



Akwalu v Director of Public Prosecutions & 7 others; Independent Policing Oversight Authority & another (Interested Parties) (Constitutional Petition 7 of 2019) [2023] KEHC 3321 (KLR) (20 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3321 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CONSTITUTIONAL PETITION 7 OF 2019
LW GITARI, J
APRIL 20, 2023**

BETWEEN

JACKSON MURITHI AKWALU PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

OFFICER COMMANDING STATION – CHUKA POLICE STATION 2ND RESPONDENT

AMOS CHERUIYOT 3RD RESPONDENT

KENNETH MURITHI 4TH RESPONDENT

IRENE KEMBOI 5TH RESPONDENT

ABUBAKAR OMAR 6TH RESPONDENT

LINDA KAJUJU 7TH RESPONDENT

CHIEF MAGISTRATES COURT AT CHUKA 8TH RESPONDENT

AND

INDEPENDENT POLICING OVERSIGHT AUTHORITY INTERESTED PARTY

DIRECTOR OF CRIMINAL INVESTIGATIONS INTERESTED PARTY



JUDGMENT

Introduction

1. Jackson Murithi Akwalu, the petitioner herein, instituted the petition that is the subject of this judgment on July 16, 2019. He sought declarations of violation of his rights and fundamental freedoms and compensation arising from the alleged detention, torture, inhuman and degrading treatment he underwent in the hands of the police officers on or about August 9, 2019.

The Petition

2. The petition that is before this court seeks for the following orders:
 - i. A declaration that the 3rd, 4th, 5th, and 6th respondents are jointly and severally in violation of article 49 of Constitution and that the illegal and unlawfully manner they arrested and detained the petitioner is unconstitutional and therefore null and void.
 - ii. A declaration that the 8th respondent is in violation of article 50 of Constitution and that disregard of the right to a fair trial is unconstitutional and therefore null and void.
 - iii. A declaration that the 3rd, 4th, 5th, 6th and 7th respondents are jointly and severally in violation of article 50 of Constitution and that charges leveled against the petitioner are unconstitutional and therefore null and void.
 - iv. A declaration that the 3rd, 4th, 5th, 6th, and 7th respondents are jointly and severally in violation of articles 24, 25, 28 of Constitution and that the statutory provision under which the petitioner is charged are unconstitutional since they seek to limit the freedom from torture, cruel, inhuman and degrading treatment/punishment, and they are null and void.
 - v. An order of *certiorari* to issue removing into the 8th respondent quashing the entire proceedings against the petitioner before the Chief Magistrate's Court at Chuka in Criminal Case Number 852 of 2018 (Republic v Jackson Murithi Akwalu).
 - vi. An order of *mandamus* to issued to the 1st interested party compelling it to conduct prompt investigation into the illegal acts of the 3rd-7th respondents within 14 days of this order.
 - vii. General damages consequential upon the declarations of violations of the fundamental rights and freedoms of the petitioner in prayers (i, ii, iii, iv, v, and vi) above as may be assessed by this honourable court.
 - viii. Exemplary/vindictory, aggravated and/or punitive damages for arbitrary, highhanded and oppressive conduct of the 3rd -7th respondents towards the petitioner.
 - ix. Interest on prayer number (vii) at court rates.
 - x. Any other or further relief that the court may deem fit and just to grant.
 - xi. Costs of the petition.

The Responses

3. The 8th respondent filed grounds of opposition dated September 16, 2019 which raised the following grounds:



- i. The petition is misconceived, misplaced and an abuse of the court process.
 - ii. Constitution as well as the existing laws provides sufficient safeguards that the petitioner can seek recourse in the event that the petitioner is prejudiced by the criminal case currently pending in the Chief Magistrate’s Court at Chuka.
 - iii. Where Constitution has conferred upon another entity, the court should exercise caution when dealing with such an entity.
 - iv. The petitioner has the right to defend himself before the chief magistrate court at Chuka.
 - v. Should this honourable court allow the petition, then this shouldn’t apply as stay as the 8th respondent has constitutional mandate to execute.
4. On their part, the 1st and 2nd respondents opposed the petition *vide* the replying affidavit of Inspector Abdi Duale sworn on November 12, 2019. They further associated themselves with the affidavits sworn and submissions made by the 3rd – 8th respondents and the 1st interested party. The respondents collectively denied that the charges that were preferred against the petitioner were to cover up the alleged human rights violations.
 5. The matter proceeded by way of *viva voce* evidence. In his testimony, the petitioner relied on his affidavits sworn on July 16, 2019 and July 16, 2020. The petitioner further called two witnesses who also relied on their respective witness statements that are both dated November 12, 2019.

The Petitioner’s Submissions

6. The petitioner filed his submissions on May 27, 2022. It was his submission that prayer No 6 in the petition was spent as the 1st interested party filed its report. He submitted that he was a victim of police brutality. That the police officers who testified in support of the respondents’ case all agreed that the petitioner lost consciousness when he arrived at the police station. According to The petitioner, he lost his consciousness because of the beatings he received from the five police officers who arrested him. It was thus his submission that his constitutional rights under articles 24, 25, 28, 49, and 50 of Constitution were violated and that an order of *certiorari* should issue removing into the 8th respondent quashing the entire proceedings against the petitioner in Chuka CMCC No 852 of 2018. Finally, the petitioner submitted that he should be awarded general damages and exemplary, vindictory, aggravated, and/or punitive damages.

The 1st Interested Party’s Submissions

7. The 1st respondent filed its written submissions on October 6, 2022. The 1st respondent opted to restrict their submissions to the claims and prayers that touch on the 1st interested party herein. As such, they that adopted, in its entirety, the 1st interested party’s replying affidavit worn and filed on December 6, 2019 and the further replying affidavit sworn on June 30, 2020 and filed on July 1, 2020 respectively, together with witness account of Denis Gikundi for the 1st interested party.
8. It was the submission by the 1st respondent that the 1st interested party fully, fairly, independently, and impartially carried out its statutory mandate of investigating the complaints by the petitioner against the respondents. That the 1st interested party correctly found that the evidence tendered by the petitioner was insufficient as there were no independent witnesses who were called to shed light in the matter.



9. On the issue of costs, it was submitted on behalf of the 1st interested party that each party should bear its own costs.

The 1st and 2nd Respondents' Submissions

10. On their part, the 1st and 2nd respondents filed their joint written submissions on November 3, 2022. It was their submission that the petitioner was lawfully arrested after a report was made against him at Chuka Police Station by one Farida Wanja. Further, that the injuries that resulted on the petitioner at the time of his arrest were because he was resisting arrest. That the charges leveled against the petitioner were therefore lawful and that investigations conducted by the 1st interested party showed that none of the fundamental rights of the petitioner were infringed. The 1st and 2nd respondents thus prayed for the petition to be dismissed with costs.

Analysis

11. Before this court is a constitutional petition, the conduct of which is generally governed by Constitution and the law. Further, Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereinafter referred to as 'the Mutunga Rules') provide for the procedure and practice that should be followed in constitutional petitions.
12. Rule 20(1) of the Mutunga Rules is on the manner in which constitutional petitions ought to be heard. Such petitions may be heard by way of affidavits or written submissions or oral evidence. Rule 20(3) of the Mutunga Rules provide that a court may upon application or on its own motion direct that the petition or part thereof be heard by oral evidence. Rule 20(4) and (5) of the Mutunga Rules provide for the summoning and examination of witnesses.
13. The conduct of constitutional petitions is also guided by various laws such as the Evidence Act which generally applies to matters relating to evidence. Sections 107(1), (2) and 109 of the Evidence Act are on the burden of proof. They state as follows:

“107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

“109. Proof of particular fact

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.”

14. The burden of proof on a petitioner in a constitutional petition was addressed by the Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR as follows: -

“Although article 22(1) of 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 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 constitutional process of dispute settlement.”

15. In the present case, the petition was heard by way of reliance on pleadings, witness accounts, as well as submissions by the parties. The petitioner’s cardinal claim is in the manner in which he was arrested and treated on arrest. It is the petitioner’s claim that his right under article 49 was violated. The said article provides as follows:

- “ 1. An arrested person has the right—
- (a) to be informed promptly, in language that the person understands, of—
 - (i) the reason for the arrest;
 - (ii) the right to remain silent; and
 - (iii) the consequences of not remaining silent;
 - (b) to remain silent;
 - (c) to communicate with an advocate, and other persons whose assistance is necessary;
 - (d) not to be compelled to make any confession or admission that could be used in evidence against the person;
 - (e) to be held separately from persons who are serving a sentence;
 - (f) to be brought before a court as soon as reasonably possible, but not later than—
 - (i) twenty-four hours after being arrested; or
 - (ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;
 - (g) at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and
 - (h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.
- (2) A person shall not be remanded in custody for an offence if the offence is punishable by a fine only or by imprisonment for not more than six months.”

16. It is not in dispute that the petitioner came into possession of a phone belonging to the said Faridah Wanja who made a complainant at Chuka Police Station on losing her phone. The petitioner himself admitted to have been given the phone by one Mucheni (PW2) and that he (the petitioner) called the last number in the phone so as to find its owner.

17. The petitioner claims that he was framed as he did not obtain the phone illegally. That he did not give the said Faridah Wanja the phone as she did not produce any form of identification. Further, that it was after refusing to hand over the phone to the said Faridah that she went made her complaint to the police and came back with the police officers who arrested him. According to the 3rd – 7th



respondents, the petitioner resisted arrest and became violent by starting to beat the 3rd respondent. The 3rd respondent produced evidence showing the injuries he suffered during the petitioner's arrest. In light of the evidence brought before court, it is my view that the petitioner's arrest was based on a valid complaint. It is therefore follows that he was lawfully detained as arrest and detention hinged on evidence. The petitioner was consequently charged before a court of law it is therefore not true that the charges preferred against him were unlawful. The petitioner could only have been vindicated if the matter proceeded to full trial. As such, it is my view that the filing of the present petition was indeed premature as the court was yet to hear and make a finding on the criminal charges that the petitioner was facing. The police officers were effecting a lawful arrest on the petitioner as provided under section 29 of the Criminal Procedure Code. He did not discharge the burden to proof that the arrest was unlawful.

18. It is further the petitioner claim that he was not arraigned before court in time. The information contained in the charge sheet on record shows that petitioner was arrested on August 9, 2018 (the same being a Thursday) and was not produced before court until August 13, 2018 (on a Monday). This delay was explained by the officers as having been occasioned by the petitioner's failure to raise bond. In my view, the allegations on infringement of the petitioner's right under the provisions of article 49(1) (f) of Constitution must fail .
19. On the breach of article 51 of Constitution, the petitioner did not, as well, avail any evidence to ascertain that he was treated inhumanly. His P3 Form on record shows that he reported his alleged injuries to the police on August 15, 2018 and was referred to hospital on August 23, 2018. In my view, the petitioner's claims based on the infringement of article 51 of Constitution are thereby not proved. This claim must therefore fail. The 1st interested party did investigate the complaint by the petitioner and in its report found that ther .
21. e was no evidence that police used excessive force or that they assaulted the petitioner. The allegation was not proved.

Conclusion

22. Flowing from the foregoing, the upshot is that the allegations on the infringement of the petitioner's fundamental rights under the various provisions of Constitution fails.

Order;

23. I dismiss the petition.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 20TH DAY OF APRIL 2023.

L.W. GITARI

JUDGE

20/4/2023

The judgment has been read out in open court

L.W. GITARI

JUDGE

20/4/2023

