



Law Society of Kenya & 3 others v Inspector General of Police & 4 others (Petition E436 of 2024) [2024] KEHC 10634 (KLR) (Constitutional and Human Rights) (13 September 2024) (Sentence)

Neutral citation: [2024] KEHC 10634 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E436 OF 2024
LN MUGAMBI, J
SEPTEMBER 13, 2024**

BETWEEN

**LAW SOCIETY OF KENYA 1ST PETITIONER
BOB MICHENI NJAGI 2ND PETITIONER
JAMIL LONGTON 3RD PETITIONER
SALAM LONGTON 4TH PETITIONER**

AND

**INSPECTOR GENERAL OF POLICE 1ST RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT
DIRECTORATE OF CRIMINAL INVESTIGATIONS 4TH RESPONDENT
NATIONAL INTELLIGENCE SERVICE 5TH RESPONDENT**

Court finds Inspector General of Police in contempt of court for failing to comply with habeas corpus order to present abducted persons to court

The petition concerned the abduction and incommunicado detention of three citizens by persons alleged to be police officers. Despite habeas corpus orders issued on 23 and 26 August 2024 directing their disclosure and release, the respondents failed to comply, and the Acting Inspector General of Police repeatedly ignored court summons, citing official engagements. The Court found the disobedience amounted to contempt, contrary to Articles 2(1), 3, 10, 159 and 160 of the Constitution. Upholding judicial authority under section 5(1) of the Judicature Act, the Court sentenced Mr. Gilbert Masengeli to six months’ imprisonment, suspended for seven days on coercive terms.

Reported by John Ribia



Constitutional Law - fundamental rights and freedoms - rights of arrested persons - habeas corpus - non compliance by the Inspector General of Police with an order of habeas corpus - whether the failure by the Inspector General of Police to comply with a habeas corpus order to present persons that had been abducted was contempt of court - what remedies were appropriate to sanction the Inspector General of Police for failure to comply with an order of habeas corpus to present abducted persons to court - whether deliberate disobedience of court orders by a state officer, including failure to attend court when duly summoned, was consistent with the constitutional principles of the rule of law, accountability, and equality before the law - Constitution of Kenya articles 2(1), 3, 10(2), 238, 159, and 160; Judicature Act (cap 8) section 5(1).

Brief facts

On 23 August 2024, the 1st Petitioner moved the High Court under certificate of urgency alleging that the 2nd to 4th Petitioners had been abducted by persons identifying themselves as police officers on 19 August 2024 and thereafter held incommunicado at undisclosed locations. The court issued interim *habeas corpus* orders directing the respondents to disclose the petitioners' whereabouts and to release or produce them before a competent court. Despite service, the respondents failed to comply, prompting the Court on 26 August 2024 to vary its orders by directing the unconditional release of the 2nd to 4th Petitioners and summoning the Inspector General of Police to explain the disobedience.

On 3 September 2024, the Attorney General, the DPP, the DCI and other state agencies appeared, but no responses had been filed, and the Inspector General failed to attend despite express summons. Excuses were advanced that he was attending a budgeting workshop in Mombasa in the morning and later engaged in security operations. Repeated adjournments and assurances by counsel yielded no compliance.

Issues

- i. Whether deliberate disobedience of court orders by a state officer, including failure to attend court when duly summoned, was consistent with the constitutional principles of the rule of law, accountability, and equality before the law.
- ii. Whether the failure by the Inspector General of Police to comply with a *habeas corpus* order to present persons that had been abducted was contempt of court.
- iii. What remedies were appropriate to sanction the Inspector General of Police for failure to comply with an order of *habeas corpus* to present abducted persons to court?

Held

1. The Constitution demanded adherence to the rule of law, which required accountability of all persons and state organs, equality before the law, and the prevention of arbitrariness. Judicial authority was derived from the people under article 159 and exercised by courts and tribunals subject only to the Constitution and the law pursuant to article 160(1). No individual, however mighty, nor any state organ stood above the law, and courts bore the responsibility of ensuring a fair balance when disputes arose between citizens, between citizens and the state, or among state organs.
2. Court orders, once issued, bound all persons and organs of state to whom they applied. Disobedience of such orders risked reducing courts to impotence and undermining the Constitution. Orders issued ex cathedra were binding, peremptory, and not subject to negotiation or selective compliance. Enforcement of court orders vindicated the rights of successful litigants and, more importantly, preserved judicial authority and the constitutional promise of equality under the law.
3. Contempt jurisdiction remained a core judicial tool even after the Contempt of Court Act was declared unconstitutional, with section 5(1) of the Judicature Act affirming the High Court's and Court of Appeal's power to punish contempt. Courts possessed inherent authority to sanction disobedience, whether through coercive or punitive orders, depending on the nature of the contemnor's conduct. Persistent defiance of court orders, particularly by those wielding public power, threatened constitutionalism, fostered impunity, and undermined the rule of law.



4. The contemnor disregarded repeated opportunities to purge his contempt, even prioritising attendance at a workshop in Mombasa over obeying court summons concerning the whereabouts of the petitioners. Such deliberate defiance of court orders, especially by those entrusted with public authority, fostered impunity and stood in direct conflict with the purposes and objects of the Constitution.
5. In sentencing, the court acknowledged the contemnor's position as the highest-ranking police officer in the country and the possible challenges in enforcing the order due to hierarchical command in the service. Nevertheless, the supremacy of the Constitution under article 2(1) bound all persons and state organs, and no office or authority stood above it. The court's duty, flowing from judicial oath, was to defend the Constitution and safeguard the integrity of the judicial system in adherence to the rule of law.

Contemnor was sentenced.

Orders

- i. *The contemnor, Mr. Gilbert Masengeli was sentenced to six 6 months' imprisonment.*
- ii. *Mr. Gilbert Masengeli was ordered to submit himself to the Commissioner General of the Kenya Prisons Service to ensure that he was committed to a prison facility to commence serving the sentence of imprisonment imposed.*
- iii. *In the event that Gilbert Masengeli did not submit himself to the Commissioner General of Kenya Prison Service as ordered, the Cabinet Secretary for Interior and National Security must take all steps that are necessary and permissible in law to ensure that Mr Gilbert Masengeli was committed to Prison to commence serving the sentence imposed on him.*
- iv. *The Court nevertheless considered it desirable to impose a 'coercive order' as opposed to a 'punitive order'. In that regard, Mr. Gilbert Masengeli could avoid serving the sentence if he complied with the direction to obey the court summons. The court suspended the sentence for Seven (7) days only. The Acting Inspector General of Police could redeem himself and comply by availing himself before the court in person to answer to the issues he had been avoiding within 7 days. In default, the Sentence shall automatically become effective.*

Citations

Cases

1. Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna, Director of Public Prosecutions, Director of Criminal Investigations, Inspector General of Police & Law Society of Kenya (Civil Application 1 of 2017; [2018] KECA 789 (KLR)) — Explained
2. Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna, Director of Public Prosecutions, Director of Criminal Investigations, Inspector General of Police & Law Society of Kenya (Civil Application 1 of 2017; [2018] KECA 789 (KLR)) — Explained
3. Githiga & 5 others v Kiru Tea Factory Company Ltd (Petition 13 of 2019; [2023] KESC 41 (KLR)) — Explained
4. Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others ((CCT 52/21) [2021] ZACC 18; 2021 (9) BCLR 992 (CC); 2021 (5) SA 327 (CC) (29 June 2021)) — Explained

Statutes

1. Constitution of Kenya — article 2(1); 3; 10(2); 238; 159; 160 — Interpreted
2. Contempt of Court Act (cap 8F) — In general — Cited
3. Judicature Act (cap 8) — section 5(1) — Cited
4. Constitution of the Republic of South Africa, 1996 — In general — Cited



Advocates

None mentioned

SENTENCE

A brief background of the present Contempt of Court Proceedings

1. On August 23, 2024, the 1st petitioner approached this court via a notice of motion application under certificate of urgency alleging the abduction/arrest of the 2nd – 4th petitioners on August 19, 2024 by persons who had introduced themselves as police officers. They were then kept incommunicado in undisclosed locations after the incident. This court issued exparte orders in the first instance as follows:
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 1. That pending the hearing and determination of this application inter partes an order is hereby issued directing the respondents to immediately disclose the whereabouts of the 2nd to 4th petitioners to the 1st petitioner.
 2. That pending the hearing and determination of this application inter partes an order is hereby issued directing the respondents to immediately release or produce the 2nd to 4th petitioners before any court of competent jurisdiction to make such orders as may be appropriate to uphold the rights and fundamental freedoms of the 2nd to 4th petitioners.
 4. The matter was then fixed for mention on Monday, August 26, 2024 at 10.00 am to confirm compliance.
2. During the virtual session held on August 26, 2024 only the Advocate for the petitioners M/s Omwenga appeared. She informed the court that the orders made on August 23, 2024 were duly served the as was evidenced by the affidavit of service. However, there neither appearance by any respondents nor responses to the habeas corpus application. There had been no compliance with the orders either. That necessitated court to vary its orders in which it directed that:
 - i. Pending the institution of charges, (if any), the court now directs unconditional release of 2nd – 4th petitioners by the 1st respondent.
 - ii. That physical service of the order be effected by close of business that day.
 - iii. That a summons to issue to the 1st respondent to appear in court on the next mention to explain why the habeas corpus orders issued by the court were not complied with. The matter was fixed for mention on September 3, 2024.
3. On the morning of September 3, 2024, the Attorney General, the DPP and the Director of National Intelligence Service, the Inspector General of Police and Directorate of Criminal Investigations appeared through counsel. None of them had filed response to the application and the orders of 23rd August had not been complied with. The Inspector General of Police who court had summoned did not turn up either. The court postponed the matter to 3.00 pm for physical attendance of the Inspector General to explain why the habeas corpus orders had not been adhered to. The afternoon came and passed; the Inspector General of Police did not attend. The court was informed that he was out of Office on official business with the nature of business being revealed to be a workshop he was attending Mombasa on budgeting that particular morning. In the afternoon, the court was told that he was engaged in security operational duties in the Coastal region.



4. The matter was rescheduled to September 5, 2024 at 10.00 am as the court was keen to establish why the habeas corpus orders could not be executed in respect to the production before court or release of the 2nd to 4th petitioners.

5. M/s Mwangi who appeared for the Inspector General explained as follows when pressed to explain the apparent persistent disregard of the court summons by the Inspector General of Police:

“The Inspector General has not said he is not coming, he is requesting for another date because it is our position that the 2nd-4th petitioners are not with the police. The Inspector General is requesting another date to appear because we had thought his officers would explain.

The Inspector General is requesting another date to appear in court (after holding Brief consultation), the Inspector General will come on Monday September 9, 2024.

The officers of Inspector General are here and have confirmed his availability of Monday considering his work and duties.”

6. The court after this Brief session fixed the matter for 3.00 pm on the same day. Despite the court convening, the Inspector General did not show up. The court finally and reluctantly agreed to give the final opportunity to the Inspector General to attend court coinciding with the date that counsel for Inspector General indicated he would be available (this was after she made some consultations). The date was Monday September 9, 2024. On that day, the distressingly wrote:

“The stream of reasons and excuses by the Inspector General of Police are definitely bound to run out. To proceed at this juncture and hastily make a finding of contempt of court may be seen as premature in a grave matter of contempt of court which is a form of a criminal sanction being an offence against the administration of Justice. Our Constitution requires a high threshold for criminal matters. Reluctantly, the reasons for non-attendance today must thus be considered...It is thus necessary that I postpone these proceedings to Monday September 9, 2024. The Inspector General having earlier indicated his availability on this particular day should have no further excuse but to comply and attend court physically at 10.00 am so that this court can put this matter to an end...”

7. Due to the persistent non-compliance with both the court summons as well as failure to comply with the order of August 23, 2024 the court opined that it was a case of contemptuous conduct that the Inspector General needed to purge even as it set the date of September 9, 2024. That date came and passed too. The Inspector General did not turn up but he made last-minute attempt and sent his Deputy Inspector General In charge of Kenya Police appear on his behalf. The court rejected the noting that the open defiance of the court summons had metamorphosed to contemptuous conduct and was now a personal matter that had to be directly and specifically addressed by the person summoned. Following the 7th failure to attend court or comply with the court order of August 23, 2023 the court entered a finding of guilty for contempt of court against the Acting Inspector General of Police on September 9, 2024 and deferred the sentence to today, Friday September 13, 2024.

Sentence

8. As part of the considering the appropriate sentence, I had to contextualize the matter from a constitutional view point.



9. The preamble to the Constitution reflects the commitment of the people of Kenya to attain a number of aspirations. One of them is statement number 6 of the preamble which is states as follows:

“Recognising the aspirations of all Kenyans for a government based on essential values of human rights, equality, freedom, democracy and social justice and the rule of law.”

10. The Constitution under that article 2 (1) proclaims itself as the Supreme law of the land that binds all persons and all state organs. Article 3 obligates every person to respect, uphold and defend the Constitution. It matters not whether they are mighty or low.

11. The Constitution further proceeds to specify the national values and principles of governance that bind all State organs and all persons whenever they make and implement public policy decisions, enact laws and interpret. Among those values and principles that are contained is article 10(2)b which has human rights, the rule of law among others whereas article 10(2)(c) has the principle of accountability.

12. In matters of national security, article 238 provides that the principles which shall apply and include the following, that -

- a) national security is subject to the authority of the Constitution and;
- (b) national security shall be pursued in compliance with the law and with utmost respect for the rule of law, democracy, human rights and fundamental freedoms.

13. The rule of law principle is thus a common thread that the Constitution heavily demands in almost every function to ensure that every person is held accountable to the law. It ensures equality of all before the law and prevents arbitrariness. The task of the court is to ensures there is a fair balance by applying the law when disputes arise either between state and its citizens or between citizens themselves or between state organs or agencies. Neither a state organ or its officers or individual is above the reach of the law as the Constitution in article 2(1) declares. The power of the court to adjudicate disputes according to the law is a delegation by the people pursuant to article 159 which states that

“Judicial authority is derived from the people and vests in, and shall be exercised by, courts and tribunals established by or under the Constitution.”

The power is exercised subject only to the Constitution and the law and is not subject to the control or direction of any person or authority (article 160(1)).

14. The following excerpt from the South African Constitutional Court case of Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others (CCT 52/21) [2021] ZACC 18; 2021 (9) BCLR 992 (CC); 2021 (5) SA 327 (CC) (29 June 2021) sums up the position of court orders in a constitutional democracy. The court held:

“...orders and decisions issued by a court bind all persons to whom and organs of State to which they apply, and no person or organ of State may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced by all and sundry, including organs of State. In doing so, courts are not only giving effect to the rights of the successful litigant but also and more importantly, by acting as guardians of the Constitution, asserting their authority in the public interest...”



15. In Civil Application No Nai 1 of 2017; *Dr Fred Matiang'i - The Cabinet Secretary, Ministry of Interior and Coordination of National Government v Miguna Miguna & 4 others* the Court of Appeal affirming the power punish for contempt held thus:

“... When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This court, as must all courts, will deal firmly and decisively with any party who deigns to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities...”

16. This court entered a finding of guilty on 9/9/2024 after all efforts afforded to the contemnor to purge the contempt were ignored. This was to ensure its authority and dignity which it exercises on behalf public does not get annihilated leading to situation of impunity and anarchy. The Supreme Court in *Githiga & 5 others v Kiru Tea Factory Company Ltd* (Petition 13 of 2019) [2023] KESC 41 (KLR) (16 June 2023) (Judgment) Neutral citation: [2023] KESC 41 (KLR) acknowledged that courts have inherent power to punish for contempt to vindicate their authority besides pin-pointing the source of this authority for Kenyan courts to punish for contempt after the declaration of unconstitutionality of *Contempt of Court Act* 2016. The court stated:

“... Courts possess the inherent power to enforce compliance with their lawful orders through sanctions imposed through contempt of court. We note that the *Contempt of Court Act* having been declared unconstitutional in *Kenya Human Rights Commission v Attorney General & another* [2018] eKLR on November 9, 2018 the instructive provision remains section 5(1) of the *Judicature Act* which grants the High Court and the Court of Appeal the power to punish for contempt. It provides:

- (1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England and that power shall extend to upholding the authority and dignity of subordinate courts...”

17. Today, this court is required to pass the sentence for contempt of court. The principles to be considered in determining an effective sentence in a contempt of court case were considered by the South African Constitutional Court in *Jacob Zuma case* (*supra*) where the court discussed the ‘coercive’ versus ‘punitive order’ and explained the difference between the two approaches as follows:

“...There is a distinction between coercive and punitive orders, which differences are “marked and important”. A coercive order gives the respondent the opportunity to avoid imprisonment by complying with the original order and desisting from the offensive conduct. Such an order is made primarily to ensure the effectiveness of the original order by bringing about compliance. A final characteristic is that it only incidentally vindicates the authority of the court that has been disobeyed. Conversely, the following are the characteristics of a punitive order: a sentence of imprisonment cannot be avoided by any action on the part of the respondent to comply with the original order; the sentence is unsuspended; it is related both to the seriousness of the default and the contumacy of the



respondent; and the order is influenced by the need to assert the authority and dignity of the court, to set an example for others...

18. The court then went ahead and found that the conduct of the contemnor, Mr Zuma had made it undesirable to benefit from a ‘coercive order’ reasoning thus:

“... A coercive order would be both futile and inappropriate in these circumstances. Coercive committal, through a suspended sentence, uses the threat of imprisonment to compel compliance. Yet, it is incontrovertible that Mr Zuma has no intention of attending the Commission, having repeatedly reiterated that he would rather be committed to imprisonment than co-operate with the Commission or comply with the order of this court. Accordingly, a suspended sentence, being a coercive order, would yield nothing...”

19. The contemnor herein casually treated every possible opportunity accorded to him by this court to purge the contempt to the extent that attending a workshop in Mombasa which he considered more important than obeying court summons on the whereabouts of the 2nd to 4th petitioners.

20. Deliberate defiance of court orders breeds impunity particularly when it is done by those entrusted with public power as it is inconsistent with the purposes and objects of the *Constitution*.

21. In passing this sentence, I am conscious that it is directed to the highest ranked police officer in this Country. He is still in office. That might pose a challenge in the enforcement of the order since in police service, seniority is highly regarded. That cannot deter me from pursuing and standing firm in the defence of the aspirations of Kenyan people who desired at the time of enacting this Constitution to have a country that is governed by adherence to the rule of law. Part of the oath office that I took as a Judge states that:

“...I will at all times, and to the best of my knowledge and ability, protect, administer, and defend this Constitution with a view to upholding the dignity and the respect for the Judiciary and judicial system of Kenya...”

22. The *Constitution* of this country is supreme and article 2(1) reiterates that by stating that it binds all persons and all state organs. No man or State organ or authority is above the *Constitution*. the *Constitution* command through this court is that I uphold the rule of law by protecting the integrity of the Judicial System.

23. The significance of this sentence today is to vindicate the cherished principle of the rule of law in our constitutional democracy by restoring the dignity and authority of this court in public interest. Borrowing from the South Africa Constitutional Court *decision*, the contemnor shall thus serve sentence as follows:

1. The contemnor, Mr Gilbert Masengeli is sentenced to six 6 months’ imprisonment.
2. Mr. Gilbert Masengeli is ordered to submit himself to the Commissioner General of the Kenya Prisons Service to ensure that he is to be committed to a prison facility to commence serving the sentence of imprisonment imposed.
3. In the event that Gilbert Masengeli does not submit himself to the Commissioner General of Kenya Prison Service as ordered, the Cabinet Secretary for Interior and National Security must take all steps that are necessary and permissible in law to ensure that Mr Gilbert Masengeli is committed to Prison to commence serving the sentence imposed on him.



4. The court nevertheless considers it desirable to impose a ‘coercive order’ as opposed to a ‘punitive order’. In this regard, Mr Gilbert Masengeli can avoid serving the sentence if he complies with the direction to obey the court summons. I thus, suspend this sentence for seven (7) days only. The Acting Inspector General of Police can redeem himself and comply by availing himself before the court in person to answer to the issues he has been avoiding within seven (7) days. In default, the Sentence shall automatically become effective.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 13TH DAY OF SEPTEMBER, 2024

L N MUGAMBI

JUDGE

