



REPUBLIC OF KENYA



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**Ondijo v Bwana (Constitutional Petition E021 of 2021)
[2023] KEHC 2167 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2167 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CONSTITUTIONAL PETITION E021 OF 2021**

RE ABURILI, J

MARCH 17, 2023

**IN THE MATTER OF ARTICLES 27(1), 28, 50,
258, 259 OF THE CONSTITUTION OF KENYA.**

AND

**IN THE MATTER OF UNIVERSAL DECLARATION OF
HUMAN RIGHTS UNDER ARTICLES 1, 2, 3, 7, 12 AND 28**

AND

**IN THE MATTER OF INTERNATIONAL COVENANT ON CIVIL AND
POLITICAL RIGHTS UNDER ARTICLES 7, 12, 17 AND 26**

AND

**IN THE MATTER OF AFRICAN CHARTER ON PEOPLES
AND HUMAN RIGHTS UNDER ARTICLES 2,3,4,6,19 AND 28**

BETWEEN

ERICK WADE ONDIJO PETITIONER

AND

SCHOLASTICA AWINO BWANA RESPONDENT

JUDGMENT

1. The petitioner Erick Wade Ondijo describes himself as a person living with disability (PLWD) who alleges that he has been subjected together with his family to human rights violations including discriminatory acts on the basis of his disability by the respondent Scholastica Awino Bwana, who is his neighbour.



2. The petitioner avers that on several occasions, the respondent inconvenienced the petitioner and assaulted the petitioner's wife who was at the time of lodging this petition six months post-partum, in their shared compound in Manyatta Estate within Kisumu County. He avers that upon his wife declining to engage the respondent in a duel, the respondent Scholastica Awino Bwana followed his wife right into their house while hurling insults at her. The petitioner further avers that the respondent also physically assaulted his children and efforts for an amicable solution bore no fruits as the respondent continued to place shoes and block the pathway used by the petitioner by doing her laundry on the way making it difficult for the petitioner who was using crutches to pass through.
3. The petitioner further avers that when the respondent's insults persisted, he approached the landlady who held a conciliatory meeting between them to no avail since the respondent recruited her son into the fight. That the respondent's son poured water in the pathway with the intention that the petitioner slides and fall due to his use of crutches.
4. The petitioner laments that the respondent accused his wife of practicing witchcraft which allegedly caused the petitioner's disability and that she even questioned whether the petitioner was the biological father to his last-born son due to their age difference. That the petitioner reported this issue to the area Chief who summoned the respondent. That the respondent violated the resolutions reached at the meeting with the Chief hence the instant petition which seeks the following prayers:
 - a. A declaration that the petitioner's right to privacy and human dignity have been violated by the respondent.
 - b. A restraining order against the respondent.
 - c. Compensation for the physical and mental torture that the petitioner and his family have suffered.
 - d. Any other further relief or orders that this Honourable court may deem just and fit to grant.
 - e. Costs to the Petitioner.
5. The respondent filed a replying affidavit sworn on October 16, 2022 opposing the petition. She denies entering the petitioner's house, insulting him or his wife or even blocking the pathway used by the petitioner and his family. She denies sending her son to threaten the petitioner and denies any knowledge of any disability exhibited by the petitioner.
6. She contends that she has never been summoned over the petitioner's complaints or assaulting any neighbour.
7. Parties were directed to file their written submissions on the petition but only the petitioner complied. The matter was thus reserved for judgement bereft of the respondent's submissions.
8. The petitioner identified the following issues for determination which his counsel submitted on:
 - a. Enforcement of petitioner's rights against the respondent.
 - b. Whether the petitioner is disabled.
 - c. Which rights have been violated.
 - d. Which remedies should the Honourable court grant.



9. On the issue of enforcement of rights against the respondent, the petitioner's counsel Dr. Ogendi submitted that under Article 54(1)(a) of the Constitution, a disabled person is entitled to be treated with dignity and respect. That this Article reinforces Article 28 which provides for the right to dignity. Counsel submitted that Sections 11-28 of the Persons with Disabilities Act outlines specific rights and privileges to be enjoyed by persons living with disabilities. He submitted that the respondent's actions reveal deep cruelty by the respondent and her son towards the petitioner.
10. On whether the petitioner is disabled, counsel submitted that Section 2 of the Persons Living with Disabilities Act defines who a disabled person is. That the petitioner is registered with the National Council for Persons Living with Disabilities under Certificate Number NCPWD/P/xxxxx coupled with the fact that the petitioner walks with crutches which is sufficient evidence that the petitioner is disabled.
11. On the rights violated, counsel for the petitioner submitted that the respondent violated the petitioner's rights under Articles 28, 29(c) and (f) of the Constitution, Articles 1, 3 and 5 of the Universal Declaration of Human Rights, (UDHR) Articles 14 and 15(2) of the Convention on the Rights of Persons with Disability, Articles 7, 9 and 10 of the International Convention on Civil and Political Rights (ICCPR) and finally, Article 4 of the African Charter on Human and People's Rights (ACHPR).
12. Counsel for the petitioner further submitted that the respondent violated the petitioner's right to privacy and family life as provided for under Articles 31 and 45 of the Constitution, Article 12 of the UDHR and Article 17(1) of the ICCPR.
13. On the remedies to be granted, the petitioner's counsel cited Article 23 of the Constitution and the South African cases of Fose v Minister of safety and Security (1977) ZACC 6, Hoffman v South African Airways (2000) ZACC 17 as well as decisions in the cases of John Gakuo & anor v County Government of Nairobi & 3 others [2018] eKLR and Ol Pajeta Ranching Limited v David Wanjau Muboro [2017] eKLR.
14. The petitioner urged this court to protect his rights under the Constitution and ensure that people such as the respondent do not violate rights without any sanction.

Analysis and determination

15. I have considered the petition, the supporting affidavits and annexures as well as the replying affidavit and the submissions filed by the petitioner's counsel and the authorities relied on in support of the petition. The bone of contention in this petition is that the respondent who is the petitioner's neighbour has discriminated against the petitioner and his family by virtue of the petitioner's disability by blocking the path to the petitioner's house, by doing her laundry thereon and placing shoes as well as verbally and physically assaulting the petitioner and his wife. The petitioner also claims that the respondent vilifies him and his family. He asserts that he has taken various steps including reporting the respondent to her land lady and the area Chief to no avail. The petitioner claims that all these acts are directed at him for being a person living with disability hence discriminatory and undignifies him.
16. The petitioner's allegations are supported by the affidavits of Dina Bunde, the landlady, Dickens Sawo and Barrack Meshach Owiti, the Mji Kumi chairman in Kondele. The respondent denied the allegations brought against her as per her filed replying affidavit.
17. The petitioner asserts that as a result of his disability, he has been discriminated against by the respondent and that therefore, his rights as protected under Articles 28 (c)(f), 31(c) and 45 of the Constitution have been violated. He also claims that his rights under the cited international instruments



have been violated more specifically those provided for under the UDHR, ICCPR and the [*African Charter on Peoples and Human Rights*](#).

18. The issue for determination is whether the petition is merited. To resolve this issue, I find it necessary to first set out the rights allegedly violated under the [*Constitution*](#). Article 28 of the [*Constitution of Kenya, 2010*](#) guarantees every person the inherent dignity and the right to have that dignity respected and protected.
19. Article 29(c) and (f) of the [*Constitution*](#) guarantees every person the freedom not to be subjected to any form of violence from either public or private sources, and, treated or punished in a cruel, inhuman or degrading manner.
20. Under Article 31(c), the petitioner's right to privacy which includes the right not to have information relating to their family or private affairs unnecessarily required or revealed is guaranteed.
21. Finally, under Article 45 of the [*Constitution*](#), the family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the state.
22. Additional rights to persons living with disability are provided for under Part III of the [*Persons with Disabilities Act, 2003*](#). It is worth noting that under Article 20 of the [*Constitution*](#), the Bill of Rights binds the state and all other persons offering services to members of the public to take measures for the enjoyment of such services by persons living with disabilities.
23. The petition herein is directed at an individual, allegedly, a neighbor of the petitioner and thus by dint of Article 20(1) of the [*Constitution*](#), the bill of rights applies to all law and binds all State organs and all persons, the respondent herein included. It follows that should this Court find that the petitioner's rights as stated above were infringed or violated by the respondent, the court is has power to grant any of the remedies provided for under Article 23(3) of the [*Constitution*](#) which remedies include:
 - (a) a declaration of rights;
 - (b) an injunction;
 - (c) a conservatory order;
 - (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
 - (e) an order for compensation; and
 - (f) an order of judicial review.
24. The right to dignity as constitutionally guaranteed under Article 28 of the [*Constitution*](#) was discussed by Mativo J in [*M W K & another v Attorney General & 3 others*](#) [2017] eKLR and while acknowledging that there is no definition of dignity provided by Article 28, the learned Judge sought meaning from the South African decision in [*S v Makwanyane*](#) (1995) ZACC 3 where it was stated that:

“The importance of dignity as a founding value of the ... Constitution cannot be overemphasized. Recognizing a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. The right is therefore the foundation of many of the other rights that are specifically entrenched in Chapter 3.”



25. The Court further found that a breach of the right to human dignity may lead to violation of other specific rights such as the right to privacy as guaranteed by Article 31 of the Constitution so that the right to dignity will be breached if the petitioner's privacy is intruded into by the respondent. The implication of this is that, if this court finds sufficient evidence that the petitioner's right to be treated in a dignified manner was violated, then as by necessary implication, his right to privacy will have been breached.
26. On this particular aspect, Mativo J at paragraph 106 of the above cited case of M W K & another v Attorney General & 3 others stated that:
- “Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court acknowledges the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitation's analysis. Dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected.”
27. The burden of proof in constitutional petitions is as applicable in all other cases by dint of Section 2 of the Evidence Act which provides that:
- (1) This Act shall apply to all judicial proceedings in or before any court other than a Kadhi's court, but not to proceedings before an arbitrator.
 - (2) Subject to the provisions of any other Act or of any rules of court, this Act shall apply to affidavits presented to any court.
28. From the above legal provisions, it is trite that the provisions on burden and standard of proof as provided for under sections 107, 108 and 109 of the Evidence Act are applicable to the instant constitutional petition.
29. There is also the principle that constitutional violations as well as the manner of such violations ought to be pleaded with reasonable degree of precision as was held by the Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR where it was held that:
- “Although article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”
30. Given the nature of this case and the allegations levelled against the respondent, I am constrained to pose this question of what amounts to constitutional violations as opposed to civil rights violations? In the alternative, are there other remedies that the petitioner can pursue rather than a constitutional petition as is in the case herein? In answering this question, I associate myself with the judicial



pronouncement by Lenaola J (as he then was) (now Supreme Court Judge) in *Mike Rubia & another v Moses Mwangi & 2 others* [2014] eKLR where the learned judge stated as follows:

“In that regard, I maintain that the Constitution is not a substitute for all redress of all injuries especially where the Petitioner has another remedy in law. If that be the case, he must pursue that remedy instead of making constitutional issues of what really is a pure matter of private law and where private law has an adequate remedy.”

31. As earlier stated, the dispute in this petition is an alleged violation of the petitioner’s rights by the respondent by virtue of his disability. The petitioner asserted that he has tried conciliatory talks with the respondent through the land lady and the area Chief to no avail and therefore he sought the intervention of this court to vindicate his rights.
32. Examining the petition herein and the submissions, I am not sufficiently persuaded that the only remedy open to the petitioner is via a constitutional petition as opposed to other civil remedies available in law.
33. Article 23 of the Constitution stipulates that in appropriate cases, the court may grant any of the appropriate reliefs stated earlier in this judgement. The petitioner sought declaratory and restraining orders as well as compensation for violation of his rights. The term appropriate relief was defined by the South African Court in the case of *Minister of Health & Others v Treatment Action Campaign & others* (2002) 5 LRC 216 at page 249 where the Court stated that:

“...Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all-important rights...the courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if need be to achieve this goal.”

34. On whether the petitioner is entitled to an order of compensation, the circumstances and the parameters within which the court can award damages in a constitutional petition was stated by the Court of Appeal in the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR that:

“As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration. Public policy considerations is also important because it is not only the petitioner’s interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.”



35. In arriving at the above conclusion, the Court considered various judicial pronouncements authorities among them, the South African Case of *Dendy v University of Witwatersrand, Johannesburg & others* [2006] 1 LRC 291 where the Constitutional Court held that:

“...The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.

...The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff’s interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.”

36. The petitioner, obviously, has issues with his neighbour who appears to be creating disturbance and breaching his peace. The neighbour is thus a nuisance and threatens and abuses the petitioner and his family whenever they intervene. The respondent neighbor, in my view, appears to be very mouthy and abusive of the petitioner by virtue of his disability. On the other hand, the allegation of the respondent abusing or assaulting the petitioner or his family is of a criminal nature and therefore it was not enough that the petitioner reports to the landlady and the Chief. It was a good move yes for alternative dispute resolution mechanisms which is encouraged as a first port of call in dispute resolution but where the conduct of a person borders on crime and vilification of another, the petitioner had other legal options which include reporting the matter to the police for investigations and even filing of a civil suit for defamation of character.

37. These issues are, in my humble view, in the ambit of both criminal and civil litigation. In civil proceedings, the petitioner can quantify damages suffered as a result of the tortious acts of the respondent neighbor. He can also seek for injunctive orders against her. What this means is that it is not every infraction that must be litigated vide a constitutional petition. In the case of *Uhuru Muigai Kenyatta v Nairobi Star Publication Limited* [2013] eKLR, it was stated that:

“It is an established practice that where a matter can be disposed of without recourse to the *Constitution*, the *Constitution* should not be involved at all...the courts will not normally consider a constitutional question unless the existence of a remedy depends on it. If a remedy is available to the applicant under some other legislative provision, or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition a breach of the declaration of rights...”

38. In the circumstances of this petition, and persuaded by the above judicial pronouncements, I find that this petition does not meet the threshold in the *Annarita Karimi (supra)* case and therefore, this matter ought to be filed as an ordinary suit via a plaint and not as a constitutional Petition. However, where the petitioner finds that the acts of the respondent border on criminality, then the petitioner is at liberty to report the matter to the police for investigations so that appropriate legal action can be taken against the respondent intruder.

39. For the foregoing reasons, I find no merit in this petition which is hereby dismissed with an order that each party shall bear their own costs of the petition. I so order.

40. File closed.



DATED, SIGNED AND DELIVERED AT KISUMU THIS 17TH DAY OF MARCH, 2023.

R.E. ABURILI

JUDGE

