



Ongili v Nation Media Group Kenya Limited & another; Director of Public Prosecutions (Interested Party) (Petition E012 of 2020) [2024] KEHC 11391 (KLR) (Constitutional and Human Rights) (20 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11391 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E012 OF 2020

EC MWITA, J

SEPTEMBER 20, 2024

BETWEEN

PAUL ONGILI PETITIONER

AND

NATION MEDIA GROUP KENYA LIMITED 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

AND

DIRECTOR OF PUBLIC PROSECUTIONS INTERESTED PARTY

JUDGMENT

1. The petitioner filed this petition against the respondents claiming violation of his rights and fundamental freedoms guaranteed under articles 25(c), 27(1), 29 and 50(2) of *the Constitution*. The petition is supported by an affidavit and written submissions.
2. The petitioner was arrested on 17th January 2020 and arraigned on 20th January 2020 for attempted murder contrary to section 220 (a) of the penal code and behaving in a disorderly manner while carrying a firearm, contrary to section 33 as read with section 34(a) of the *Firearms Act*, in criminal case No. 110 of 2020. He pleaded not guilty and was released on bail.
3. The petitioner asserted that on 29th June 2020, the 1st respondent ran a prime-time news exclusive story titled “DJ Evolve speaks of life after being short by Babu Owino (the petitioner)”. The news anchor, Ken Mijungu, introduced the story stating: “The only thing people know about him is that he was the victim of a near fatal shooting right here in Nairobi, Felix Orinda popularly known as DJ Evolve who was short by Embakasi East MP Babu Owino”



4. The petitioner asserted that at no point during the news item or before, did the Felix Orinda state that he had shot him. The 1st interested party also confirmed that Mr. Orinda had never recorded a statement on the matter.
5. The petitioner argued that within 7 days from 29th June 2020, the 1st respondent consistently and without any provocation published numerous inciteful, spiteful and unfounded publications about him. It is the petitioner's case, that the 1st respondent had a duty to verify information before publishing and failure to do so demonstrated malice on its part. It is the petitioner's further case, that the story as aired directly infringed on his constitutional right to fair hearing and trial. There were threats to his life and the security of his person.
6. The petitioner maintained that the 1st respondent went on to air an alleged footage that had not been admitted as evidence in court to push the agenda of soiling his reputation. In so doing, the 1st respondent engaged in a public discussion on a matter that was pending before court which was sub judice.
7. The petitioner again argued that on 1st July 2020, the 1st respondent published on the front page of the Daily Nation Newspaper an article titled "A victim waits for justice; His life goes on". The publication, the petitioner contended, was used to attack, accuse, persecute, reprimand and convict him in the eyes of the public.
8. The petitioner asserted that as a consequence, he suffered considerable distress, anxiety and was ridiculed by his close friends, relatives and members of the public in the 1st respondent's social media page and on several other social media platforms who based reliance on the 1st respondent's words referring to him as a killer, in violation of his rights and fundamental freedoms. His effort to have the 1st respondent pull down the offending and malicious publication was not successful.
9. The petitioner relied on the decisions in *Phineas Nyagah v Gitobu Imanyara* [2013] eKLR and *Gideon Mose Onchwati v Kenya Oil Company Ltd & Another* (2015) eKLR for the argument that defamation has a constitutional underpinning and that the freedom of expression and media are subject to limitations.
10. The petitioner further placed reliance on the decisions in *Micah Cheserem v Immediate Media Services* (2000) 1 EA 371 and *Gatley on Libel and Slander* 12th Edition, Sweet and Maxwell on the legal threshold for granting injunction in defamation cases
11. The petitioner further cited *Giella v Cassman Brown* (1973) EA 358 on the requirements for granting injunctions. The petitioner maintained that the words used by the 1st respondent could only be understood to mean that he shot DJ Evolve who will never walk again. He relied on *Jared Sigiri Keegwa v Walter Onchwari and another* (2014) eKLR to support this argument
12. According to the petitioner, there was no contention that the 1st respondent wrote, printed, published, circulated and disseminated information relating to the criminal case to disparage his character, in violation of Article 50(2) (a) of *the Constitution*. The publication and discussions about him were also defamatory. To this end, the petitioner relied on *Alnashir Visram v Standard Limited* [2016] eKLR that by virtue of the publication, the 1st respondent implicated him with an allegation of attempted murder yet particulars of the charge he was facing in the Criminal case were behaving in a disorderly manner while carrying firearm. He was, however, acquitted under section 215 of the Criminal Procedure Code on 29th August 2023. For that reason, the words the 1st respondent published and aired were false, malicious, discriminatory and untrue.



13. The petitioner relied on Ibrahim Mukhtar Abasheikh v Royal Media Services & Another [2020] eKLR to assert that his constitutional rights and freedoms should not be sacrificed where no cause of action is imminent. He took the position that given his reputation as a respected member of Parliament, the 1st respondent's action caused him harm that could not be adequately compensated in damages. He relied on the decisions in Joseph Sire Oromo v Housing Finance Company of Kenya [2008] eKLR and Brigadier Arthur Ndonj Owuor v The Standard Limited [2011] eKLR.
14. The petitioner maintained that the balance of convenience tilted in his favor as the rights and freedom guaranteed under Articles 33 and 34 of *the Constitution* are not absolute. He relied on American Cyanid vs Ethicon Ltd [1975] 1 All ER 510-51.
15. Regarding the justification for making the publication, the petitioner submitted that the publication named him as the perpetrator of the offence of attempted murder. It was his case that where a plea of justification is made and the allegation are of a grave nature as in this case, a higher standard of proof is required than the normal proof in civil cases. He relied on the case of United Africa Press Ltd vs Zaverchand K Shah (1964) 1 EA 336 to support this argument.
16. The petitioner proposed general damages of Kshs. 12,000,000 and relied section 27 of the *Civil Procedure Act*; Halsbury's Laws of England (4th Ed.) Vol. 37 (p. 552) and decisions in CAM v Royal Media Services Limited [2013] eKLR and Standard Media v Kagia and Co. Advocates [2010] eKLR.
17. He sought the following reliefs:
 - i. A declaration that the 1st respondent through its acts has infringed the petitioner's right to a fair trial, right not to be discriminated against, right to freedom of security of the person and right to be presumed innocent until the contrary is proved under articles 25(c), 27(1), 29 and 50 of *the Constitution*.
 - ii. A declaration that the 1st respondent through its acts has threatened the petitioner's right to a fair trial, right not to be discriminated against, right to freedom of security of the person and right to be presumed innocent until the contrary is proved under articles 25(c), 27(1), 29 and 50 of *the Constitution*.
 - iii. An order of permanent injunction against the 1st respondent whether by itself, officers, members, agents, servants and/ or employees or otherwise howsoever be restrained from further writing, printing and publishing, circulating, disseminating or causing to be written, printed, published, circulated, disseminated in any manner whatsoever words and statements concerning and in respect of the petitioner emanating from criminal case No. 110 of 2020 to the public and / or any other third parties or causing the publication or publishing of any further inciteful and spiteful statements as against the petitioner unless the trial court arrives at a finding of guilt and convicts the petitioner.
 - iv. The 1st respondent whether by itself, officers, members, agents, servants and/ or employees or otherwise howsoever be restrained from further writing, printing, publishing, circulating, disseminating or causing to be written, printed, published, circulated, disseminated in any manner whatsoever (electronically or on online platforms) words and statements depicting the petitioner as having already been tried and convicted in respect to criminal case No. 110 of 2020 unless the trial court arrives at a finding of guilt and convicts the petitioner.
 - v. General damages for infringement and threatening the petitioner's right to a fair trial, right against discrimination, right to freedom and security of the person and right to be



presumed innocent until the contrary is proved under articles 25(c), 27(1), 29 and 50(2) of the Constitution.

- vi. Punitive Damages
- vii. Such other orders as this Honourable Court shall deem fit and just to grant.
- viii. Costs of the Petition.

1st respondent's case

18. The 1st respondent opposed the petition through a replying affidavit further affidavit, supplementary affidavit and written submissions. The 1st respondent stated that the petitioner being a state officer is required to uphold standards set by Chapter 6 of the Constitution and Leadership and Integrity Act, on leadership and integrity. His actions are subject to scrutiny differently from those of ordinary persons.
19. According to the 1st respondent, on 17th January 2020, the petitioner was involved in an incident at a club within Kilimani, Nairobi which led to the shooting of Felix Orinda alias DJ Evolve. On the same day, K24 Digital released a video clip of CCTV footage on its Twitter page showing what had happened in the club. The clip was shared multiple times by different accounts in social media platforms.
20. The 1st respondent maintained that there is no dispute that the petitioner was arraigned in court and the case attracted immense public interest owing to the petitioner's position as a member of Parliament and a public figure. The 1st respondent decided to investigate how the victim (Felix Orinda) was faring following that incident. On 29th June 2020 the victim gave an interview and the story was aired on the same day, followed by a bulletin on 30th June 2020 and a news article on 1st July 2020.
21. The 1st respondent contended that the story did not depict the petitioner as guilty as this a function of a court of law. The decision to report the story was informed by public perception in Kenya that for politicians and public figures, the wheels of justice grind slowly and justice is delayed while in cases involving ordinary Kenyans it is the contrary. The story published was not false; defamatory or malicious since the information aired was already in the public domain.
22. The 1st respondent maintained that the murder charge was withdrawn (on 14th December 2021) following a settlement agreement between the petitioner and the victim's family. The petitioner was then acquitted of the offence of behaving in a disorderly manner while carrying a firearm in a judgment delivered on 29th August 2023.
23. The 1st respondent took the position that the petitioner had not provided evidence of discrimination or unequal treatment. He did not adduce evidence to show the comparative reporting of other accused persons compared to his that would indicate usage of different standards in reporting to amount to discriminatory treatment. Reliance was placed on Lain Currie & Johan De Waal in The Bill of Rights Handbook, 6th Edition, page 223-225; and the decisions in Gichuru v Package Insurers Brokers Ltd (petition 36 of 2019) [2021] KESC 12 (KLR) and Non- Governmental Organization Coordination Board vs EG & 5 others [2019] eKLR.
24. The 1st respondent further argued that by virtue of this court's ruling of 30th September 2022 (Ong'undi J), the issue of discrimination was determined and cannot be relitigated. The 1st respondent relied on Trade Bank Limited v LZ Engineering Construction Limited [2001] EA 266 and George Kamau Kimani and 4 others v the County Government of Transzoia [2014] eKLR.
25. Regarding alleged violation of Article 29, the 1st respondent took the position that the petitioner did not prove the threat to violence and that the claim was not grounded on real apprehension of violation



- to his bodily security. In any case, he was protected due to the status that comes with his status as member of parliament.
26. On presumption of innocence and the right to fair trial, the 1st respondent argued that the media should not be prevented from covering/challenging ills in the public sphere as they are the watchdog of the judicial system and effective weapon against corruption of police, prosecutor and other law enforcement personnel such as in the case the petitioner faced.
 27. In any case, the 1st respondent argued, freedom of the media was exercised within the confines of the limitations under Article 34 read with Article 33 of *the Constitution*. Reliance was placed on Shadrack B.O. Gutto & 4 others v Hillary Ng'weno & 3 others HCC 888 of 1981 and *JWI & another v Standard Group Limited & another* [2015] eKLR.
 28. The 1st respondent maintained that the petitioner's right to fair trial was not infringed as the publication complained of did not prevent him from being granted bail; withdrawal of the murder charge and eventual acquittal in the disorderly conduct charge. The 1st respondent placed reliance on Richard Kuloba in *The Principles of Injunctions*, Oxford University Press, 1987 (at pages 21 to 31) and the decisions in Attorney *General v Baka (Civil Appeal 223 of 2017)* [2023] KECA 117 (KLR); *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* [2018] eKLR and *The Bank of Baroda (Kenya) Ltd v Timewood Products Ltd (2008)* eKLR that the petitioner had not proved the constitutional violations alleged. It urged that the petition be dismissed with costs.
 29. The 2nd respondent was excused from taking part in these proceedings. The interested party did not take part in the proceedings either.

Determination

30. I have considered the petition, the response and arguments by parties as well as decisions relied on. The issue that arises for determination is whether the 1st respondent's action(s) violated the petitioner's right and fundamental freedoms.
31. The facts of this petition are not in dispute. The petitioner, a member of Parliament, was involved in a shooting incident which resulted into leading to a serious injury to one person. The incident was widely reported in both electronic and print media. The petitioner was subsequently arrested and charged in court for the shooting. The 1st respondent, a media house covered the story and conducted an interview with the victim which was again widely publicised in its electronic media channel and daily newspaper.
32. The petitioner then filed this petition complaining of the interview and how it was covered, arguing that the coverage violated his rights and fundamental freedoms. In particular, the petitioner asserted that his right to dignity; non-discrimination; integrity and fair trial were violated. He sought declarations of violation of those rights and compensation.
33. The 1st respondent denied violating any of the petitioner's rights and fundamental freedoms, contending that the coverage was on factual matters that were within public domain and, therefore, merely highlighted what was already known to the general public.
34. *The Constitution*, no doubt guarantees every person's right to dignity, integrity, non-discrimination, fair trial and fair hearing and all the rights in the Bill of Rights and even those not prominently mentioned in the Bill of Rights. Violation of fundamental rights and freedoms does call for sanctions commensurate with proved violations.
35. The petitioner's case, as I understand it, is that the 1st respondent's coverage of the matter through the interview and subsequent newspaper stories injured the petitioner's name and reputation as public



figure. In other words, the coverage amounted to constitutional violation of the rights referred to above.

36. I have read through the pleadings and in particular, the words the petitioner complained of. The words introduce the topic the interview was to centre on. The words were on a matter that was as already stated in the public domain and even in court. It was not a creation of the reporter or the person conducting the interview. The petitioner himself admits that the reporter was interviewing the victim of the shooting incident.
37. Article 34 of *the Constitution* recognises and protects the independence and freedom of the electronic, print and all other media. This freedom, just like many of the freedoms in *the Constitution*, is not absolute. For instance, the Article is clear that the independence and freedom of the media does not extend to facts of propaganda (of war), incitement to violence, hate speech or advocacy of hatred. The State is prohibited from controlling the media or interfering with anyone engaged in publication.
38. In exercising the right to freedom of the media, what is required of the media, is responsibility in reporting and disseminating information so that that information does not injure the reputation of others. To amount to offensive reporting, dissemination or publication, the information must be false thereby likely to harm the reputation of the petitioner or the party complaining. In this respect, the petitioner's case is that the coverage of the matter was injurious to his integrity, reputation, suffered discrimination and right to fair trial and hearing thus, which violated his rights and fundamental freedoms.
39. I have considered the report complained as covered by the 1st respondent. First, it is a fact there was a shooting in which the petitioner was involved. It is also true that the victim of the shooting was seriously injured. The petitioner was arrested and charged in court. He says he was charged with attempted murder but the report complained of stated that he was charged with murder, which the petitioner argues, was false. It is also a fact that the petitioner was charged with another offence of disorderly behaviour while handling a firearm.
40. Whether the petitioner was charged with murder or attempted murder makes little difference to the understanding of the general public. People tend to pay more attention to the words they easily understand. In this case, many people would understand murder but would not tell the difference between murder and attempted murder.
41. In that premise, the fact of the matter remains that the petitioner was facing prosecution arising from the shooting incident which was in the public domain. The 1st respondent was only highlighting the fact that the petitioner was facing prosecution as a matter of fact. The media had the freedom to report and discuss a matter that was in the public domain without curtailing the freedom of speech, an essential ingredient of freedom of expression in a democratic society which Kenya is one.
42. In this regard, Corey J, writing for the Supreme Court of Canada in *Edmonton Journal v Alberta* [1989] 45 CRR 1, underscored the importance of the freedom of expression, stating that "it is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed, a democratic society cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions.
43. In *Manika Gandhi v Union of India* [1978] 2 SCR 621, the Supreme Court of India stated thus:

Democracy is based essentially on a free debate and open discussion for that is the only corrective of government of actions in a democratic set up. If democracy means government of the people by the people, it is obvious that every citizen must be entitled to participate



in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential.

44. Similarly, in *Rangrajam v Jigjivan* 1989 SCR (2) 204, 1989 SCC (2) 574, it was stated that “in a democratic society...Freedom of expression is the rule and it is generally taken for granted. Everyone has a fundamental right to form his own opinion on any issue of general concern. He can form and inform by any legitimate means.”
45. The petitioner is a public figure, thus open to scrutiny and even criticism. In an open and democratic society, public officers must tolerate such scrutiny and fair criticism because citizens usually exercise the right granted to them by *the Constitution* to discuss their conduct. The right to scrutinize and criticize should not be unreasonably curtailed through threats of litigation unless the criticism crosses the constitutional boundaries.
46. It was in this regard that the Privy Council stated in *Hector v Attorney General of Antigua and Barbuda & Another* (1991) LRC (const) 237 (PC) [1990] 2 All ER 102 that “In a free and democratic society, it is almost too obvious to need stating that those who hold office in government and who are responsible to public administration, must always be open to criticism. An attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind.”
47. The petitioner has not demonstrated how the reporting violated his right to fair trial and hearing. The 1st respondent argued that the attempted murder charge was settled and that the petitioner was acquitted of the other charge relating to handling of a firearm. The petitioner thus, did not demonstrate that the reporting of the shooting incident affected the trial in any way and therefore the right to fair hearing.
48. Further, the petitioner did not demonstrate how the reporting and even the interview, violated his right to non-discrimination. In short, the petitioner did not demonstrate that his rights and fundamental freedoms were violated and the manner of such violation. The discussion and reporting carried out about the shooting, the arrest and subsequent arraignment could not amount to violation of his rights as claimed. Furthermore, whether the reporting and discussion of the matter was sub judice, could only be raised before the trial court. Only that court could examine the coverage and reporting complained of and determine whether it was sub judice.
49. In claims of violation of constitutional rights and fundamental freedoms, the petitioner has the burden to demonstrate that indeed the rights were violated and the manner of such violation. It is not enough to merely invoke the Bill of Rights, claiming that the rights protected therein were violated without showing how. The petitioner has fallen short in this regard.

Conclusion

50. Having considered the petition, the response and arguments by parties, the conclusion I come to, is the petitioner has not proved his case on a balance of probabilities. The petitioner has not proved that his rights and fundamental freedoms were violated; that the reporting was false and injurious to his reputation and dignity, how the reporting was discriminatory; how the reporting affected his right to fair trial and that the reporting or coverage of the interview exceeded the freedoms of the media limits allowed by *the Constitution*.
51. In the circumstances, the petition fails and is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2024

E C MWITA

JUDGE

