



REPUBLIC OF KENYA



KENYA LAW
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**Kanore v Director of Public Prosecutions & 2 others (Constitutional
Petition 1 of 2022) [2023] KEHC 18215 (KLR) (9 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18215 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CONSTITUTIONAL PETITION 1 OF 2022
SM GITHINJI, J
MAY 9, 2023
IN THE MATTER OF: THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF: ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS
UNDER ARTICLES
22,
23 (F), 25 (C), 28, 29 (D) AND 50 OF THE
CONSTITUTION OF KENYA
IN THE MATTER OF: ENFORCEMENT OF FUNDAMENTAL RIGHTS
AND
FREEDOMS OF THE INDIVIDUAL
(SUPERVISORY
JURISDICTION) PRACTICE AND PROCEDURE
RULES 2006 AND PART 5 RULE 19 OF THE
SIXTH
SCHEDULE TO THE CONSTITUTION OF KENYA
MALINDI HC CRIMINAL CONST PETITION NO 1 OF 2022- JUDGMENT PAGE 1
IN THE MATTER OF: UNIVERSAL DECLARATION OF HUMAN
RIGHTS
1948 INTERNATIONAL COVENANT ON CIVIL
AND POLITICAL RIGHTS, 1956 AMERICAN
CHARTER ON HUMAN RIGHTS (BANJUL)



CHARTER
ON HUMAN RIGHTS, INTERNATIONAL HUMAN
RIGHTS LAW AND LATIMA PRINCIPLES AND
UNITED NATIONS RESOLUTIONS
AND
IN THE MATTER OF: THE CRIMINAL PROCEDURE CODE CHAPTER
75 LAWS OF KENYA
AND
IN THE MATTER OF: IN CRIMINAL CASE NO. E024 OF 2022
REPUBLIC V DANIEL MACHACHE KANORE
AND
IN THE MATTER OF: THE SUCCINT PRINCIPLES OF NATURAL JUSTICE
AND
IN THE MATTER OF: THE PRINCIPLE OF LEGITIMATE EXPECTATION
AND FAIRNESS
BETWEEN

BETWEEN
DANIEL MACHACHE KANORE PETITIONER
AND
DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT
RESIDENT MAGISTRATE’S COURT, MALINDI 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. The Petitioner brought the instant Petition dated 23rd June 2022 seeking the following orders;
 1. A declaration that the Petitioner’s fundamental rights to a trial under Article 50 of the Constitution of Kenya have been infringed by the 1st and 2nd Respondents.
 2. A declaration that there is a real danger that the Petitioner’s fundamental rights under Articles 29 and 39 of the Constitution of Kenya are likely to be violated in view of prayer 1 above.
 3. An order of Certiorari do issue to bring to this court for purposes of quashing the charge sheet dated 21st March 2022 by the 1st respondent before the Resident magistrate Malindi, in Malindi Criminal Case no. E024 of 2022, Republic Versus Daniel Machache Kanore.



4. An order of prohibition prohibiting the 1st and 2nd Respondents from moving forward with any further proceedings related to the Malindi Criminal Case No. E024 of 2022, Republic V Daniel Machache Kanore in view of prayers 1 to 3 above.
 5. In the alternative an order that the proceedings in the criminal charges against the petitioner herein start afresh outside the jurisdiction of Miss Edith, prosecution counsel for the Director of Public Prosecutions.
 6. General damages.
 7. Costs of the petition.
 8. Any other order that the court deem fit for the interest of justice.
2. The application is anchored on the grounds set out on the face of the petition and the supporting affidavit of Daniel Machache Kanore the petitioner who stated that he is a teacher at Ummul Qura Secondary School in Ganda and a part time student at Mount Kenya University. He stated that he knows one Natasha Muthoni aged 10 years who is a pupil at Morning Star Academy where his mother is a director and sometimes helps with classes at the place.
 3. It is his averment that on 19th March 2022 he was arrested on allegations of defiling Natasha Muthoni. He was then charged and released on a bond. Further, on 28th March 2022 he was condemned to proceed with trial in the absence of all requisite documents including witness statements which is contrary to his right to a fair hearing as enshrined in the constitution.
 4. In response to the petition, the 1st respondent filed a replying affidavit sworn by No. 92913 Cpl Marian Hussein the investigating officer in the criminal case, who deponed that the 1st respondent is empowered by the Constitution to institute criminal proceedings.
 5. She stated that on 11th January 2022, the minor accompanied by her mother made a report at Malindi Police station that she had been sexually assaulted. Pursuant to the complaint, she recorded witness statement and collected evidence which pointed to the fact that the petitioner had committed the offence of Sexual assault.
 6. It was further stated that on 21st March 2022, the petitioner took plea and was represented by Ms. Adoyo an advocate who was holding brief for Mr. Mwadilo. Additionally, it is on record that Ms. Adoyo confirmed to the court that she had received all witness statements and documentary evidence to be relied upon by the prosecution and the matter was fixed for hearing on 28th March 2022. It was also deponed that when the matter proceeded on 28th March 2022, the petitioner was represented by Ms. Adoyo who was holding brief for Mr. Mwadilo and she cross examined all the witnesses who testified that day thus the petitioner was ably represented by counsel at all times.
 7. The 2nd and 3rd respondents filed grounds of opposition opposing the petition on the following grounds;
 - i. That whereas the petitioner is seeking several orders against the 2nd and 3rd respondents he has not alleged any procedural or substantive irregularity occasioned by the 2nd respondent herein as to support the issuance of the same against it.
 - ii. That the 3rd respondent has by dint of Article 156 (4) (b) of the Constitution no role in Criminal proceedings and to that extent has been wrongly enjoined in this proceedings which are challenging the propriety of criminal proceedings.



- iii. That no prima facie case is established from the proceedings of this case that would remotely suggest that the 2nd respondent has any likelihood of infringing the petitioner's constitutional rights.
 - iv. That there is a presumption that the 2nd respondent shall act in a fair, just and impartial manner in accordance with the Constitution and all applicable law and that presumption has not been rebutted in any manner by the Petitioner.
 - v. That the 2nd respondent has the jurisdiction to hear and determine whether the prosecution has been actuated by malice, influenced by extraneous considerations, whether the prosecution has established a prima facie case or not, whether the petitioner should be put on his defence or not, whether there is adequate evidence to support the charges brought or not.
 - vi. That from the evidence adduced before this court there is no basis for any suspicion or fear that the 2nd respondent will infringe on the petitioner's rights as provided under Article 50 of the Constitution.
 - vii. That the application is devoid of merit as the applicant has failed to include material considerations which indicate prima facie that the 2nd respondent committed a failure of duty, or abused its discretion, or misused its authority which in public law calls for the remedies sought.
8. The petition was canvassed by way of written submissions. I have considered the petition, the replying affidavit and grounds of opposition as well as the submissions and the authorities relied upon. The issue for determination is whether the petition meets the threshold of a constitutional petition.
9. As to whether or not there is a competent constitutional petition before the Court, it is necessary to consider whether the petition satisfies the threshold of what constitutes a constitutional petition as per the principle established in the case of *Anarita Karimi Njeru -vs- The Republic* (1979) eKLR which principle was later restated by the Court of Appeal in the case of *Mumo Matemo -vs- Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR. The principle established in the *Anarita Karimi Njeru* case (supra) was that a Constitutional petition should set out with a degree of precision the petitioner's complaint, the provisions infringed and the manner in which they are alleged to be infringed. The *Mumo Matemo* case (supra) reaffirmed the principle in the *Anarita Karimi* case when the Court at paragraph 44 of the judgment stated as follows: -

“(44) We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru* (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st Respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these short comings, it was not enough for the superior Court below to lament that the petition before it was not the “epitome of precise, comprehensive or elegant drafting, without remedy by the 1st respondent”

10. Further at paragraph 87(3) in the same judgment the Court on its findings stated as follows: -

“It is our finding that the petition before the High Court was not pleaded with precision as required in Constitutional Petitions. Having reviewed the petition and supporting affidavit we have concluded, that they did not provide adequate particulars of the claims relating



to the alleged violations of the constitution of Kenya and the Ethics and Anti-corruption Commission Act, 2011, accordingly the petition did not meet the standard enunciated in the Anarita Karimi Njeru case.”

11. It is indisputable that for a constitutional petition to be sustainable as such must at a minimum satisfy a basic threshold. It must with some reasonable degree of precision identify the constitutional provisions that are alleged to have been violated or threatened to be violated and the manner of the violation and/or threatened violation. I do not suppose it is enough to merely cite constitutional provisions. There has to be some particulars of the alleged infringements to enable the respondents to be able to respond to and/or answer to the allegations or complaints.
12. The backbone of the petition herein is that the petitioner was condemned to proceed with the hearing of the criminal case at the lower court without having been supplied with witness statements and evidence that the prosecution intended to rely on. The 1st respondent in countering the petition, has intimated that the petitioner was ably represented by an advocate at all times and the advocate had confirmed to having been supplied with the witness statements and all evidence. The issues that emerge herein in my view do not raise any infringement of constitutional rights as it is clear that the matter has not been heard and determined. This therefore does not fall in the purview of a constitutional petition and the remedies available therein. The issues raised in the petition can be exhaustively addressed by the trial court which is well versed with the disputed facts and in which the matter is still pending. In case the witnesses offered evidence before the statements had been issued, the statements can be issued and the witnesses recalled for further cross-examination if the defence finds it necessary.
13. The upshot is that the petition fails and the same is hereby struck out with no orders as to costs. This Court so finds.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 9TH DAY OF MAY, 2023.

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S.M. GITHINJI

JUDGE

In the Presence of; -

- 1. Ms Muna for the Petitioner holding brief for Mr Mwandilo**
- 2. Ms Ochola for the ODPP**

