



REPUBLIC OF KENYA



**Masafu v Inspector General of Police & 2 others (Constitutional Petition
E020 of 2022) [2024] KEHC 10152 (KLR) (10 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 10152 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CONSTITUTIONAL PETITION E020 OF 2022
DO CHEPKWONY, J
JULY 10, 2024**

BETWEEN

EVANS MIRUNI MASAFU PETITIONER

AND

THE INSPECTOR GENERAL OF POLICE 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS 3RD RESPONDENT

JUDGMENT

1. The Petitioner moved this court by way of Petition dated 22nd June, 2022 seeking the following Orders:
 - a. A Declaration that the 1st and 2nd Petitioners denial and/or refusal of the Petitioners right to receive the Certificate of Good Conduct on the basis of the Judgment in Criminal Case No. 35 of 1995 - Chief Magistrate Court is unconstitutional.
 - b. The records held in the custody of the Respondents herein and or with any other authority be deemed by this Honourable Court be as irrelevant and/or inadmissible in relation to issuance of a Certificate of a Good Conduct and the same be deemed as expunged from the records.
 - c. An Order directed at the 2nd Respondent their agents, officers or employees compelling the issuance of a certificate of good conduct to the Petitioner herein.
 - d. Any other or further relief that this Honourable Court may deem fit and just in the circumstances of this petition.
 - e. Costs of the Petition.
2. The facts of this case as pleaded by the Plaintiff is that in the year 1995, the Petitioner as a minor schooling at Queen of Rosary School in standard 7 accidentally kicked a fellow pupil while playing



football and who later died while being rushed to hospital. The Petitioner was arrested and charged with the offence of manslaughter contrary to Section 202 of the *Penal Code* in Criminal Case No. 35 of 1995.

3. The Petitioner avers that owing to his young age at that time and lack of legal representation he pleaded guilty to the offence and was placed on probation for three years. He was later discharged from the probation on 27th February, 1999. The Petitioner added that he completed his primary, and secondary education and undertook a Bachelor's Degree in Education and thereafter enrolled with the Teachers Service Commission (TSC). However, he has been unable to acquire and or obtain a job due to lack of Certificate of good conduct which the Respondent has failed to issue him citing his criminal record and conviction back in 1995.
4. The Petitioner avers that other than the inadvertent criminal act back in 1995, he has never committed any other criminal act of offence hence his fundamental rights as enshrined under Articles 2 (1), 4, 5, 6, 10 (1) (b and c), 19 (3), 31(c), 39(2), 43(1), 27(2), 28, 31(2) (b) and 258 (1) of the *Constitution* of Kenya have been infringed, violated, threatened by the Respondent failing to issue the Certificate of Good Conduct.
5. According to the Petitioner, the criminal offence having been committed when he was still a minor having no mensrea and further being committed to probation, the records and Judgment thereto ought not to be held against him. He suggests that the records ought to be expunged from the record as they amount to infringement of fundamental rights.
6. The 1st Respondent filed Replying Affidavit which was sworn by No. 239686 I.P Samson Ireri on 31st October, 2022. He confirmed that the Petitioner was charged and convicted for the offence of manslaughter and was sentenced to three years' probation. He holds that the Petitioner applied and was issued with a Police Clearance Certificate which contained a record of the conviction and the outcome of the trial which is in accordance to the Constitution relating to access to information. He holds that the Certificate should contain true reflection of the information maintained by the 1st Respondent relating to past criminal record of the Applicants being the Petitioner herein.
7. The Respondent holds that the Petitioner 'request to the court that the records be omitted from the records is in violation of provisions of Article 35 of the *Constitution* as it is obligated to avail correct information upon formal request.
8. The Respondent holds that it operates under Section 55 of the *National Police Service Act* which allows it to be the custodian of fingerprints as well as proof of conviction. He holds that there is no requirement in law for criminal record to be expunged except where the conviction has been vacated through a criminal revision by the trial court or by appeal by higher court. He stated that the sentence of the Petitioner was not vacated by any court of law and it is not possible to expunge them from record of past conviction.
9. The Respondent holds that there is no legal basis to direct it to omit the information and the court should not aid an illegality and therefore the court should not allow the prayers of the petitioner sought.

Analysis and Determination.

10. The Petition was disposed off by way of written submissions. In the Petitioner's submissions dated 9th August, 2023, the Petitioner listed five issues for determination which the court shall adopt.
 - a. What are the circumstances that led to the entry of the criminal record?
 - b. Which constitutional violations have been meted against the Petitioner herein.



- c. Are minors in conflict with the law treated differently compared to adults in the criminal justice system.
- d. Does the maintenance of a permanent archived criminal record amount to double jeopardy?
- e. Whether the permanent /archived criminal record affects the enjoyment of rights under Article 43.

a. What are the circumstances that led to the entry of the criminal record?

- 11. The facts that led to the entry of the criminal record is not in dispute as it has been admitted by both the Petitioner and the 1st Respondent.

b. Which constitutional violations have been meted against the Petitioner herein.

- 12. It is trite law that Constitutional violations should be pleaded with a reasonable degree of precision as was stated in the case of *Anarita Karimi Njeru v The Republic* (1976-1980) KLR 1272 . See also the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR which provided the standard of proof in Constitutional Petitions. The Court of Appeal Judges stated;-

“...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.

- 13. The Petitioner cited the following Constitutional provisions: Article 35 (2) of the *Constitution* which provides that every person has the right to the correction or deletion of untrue or misleading information that affects the person. The Petitioner holds that the Police Clearance Certificate dated 21st February, 2022 shows that he was convicted for the offence of murder and the accused was charged with offence of manslaughter and therefore the incorrect information ought to have deleted.
- 14. Article 31 (c) of the *Constitution* provides for right of privacy which the Respondent has violated for sharing permanently his criminal record. Article 47 (1) on the right to Administrative Action which the Petitioner holds that the Respondents exposed him to unlawful and unfair administrative act as it will permanently keep and publish the criminal record. Article 238 (2) on principles of national security which he holds that the Respondents has violated it by making the declaration of the criminal record in the police clearance.
- 15. Article 10(2) on national values and principles of governance which the Respondents have denied him. Article 27 of the Constitution on equality and freedom from discrimination the Petitioner holds that the presence of the criminal record has discriminated him from securing employment which is also against Article 41 of the *Constitution* on Labour Relations.
- 16. The court finds that the Petitioner has discharged the standard of proof for Constitutional Petitions by showing with precise how various constitutional provisions have been violated by the Respondents.
- 17. The court shall merge the third, fourth and fifth issues of the Petition into one main which is;



c. What were the objectives and implication of the criminal record on the Petition at the time he was a minor and now when he is of age.

18. The Petitioner has cited the English case of the *Queen on the Application of HC (a child by his litigation friend CC) and The Secretary of State for the Home Department & The Commissioner of Police of the Metropolis* [2013 EWHC 982 (Admin) where the court pointed out that:-

“....The underlying principle is that the criminal justice system should take account of a defendant’s age, level of maturity, and emotional capacity. It is only by doing so that the system can redress the imbalance which is the inevitable result where a child or young person is confronted by the power of the criminal justice”

19. In this case, it is not disputed that at the time of commission of the offence the Petitioner was a minor who ought to have been treated differently from an adult. It is the court’s finding that although the Petitioner was convicted to the offence of manslaughter , the keeping of permanent criminal record violates his constitutional rights particularly since he was a minor which has now affected his adult hood particularly his employment which is discriminatory and amounts to double punishment.

20. The court relies on the case of *PMK v Inspector General of Police, Director of Criminal Investigations & Attorney General* (Constitutional Petition No.10 of 2019) [2019] KEHC 486 (KLR) (19 December, 2019) (Judgment) which holds that:-

“I therefore agree with the petitioner that our juvenile justice system recognizes that criminal offences committed by children are to be handled in a totally different way from crimes committed by adults. They therefore cannot be subjected to the harsh punishment of permanent criminal records, publishable on demand because children are different. ... Keeping permanent records of juvenile offenders presupposes that such offenders are incapable of reforming since the said decision by the DCI does not provide for mechanisms through which such records can be expunged. I agree with the petitioner that by issuing permanent criminal records to juveniles, the Respondents will extinguish the Petitioner’s potential and by extension, her life to be a productive, vibrant part of society.”

21. The court finds that the Petition herein has merits and the same is allowed to the following terms:-

- a. A Declaration is hereby issued that the criminal records of the Judgment in Criminal Case No. 35 of 1995 - Chief Magistrate Court Thika is unconstitutional and inadmissible and the same are hereby expunged from the records.
- b. An Order is hereby issued to the 2nd Respondent, its agents, officers and or employees compelling them to issue a Certificate of Good conduct to the Petitioner herein.
- c. There shall be no Order as to costs.

It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT KIAMBU VIA ELECTRONIC MAIL THIS ...10TH ...DAY OF ...JULY....., 2024.

D. O. CHEPKWONY

JUDGE

