



REPUBLIC OF KENYA



**Julien v Director, Department of Immigration Services & 2 others (Petition E351 of 2021)
[2023] KEHC 2423 (KLR) (Constitutional and Human Rights) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2423 (KLR)

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

PETITION E351 OF 2021

HI ONG'UDI, J

MARCH 23, 2023

BETWEEN

MUAMBA TSHIBANDA JULIEN PETITIONER

AND

**DIRECTOR, DEPARTMENT OF IMMIGRATION SERVICES 1ST
RESPONDENT**

**CABINET SECRETARY, MINISTRY OF INTERIOR &
COORDINATION 2ND RESPONDENT**

ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. The petition dated September 2, 2021 was filed under articles 22(1), 23 and 165(1) (2) (b) of the *Constitution* and section 33(1) and 43(1) of the *Citizenship and Immigration Act*, No.12 of 2011 for the alleged contravention of rights and freedoms under articles 19, 22, 23, 25, 27(1), 28, 29(d), 30 and 31 of the *Constitution*. Accordingly the petition seeks the following orders:
 - a. A declaration that the respondent violated the petitioner's right under Article 22, 25, 27, 35, 47, 50 and 51 of the *Constitution*.
 - b. A declaration that the inclusion of the petitioners name in the list of prohibited immigrants is in breach of the petitioner's constitutional rights and fundamental freedoms.
 - c. An order of mandamus compelling the respondents to remove the petitioner's name from the list of prohibited immigrants.



- d. An order of mandamus to compel the respondents whether by themselves and or through their agents or officers to forthwith allow the petitioner peaceful entry, exit, residence, stay, working and or carry out business in Kenya.
- e. Any other orders as the Court may deem fit to meet the ends of justice.
- f. Costs of this petition.

The Petitioner's case

2. The petition was supported by the averments in the petitioner's affidavit of September 2, 2021. His case revolves around his classification as a prohibited immigrant by the respondents. He averred that he is a national of the Democratic Republic of Congo (DRC) bearing passport No. [particulars withheld], and he had travelled to Kenya on July 21, 2016 with the aim of conducting business in the country.
3. He deposed that on or about May 19, 2017, at around 3 pm police officers and officers purporting to be from the Immigration department stormed into the house of one, Jones Kabaya in Kileleshwa, where he was. They arrested and detained the two of them at Nairobi Area Police Station up to 7 pm, before transferring them to Kamukunji police station where they were detained incommunicado for 5 days. They were deported to DRC on May 23, 2017.
4. The petitioner took issue with these actions because he was not given any reasons for his arrest since there was no arrest warrant produced before said action. He further deposed that he was not granted an opportunity to seek legal representation as his phone and sim card were seized by the officers. He additionally averred that he was not issued with a deportation order or written reasons for his deportation. Further that he was not granted a chance to appeal the said decision.
5. He deposed that as a result of the respondents' actions his business had been affected adversely occasioning great economic hardship and emotional distress to his family as he is the sole breadwinner. Further that the respondents' actions which he termed as malicious and unfair contravened immigration laws and the Constitution.

The Respondents' case

6. The respondents in reply filed the following grounds of opposition dated May 25, 2022:
 - i. The petition does not meet the test of a constitutional petition laid down in the case of Anarita Karimi Njeru v Republic (No.1) [1979] KLR 154 and emphasized in the case of Mumo Matemu v Trusted Society of Human Rights alliance [2014] eKLR and on that ground alone, we urge that this petition should fail.
 - ii. The petitioner is a prohibited immigrant pursuant to section 33(1) (f) of Kenya Citizenship and Immigration Act, 2011 and section 43(1) which gives the 2nd respondent power to remove persons who are unlawfully present in Kenya.
 - iii. By dint of article 39 of the Constitution and section 22 (1) (a) of the Kenya Citizenship and Immigration Act, the right to enter, remain in and reside anywhere in Kenya is inherently vested in the citizens of Kenya. A non-citizen's residency and their act of remaining in Kenya is a privilege which may or may not be granted.
 - iv. The right of removal of undesirable aliens under section 33 and 43 of the Kenya Citizenship and Immigration Act, including removal of a person whose presence in or entry into Kenya is



unlawful under any written law is an act of absolute state sovereignty and not a determination of a civil right.

- v. That the petition is bad in law, unmerited and an abuse of the process of this honorable court and ought to be dismissed.

The Petitioner's submissions

7. The petitioner through the firm of Lusweti and Nabutola Company Advocates filed written submissions and a list of authorities dated June 6, 2022. Counsel identified the issues for consideration as follows:
 - i. Whether due process was followed in the petitioner's deportation by the respondents.
 - ii. Whether there is an infringement on the petitioner's constitutional rights and freedoms under the Constitution.
 - iii. Whether the petitioner was affected by the respondents' decision.
 - iv. Whether the petitioner is entitled to the reliefs sought.
8. On the first issue, and while relying on section 43 of the Kenya Citizenship and Immigration Act, Counsel submitted that a person cannot be deported out of Kenya without a deportation order from the Cabinet Secretary. In this case it was noted that the petitioner was not issued with this order contrary to the dictates of the law. In support reliance was placed on the case of Oumaron Moumouni Ali v Director General Kenya Citizens and Foreign Nationals Management Services & 3 others [2020] eKLR where it was held that when it is clear that such autonomy has been abused by issuing a deportation order, failing to serve the same and failing to accord the petitioner the right to be heard, then due process in deporting the petitioner was not followed.
9. On the second issue, it was submitted that according to article 47 of the Constitution, every person has a right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair and they must be granted written reasons for decisions against them. He contended that none of these processes was accorded to the petitioner thus violating his rights under articles 22, 25, 27, 35, 47, 50 and 51 of the Constitution. To buttress this point reliance was placed on the case of Republic v Director of Immigration Services Ex-parte Planet Motors Company Ltd and another [2016] eKLR where it was noted that acting without jurisdiction or *ultra vires* or contrary to the provisions of the law or its principles are instances of illegality. Also see Republic v Minister of State for Immigration of Persons ex parte C.O. [2013] eKLR.
10. On the third issue, Counsel stated that the respondents' decision prejudiced the petitioner as he is the sole bread winner for his family and this decision caused economic hardships, anguish and emotional distress to his family.
11. Turning to the fourth issue, Counsel submitted that having established that the respondents failed to follow due process and violated the petitioner's rights, it was clear that the petitioner was entitled to the reliefs sought. He relied on the case of Bashir Mohamed Jama Abdi v Minister for Immigration and Registration of Persons & 2 others [2014] eKLR where it was held that the respondents' actions in deporting the petitioner to the United Kingdom without following due process was a violation of his constitutional rights. Also see the case of Republic v Director of Immigration Services Ex Parte Planet Motors Company Limited and another [2015] eKLR.



The Respondents' submissions

12. State Counsel, Mwise Robi on behalf of the respondents' filed written submissions dated October 28, 2022 where he identified the issues for determination as:
 - i. Whether the respondents were involved in the alleged deportation.
 - ii. Whether the petitioner's constitutional rights and freedoms were violated.
13. Relying on section 107 of the *Evidence Act* Counsel pointed out that a party seeking to rely on a fact bears the burden to show its existence. He argued that despite the petitioner saying he was arrested and detained no evidence had been supplied such as an OB No. confirming this assertion. To support this argument counsel relied on the case of *Peter Ngari Kagume & 7 others v Attorney General* [2009] eKLR where it was held that a mere allegation of incarceration without providing evidence of the same does not assist the Court. Also see *China Wuyi and Company Limited v Samson K. Meto* (2014) eKLR.
14. Counsel further submitted that there was no evidence that the petitioner had been in the Country legally. He stated that according to section 34(2) of the *Kenya Citizenship and Immigration Act* the presence of any person in Kenya who is not a citizen shall unless otherwise authorized under this *Act* be unlawful unless that person is in possession of a valid work permit or a valid residence permit or a valid pass. He thus submitted that the petitioner was in violation of the Kenya immigration laws and so could not seek protection under the same as seen in the case of *Simon Kiprotich & 2 others v Principal Secretary, Ministry of Devolution and Planning and 4 others* (2018) eKLR.
15. On the second issue, Counsel citing the case of *Anarita Karimi* (*supra*) stated that the petitioner was required to show how the provisions of the *Constitution* had been violated and the manner of violation which he had not done.

Analysis and determination

16. From the foregoing account, it is my considered view that the issues that arise for determination are as follows:
 - i. Whether the petitioner's constitutional rights under articles 22, 25, 27, 35, 47, 50 and 51 were violated by the respondents.
 - ii. Whether the petitioner is entitled to the reliefs sought.

Whether the petitioner's constitutional rights under Articles 22, 25, 27, 35, 47, 50 and 51 were violated by the respondents

17. The petitioner's key grievance is that he was deported out of Kenya unprocedurally, since he was not accorded due process as dictated by the *Constitution* and the *Kenya Citizenship and Immigration Act*, 2011. He further complained of having been listed as a prohibited immigrant hence barred from returning to the Country. The respondents opposed the petition arguing that the petitioner had not proved his allegations as required by the law and in line with the principle set out in the case of *Anarita Karimi* (*supra*).
18. As a starting point, the *Constitution* of Kenya makes known that the Bill of Rights is a fundamental component of our Nation's laws. Article 20(1) and (2) of the *Constitution* states as follows:
 - (1) The Bill of Rights applies to all law and binds all State organs and all persons.



- (2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.
19. The right to freedom of movement is applicable not only to nationals of a country but also everyone lawfully within the territory of that nation. With reference to protection of foreign nationals in a nation, Article 12 of the *International Covenant on Civil and Political Rights* Convention which is applicable in Kenya by virtue of Article 2(5) and (6) of the *Constitution* provides as follows:
1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
 2. Everyone shall be free to leave any country, including his own.
 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (order public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
 4. No one shall be arbitrarily deprived of the right to enter his own country.
20. On removal of foreign nationals in a nation, article 13 provides as follows:
- An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.
21. Evidently, foreign nationals' rights are enshrined in International law and National law fundamentally under the *Constitution*. Notwithstanding a nation's enjoyment of sovereignty in which it has a right to admit or expel from its state a foreign national the common thread in the laws on expulsion of foreign nationals is that, the process must be lawful and in accordance with the law.
22. The *Kenya Citizenship and Immigration Act*, 2011 is the law that deals with the presence of foreign nationals in Kenya and stipulates the conditions precedent for a foreigner's continued stay in Kenya and the consequences for breach thereof. In this case, the first issue complained of is the alleged deportation. Section 2 of the *Act* defines deportation as follows:
- “deportation” as the action or procedure aimed at causing an illegal foreign national to leave the country either voluntarily or compulsorily, or under detention in terms of this Act.
23. The legal process of removing an illegal foreign national in the Republic of Kenya is outlined under section 43 of the *Act* as follows:
- Power to remove persons unlawfully present in Kenya:
1. The Cabinet Secretary may make an order in writing, directing that any person whose presence in Kenya was, immediately before the making of that order, unlawful under this *Act* or in respect of whom a recommendation has been made to him or her under section 26A of the *Penal Code* (Cap. 63), shall be removed from and remain out of Kenya either indefinitely or for such period as may be specified in the order.



2. A person against whom an order has been made under this section shall—
 - a. be returned to the place where he originated from, or with the approval of the Cabinet Secretary, to a place in the country of habitual residence, permanent residence or citizenship, or to any place to which he consents to be taken if the competent authorities or government of that place consents to admit him or her to the country; or
 - b. if the cabinet secretary so directs, be kept and remain in police custody, prison or immigration holding facility or until his departure from Kenya, and while so kept is deemed to be in lawful custody whether or not he has commenced any legal proceedings in court challenging the Tribunals decision until the suit is finally disposed of.
3. Subject to this section, an order under this section shall be carried out in such manner as the Cabinet Secretary may direct, subject to the Constitution and related laws.

24. The Courts have on numerous occasions addressed their mind on the legal process of deporting illegal foreigners. To name but a few, the Court in the case of Mohammed Ibrahim Naz v Cabinet Secretary Responsible for Matters Relating to Citizenship and the Management of Foreign Nationals & another [2013] eKLR stated as follows:

“... The requirement in removing an alien from a state’s territory, as provided under the above conventions and in accordance with the constitutional provisions contained in article 47, is that such removal should be ‘in accordance with the law’, that due process should be followed. This, I believe, is also the essence of the decision in the case of *Samuel Murial Mobochi v the Attorney General of Uganda*, though distinguishable from this case to the extent that the court found that the provisions of the Uganda Citizenship and Immigration Act were modified by the Treaty for the Establishment of the East African Community and the East African Common Market Protocol. The question then is whether the petitioner was accorded due process.”

25. Similarly, the Court in the case of Oumarou Moumouni Ali (*supra*) opined as follows:

“27. The Respondents in exercise of their functions as state officers are bound by provisions of article 10 of the Constitution thus the National Values and Principles of Governance which includes the rule of law, democracy, human dignity, equity, social justice, human rights, non-discrimination and protection of the marginalized, transparency and accountability. It is not for them to urge that they should be accorded the anatomy vested in them by statute without unnecessary intervention of the Court when it is clear such autonomy has been abused by issuing deportation order, failing to serve the same and failing to accord the Petitioner the right to be heard. In view of the above, I find that the due process was not followed in the Petitioner’s deportation... This very act goes against the dictates of our constitution and International Law and should not be allowed at all.”



26. The irreducible minimum as can be discerned from the outlined legal principles is that the respondents are obliged to follow the due process under the law before deporting a foreign national. It follows thus that where a decision is taken contrary to the law, the Constitution and international law in that regard, the Court will automatically interfere with such a decision on review.
27. The second issue raised by the petitioner was that the respondents have listed him as a prohibited immigrant and as such he cannot gain entry into Kenya. Section 33 of the Kenya Citizenship and Immigration Act, defines who a prohibited immigrant is. It provides that:
1. For purposes of this Act, a prohibited immigrant is a person who is not a citizen of Kenya and who is—
 - a. not having received a pardon—
 - i. has been convicted in Kenya or any country of an offence created under a statute for which a sentence of imprisonment is for a minimum term of three years;
 - ii. has been acquitted by a court of any offence and who at the time of acquittal has no valid immigration status;
 - iii. has committed or is suspected of having committed an offence provided for under international treaties and conventions ratified by Kenya;

Further under section 33 (1)(b)-(v) the provision gives more circumstances.

28. Section 33(5) of the Act informs that once a person is deemed as a prohibited immigrant the outcome is that:

Subject to section 34 the entry into and residence in Kenya of a prohibited immigrant or an undesirable person shall be unlawful, and a person seeking to enter Kenya shall, if he or she is a prohibited immigrant or undesirable person, be refused permission to enter or transit through Kenya, whether or not he or she is in possession of any document which, were it not for this section, would entitle him or her to enter or transit through Kenya.

29. Section 33 (8) provides that the status of the prohibited immigrant maybe reviewed by the Cabinet Secretary subject to the advice of the relevant committee.
30. To start with for a constitutional petition to be allowed, a party must reasonably demonstrate the manner in which the stated rights were violated. This principle finds its roots in the age old legal principle that one who alleges existence of certain facts must prove their existence. I find guidance in the Supreme Court case of Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] eKLR where it was noted that:

“[49] Section 108 of the Evidence Act provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and section 109 of the Act declares that,

“ the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”



[50] This Court in *Raila Odinga & others v Independent Electoral & Boundaries Commission & others*, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:

“a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden ...”

31. I now proceed to apply the legal principles and the law to the facts of this case. The petitioner in his pleadings relied on two documents to support his case. The documents are his DRC passport and a foreign certificate issued by the Kenyan Government during his stay in Kenya. Regrettably other than these two documents no other evidence was adduced to assist this Court in interrogating the facts herein. I say so because while the petitioner averred that he was arrested, deported and declared a prohibited immigrant, no evidence was adduced to support this narrative.
32. For context, there is no correspondence from the petitioner or his advocate to the respondents inquiring about or requiring issuance of the deportation order and reasons for his deportation. In the same vein, it is reasonable to assume that while he was being deported he was issued with an air ticket and boarding pass, yet this was not produced. Further the petitioner describes himself as a prohibited immigrant but does not provide the notice he was issued with nor the declaration, made under section 33 of the *Kenya Citizenship and Immigration Act* by the Kenya Government to that effect. The said Notice or declaration would have shown why he had been declared a prohibited immigrant.
33. Evidently it was also important for the petitioner to demonstrate that he was legally in Kenya at the time of the alleged deportation. This is in line with the international principle that a foreign national is accorded protection of the law as long as he or she is legally within that particular State.
34. It has not been shown that the petitioner attempted to gain entry back to Kenya and was denied access. This is demonstrable under regulation 37(2) *Kenya Citizenship and Immigration Regulations*, 2012 which provides as follows:

A notice to a prohibited immigrant or an inadmissible person may require the prohibited immigrant or inadmissible person—

- (a) to remain on the carrier by which he entered, intended or attempted to enter Kenya;
- (b) to leave Kenya by such means and within such period as may be stated in the notice; and
- (c) to enter into or remain in Kenya subject to complying with such requirements as to place of residence, occupation, security or reporting to a specified authority as may be specified in the notice.

35. Further under regulation 37(6) it is noted that:

Where a prohibited immigrant or an inadmissible person has been refused permission to enter Kenya, the immigration officer shall issue a notice in form 39 set out in the First Schedule to the owner, person in charge or agents of the carrier on or from which the prohibited immigrant or inadmissible person entered, intended or attempted to enter Kenya requiring the owner, person in charge or agents of the carrier on or from which the prohibited immigrant or inadmissible person entered, intended or attempted to enter Kenya



to take the prohibited immigrant or an inadmissible person into their custody and ensure that the prohibited immigrant or an inadmissible person is removed from Kenya.

36. It is worthy to note that had the cited evidence I have pointed out in the above paragraphs been adduced the same would have given this Court a clear picture to enable it make a determination on the veracity of the petitioner's claims and whether due process had been adhered to, or not. Palpably any determination made by a Court of law is premised on establishment of alleged facts through the evidence supplied. This was aptly captured by the Court in the case of Edward Akong'o Oyugi & 2 others v Attorney General [2019] eKLR

“73. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Britestone Pte Ltd v Smith & Associates Far East Ltd*[38] :-

“The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”

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. Court decisions cannot be made in a factual vacuum. To attempt to do so would trivialize the Constitution and inevitably result in improper use of judicial authority and discretion. It will be a recipe for ill-considered opinions. The presentation of clear evidence in support of such prejudice is a prerequisite to a favourable determination on the issue under consideration. Court decisions cannot be based upon the unsupported hypotheses.”

37. I further observe that the only thing proved by the adduced documents is that the petitioner's foreign certificate in Kenya expired on March 24, 2017 before the time of the alleged deportation on May 23, 2017. The petitioner did not show whether he had applied for a permit or pass to continue staying in the Country before the alleged deportation. Furthermore, the petitioner was not in possession of a valid DRC passport at the time of filing this suit in view of his desire to gain entry into Kenya. In the unlikely event that he had one, he never produced it for reasons best known to him.

38. From the material placed before this Court. I find that the petitioner has not sufficiently discharged his burden of proof, the reasons being that although he pleaded violation of various provisions of the Constitution, he failed to demonstrate to the required standard how his rights were violated by the respondents. I therefore find that the respondents herein did not violate the petitioner's rights under Article 22, 25, 27, 35, 47, 50 and 51 of the Constitution. For this reason, the petitioner is not entitled to the reliefs sought.

39. The upshot is that the petition dated September 2, 2021 lacks merit and is dismissed with costs.
Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 23RD DAY OF MARCH, 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

