Kitengela Town for hours before being taken to the police station. The 2nd Petitioner was placed in police cells for three hours before being released.
15. The 2nd Petitioner was in pain. She reported the matter to the police at Kitengela Police Station under OB No. 83/19/09/2019. She attended hospital the following day, 20th September 2019 for treatment.
16. She claims that her right to dignity was violated and that she lost her entire business and Kshs 2,000 which was her capital. The 1st Petitioner testified in court on 26th June 2022. He reiterated the contents of his affidavit in support of the Petition.

Petitioners' submissions

17. The petitioners' submissions are dated 24th July 2023 and filed on the same date. The petitioners have identified two issues for determination, namely:
 - i. Whether the petitioners have proved their case to the required standard in law?
 - ii. Whether the petitioners are entitled to the reliefs sought?



Whether the petitioners have proved their case to the required standard in law?

18. It was submitted that the petitioners have adduced evidence through their affidavits in support of the Petition and oral evidence in court that they were arrested, beaten and subjected to inhuman and degrading treatment thereby violating their rights enshrined in *the constitution*.
19. It was submitted that the respondents did not inform the petitioners the reason for their arrest, denied them an opportunity to communicate with their advocates and other persons whose assistance was necessary, forced them to accede to and enter into the respondents' motor vehicle to be taken to the police station for booking before investigations were carried out and detained them in custody when it was clear that there was no offence committed thereby violating the petitioners' rights under Article 49 of *the constitution*.
20. It was submitted that the petitioners' rights under Articles 28 and 51 of *the constitution*, Articles 4 and 7 of the ICCPR and Article 2 of the Convention Against Torture and other cruel, inhuman or degrading treatment or punishment were violated and that the 1st Petitioner lost his valuables and cash in the hands of the 3rd, 4th and 5th respondents. It was submitted that the petitioners' evidence was not controverted by the 1st, 3rd, 4th and 5th respondents.
21. The petitioners relied on *David Gitau Njau & 9 others v. Attorney General* [2013] eKLR where the Court upheld the petitioners' claim of torture and ill-treatment and held that:

“(45) ...At the hearing, the Petitioners gave specific details under oath relating to how they were arrested, tortured and how they were moved from one detention prison to another. The fact that the Respondent or any witness on his behalf did not deny these allegations under oath indicates that the allegations are true. I therefore have no reason to doubt the veracity of the testimony of the Petitioners. I also find notwithstanding that none of the Petitioners produced any documents or medical evidence in support of the allegations that they were detained for 8 months, torture or injured in the hands of the Respondents. It is true that the medical evidence would have corroborated the Petitioners' evidence and would have been enough to establish the Petitioners' allegations, but, to my mind the absence of such evidence is not fatal because of what I have said above; that their averments of facts were not specifically or in any way contradicted by the Respondent.”

22. It was submitted that the petitioners have discharged the burden of proof in this matter to the required standard. They relied on *John Cheruiyot Rono v. Attorney General*, Petition No. 536 of 2015 where the Court observed that:

“The burden of proving violation of a right or freedom enshrined in *the Constitution* rests on the person alleging the violation. See *Matiba v. Attorney General* (1990) KLR 666. Such burden is to be discharged on a balance of probabilities by the Petitioner showing that the right existed and that it has been violated and the manner of such violation.”

Whether the petitioners are entitled to the reliefs sought

23. It was submitted that the petitioners have demonstrated that their constitutional rights and freedoms were violated by the respondents who are enjoined by *the constitution* to protect those rights; that



human rights and freedoms are for enjoyment and to the greatest extent possible and should not be curtailed.

24. The petitioners relied on Attorney General v. Kituo Cha Sheria & 7 others [2017] eKLR where the Court held that:

“.....rights have inherent value and utility and their recognition, protection and preservation is not an emanation of state largely because they are not granted, nor are they grantable by the State. They attach to persons, all persons, by virtue of their being human and respecting rights is not a favour done by the State or those in authority. They merely follow a constitutional command to obey.”

25. It was submitted, on the issue of awarding damages in a constitutional petition, that damages are awarded with a view to deterring a repetition of breach or punishing those responsible for it (see Pilkington, Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms (1984) 62 Canadian Bar Review 517).
26. It was submitted that the respondents failed to adduce evidence to satisfy the court a limitation or a restriction of the petitioners’ fundamental rights was justified. The petitioners urged the court to grant the reliefs sought and award Kshs 5,000,000 as damages to each of the petitioners.

Analysis and determination

27. From the outset, I wish to state that the petitioners informed the court, through Mr. Nairi, learned counsel for the petitioners, that they had no claim against the 2nd Respondent after the latter withdrew criminal charges against the 1st Petitioner. In this judgment therefore, I will not deal with any claim or relief sought touching on the 2nd Respondent.
28. I will adopt the following issues as the ones requiring my attention:
- a. Whether this Court is seized with requisite jurisdiction to determine this petition?
 - b. Whether the petitioners have met the threshold in a constitutional petition?
 - c. Whether the petitioners deserve the reliefs they are seeking?
29. Jurisdiction of a court to hear and determine a matter filed before it. The jurisdiction of this Court to hear and determine this matter has not been questioned. However, it is always prudent to remind oneself that the court handling the matter before it is seized with requisite jurisdiction to do so.
30. It is trite that jurisdiction is everything, and without jurisdiction a court has no power to proceed with the matter before it. (See Owners of Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Limited [1989] KLR 1) . In Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others (2012) eKLR, the Court stated as follows: -

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits.



It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

31. The jurisdiction of this Court is created under Article 165 (3) of *the Constitution*. This article provides that:

Subject to clause (5), the High Court shall have—

- (a) unlimited original jurisdiction in criminal and civil matters;
- (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
- (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
- (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191; and
- (e) any other jurisdiction, original or appellate, conferred on it by legislation. (emphasis added).

32. The above provision brings clarity in this regard and on that basis, I will now proceed with the other issues. It is trite that a petitioner in a constitutional petition must identify the constitutional entitlement threatened, infringed or violated and demonstrate with some level of precision the manner of violation so as to enable the respondent to defend the case. This is the position as stipulated in *Anarita Karimi Njeru v Republic* {1979} eKLR where the Court held that:

“... 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...”

33. This is the threshold the petitioners in this petition must meet. I have noted that they have cited many provisions of *the constitution* as having been violated. But I will narrow these to specific provisions that touch on the petitioners. In doing so I am alive to the fact that Article 3(1) of *the Constitution* commands that “Every person has an obligation to respect, uphold and defend this Constitution’.



34. Under Article 10 (1) of *the Constitution*, the national values and principles of governance in that article bind all State organs, State officers, public officers and all persons whenever any of them (a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. These national values and principles of government include the rule of law, human dignity, human rights, integrity, transparency and accountability.
35. The petitioners have claimed that their rights under articles 28, 29, 47, 48 and 51(1) of *the Constitution* were violated by the 1st, 3rd, 4th and 5th respondents.
36. I have considered all the evidence tendered by the petitioners in their respective supporting affidavits and the evidence in court. The 2nd petitioner was in the market selling her fruits on 19th September 2019 when the 3rd, 4th and 5th respondents accosted her, beat, assaulted and manhandled her as evidence shows. According to her evidence, she was not informed of what she had done wrong to attract the wrath of the respondents. She stated that she lost Kshs 2000 which she termed as her capital and sustained injuries. She was driven around in Kitengela town after being arrested and pushed into a motor vehicle belonging to the 1st respondent. She finally ended up at Kitengela Police Station where she was placed in cells for several hours and eventually released with no charges being preferred against her.
37. I have read the P3 Form marked as ‘RSM1’ attached to her Supporting Affidavit. It bears a stamp of the Medical Superintendent of Kitengela Sub-County Hospital dated 20th September 2019. It shows that the 2nd petitioner has suffered swollen left elbow area with limited movement and injuries to both thighs area. These injuries were about 16 hours old at the time of examination. The doctor found that a blunt object has caused those injuries.
38. Similarly, the 1st petitioner produced P3 Form marked ‘LJH2’ attached to the Supporting Affidavit. The report shows bruise at left lateral part of thigh and injuries to the right knee. The injuries were 16 hours old at the time of treatment and a blunt object was used to inflict those injuries.
39. The two petitioners reported the arrest, assault and lost property at Kitengela Police Station vide the OB reports shown in their evidence and captured above in this judgment. I have seen the OB report in respect of the 1st petitioner and its contents. I have no doubt in my mind that the petitioners were accosted, arrested, harassed and placed in the motor vehicle belonging to the 1st respondent, driven around before they were finally taken to the Kitengela Police Station where the 1st petitioner was placed in cells and later charged with the criminal offence mentioned in this judgment and which has been withdrawn. The 2nd petitioner was released from cells without charges.
40. The claim by the petitioners is that their rights under articles 28 and 29 of *the constitution* were violated. These articles provide that:
28. Human dignity
Every person has inherent dignity and the right to have that dignity respected and protected.
29. Freedom and security of the person
Every person has the right to freedom and security of the person, which includes the right not to be—
- (a) deprived of freedom arbitrarily or without just cause; (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;
- (c) subjected to any form of violence from either public or private sources;



- (d) subjected to torture in any manner, whether physical or psychological;
- (e) subjected to corporal punishment; or
- (f) treated or punished in a cruel, inhuman or degrading manner.

41. The evidence shows that the petitioners were not given reasons for the arrest and their access to justice was imbedded by the 3rd, 4th and 5th respondents contrary to articles 47 and 48 of *the Constitution*. Their rights under Article 49 of *the constitution* to be informed promptly, in language that they understand the reason for the arrest, the right to remain silent, the right to communicate with an advocate of other persons whose assistance is necessary were violated.
42. I have noted that the evidence by the two petitioners has not been controverted. The 1st, 3rd, 4th and 5th respondents did not file any response to the Petition nor did they attend court to defend their case or file submissions. They were properly served as evidenced in the affidavits of service on record.
43. Upon careful analysis of the evidence tendered and the applicable provisions of the law, it is my finding that the petitioners have met the threshold in this petition. They have demonstrated with some level of precisions the manner of violation of their rights and freedoms in a manner that enabled the respondents to defend the case. However, the respondents did not defend their case. The claim by the two petitioners remain unchallenged.
44. On the first issue, I find for the petitioners that indeed, they have satisfied this court that they have met the legal threshold in proving this petition against the 1st, 3rd, 4th and 5th respondents. I have no reason to find otherwise than that the 3rd, 4th and 5th respondents were on duty on that day and were discharging their duties as employees of the 1st respondent. In *Tabitha Nduhi Kinyua v Francis Mutua Mbuvi & another* [2014] eKLR, it was stated that:
- “The principle of vicarious liability is an anomaly in our law because it imposes strict liability on an employer for the delict of its employee in circumstances in which the employer is not itself at fault. An employer will be held to be vicariously liable if its employee was acting within the course and scope of employment at the time the delict was committed.”
45. On the second issue, it is my finding that, the petitioners are entitled to the reliefs sought, not in the manner they have pleaded, but as this court will award. This court was asked to enter judgment for the petitioners as stated in the Petition. However, because the petitioners dropped their claim against the 2nd respondent, some of the reliefs they are seeking cannot issue as claimed.
46. I make the following orders:
- i. A declaration be and is hereby issued that the petitioners’ fundamental rights and freedoms guaranteed under articles 28, 29, 47, 48, 49 and 51(1) of *the Constitution* were violated by 1st, 3rd, 4th and 5th respondents.
 - ii. A declaration be and is hereby issued that the petitioners are entitled to payment of compensation by way of damages by the 1st, 3rd, 4th and 5th respondents, jointly and severally for the violation of their fundamental rights and freedoms guaranteed in the provisions of *the constitution* specified under (i) above.
 - iii. Each petitioner shall be paid Kenya shillings two million, five hundred thousand (Kshs 2,500,000) as compensation for the violation of their rights and fundamental freedoms.
 - iv. Costs of this petition.



47. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 2ND JULY 2024.

S. N. MUTUKU

JUDGE

In the presence of:

Mr. Nairi, learned counsel for the petitioners.

