



**Mwiti v Cabinet Secretary Ministry of Environment and Forestry (Kenya) & another;  
 Director of Public Prosecutions & another (Interested Parties) (Constitutional  
 Petition E013 of 2022) [2023] KEHC 18896 (KLR) (12 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18896 (KLR)

**REPUBLIC OF KENYA  
 IN THE HIGH COURT AT MERU  
 CONSTITUTIONAL PETITION E013 OF 2022**

**EM MURIITHI, J  
 JUNE 12, 2023**

**BETWEEN**

**JOSHUA MWITI ..... PETITIONER**

**AND**

**THE CABINET SECRETARY MINISTRY OF ENVIRONMENT AND  
 FORESTRY (KENYA) ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... INTERESTED PARTY  
 NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... INTERESTED  
 PARTY**

**JUDGMENT**

1. By a petition dated July 14, 2022, the Petitioner seeks specific reliefs that:
  - a) Declaration that the Respondents have violated the Petitioner’s rights under articles 2, 10, 19(4), 21, 24, 25(a), 27 and 28 of the Constitution of Kenya 2010 for failing to provide for degrees or categories of offences committed which commensurate with penalties or sentence to be served, pursuant to Gazette notices no 2334 and 2356 as read with Section 140 (b) of the Environment Management and Coordination Act 2015.
  - b) Declaration that the minimum mandatory sentence provided for under Section 140 (b) of the Environment Management and Coordination Act 2015 violates and infringes Articles 2, 10, 20, 21, 24, 25 (a), 27 and 28 of the Constitution of Kenya 2010.



- c) Declaration that the minimum mandatory sentence provided for under Section 140 (b) of the Environment Management and Coordination Act 2015 is unconstitutional as it is in violation and infringement of pockets and Articles of the Constitution of Kenya 2010.
- d) Declaration that the sentences as meted out to the Petitioner vide ISIOLO CRIMINAL CASE NO E071 OF 2022 on count III to pay a fine of Kshs 2,000,000/= or serve 1 year sentence issued pursuant to Gazette Notices no 2334 and 2356 as read with section 140 (b) of the Environment Management and Coordination Act 2015, violates and infringes on his fundamental rights and freedoms as provided for under the Constitution of Kenya 2010 hence the same be and is hereby quashed and or set aside and the Petitioner be released from prison unless he is otherwise lawfully held.

### **Petitioner's case**

2. Following the amendment of the Environment Management and Coordination Act in 2015 (henceforth called the Act), which enhanced the fine under section 140 (b) from Kshs 500,000 to Kshs 2,000,000, the 1<sup>st</sup> Respondent issued Gazette Notices Nos 2334 and 2356, in exercise of the powers under section 3 and 86 of the Act, banning the use, manufacture and importation of all plastic bags used for commercial and household packaging. The Petitioner was arrested on February 9, 2022 and charged with, among other offences, being in possession of 10 packets of plastic carrier bags, contrary to measures prescribed under Gazette Notices Nos 2334 and 2356 as read with section 140 (b) of the Act. The Petitioner, oblivious of the facts and particulars of the offences pleaded guilty, he was convicted on his own plea of guilty and on count 3 sentenced to pay a fine of Kshs 2000,000 or in default to serve 1 year imprisonment pursuant to the punishment prescribed under section 140 of the Act. He filed a miscellaneous application dated March 2, 2022 seeking revision of the sentences on the basis that they were harsh, excessive and extremely high in the circumstances and against the established tenets of the law. The court vide its ruling of June 9, 2022 set aside the sentence of fine of Kshs 15,000 or in default 2 months in count 2 as the offence therein did not exist. The High Court declined to interfere with the sentencing discretion of the trial court in count 3 as the same was mandatory thus incapable of revision, as it was the only minimum sentence prescribed under section 140 of the Act. It is on that basis that the Petitioner challenges the constitutionality of the penalties meted out to him pursuant to section 140 of the Act finding the same to be harsh, excessive, cruel and punitive in the circumstances, extremely high and against his fundamental rights and freedoms as enshrined under the Constitution and other established tenets of the law, bearing in mind that he was found in possession of only 10 packets of the banned plastic carrier bags.

### **The Respondents' case**

3. The Respondents filed grounds of opposition on July 27, 2022 that, 'The petition is misconceived, misplaced and an abuse of the court process as it is collateral attack on a valid judicial decision; The Constitution of Kenya as well as the existing laws provide sufficient safeguards that the Applicant/ Petitioner herein can seek recourse in the event that he is prejudiced by the outcome of the criminal case in the Chief magistrate's court at Isiolo; No constitutional issues are discernable in the entire petition to warrant its admission and adjudication before this Honorable Court; The petition is fatally defective in form and substance having been lodged as an appeal against the decision of the Chief Magistrate's Court at Isiolo; The Applicant herein has not established a prima facie case within the meaning of the rule in Mumo Matemo v Trusted Society of Human rights Alliance & 5 Others (2013) eKLR, to enable hi apply for orders sought in his petition; This Honorable Court should not grant the orders sought as the Applicant's petition is an abuse of the court process.'



### The 1st Interested Party's case

4. The 1<sup>st</sup> Interested Party opposed the petition vide a replying affidavit sworn by BN Nandwa, a prosecution counsel, on September 26, 2022. She avers that section 140 (b) of the Act has not yet been declared unconstitutional and is still legal, and the Petitioner has not been forced to serve a harsh, excessive and cruel sentence. In fact, the sentence under section 140 (b) of the Act is indeed commensurate to the offence committed, because the drafter of the Act took into account Article 42 of the Constitution whereby every person has a right to a clean and healthy environment.
5. The court is required to apply the proportionality test which requires the court to balance the interests of the society with those of the individual and groups in an effort to realize good governance. She accuses the Petitioner of failing to demonstrate how his rights and fundamental freedoms were violated by the Respondents, and thus his petition ought to be dismissed.

### The 2nd Interested Party's Case

6. The 2<sup>nd</sup> Interested Party opposed the petition vide a replying affidavit sworn by Mamo B Mamo, its Director General on August 13, 2022. He avers that section 140 (b) of the Act relates to offences of standards and measures, and not just plastic or plastic management ones. Consequently, the section cannot be deemed unconstitutional whereas it is not specific to plastics management. The section is only applicable to plastics where it is read together with gazette notice 2336 of 2017 that banned the use, manufacture and selling of plastic flat and carrier bags. Declaring the section as unconstitutional would thus rob the 2<sup>nd</sup> Interested Party legislative framework for enforcing all other standards and measures. In praying for the dismissal of the petition with costs, he urges that the same is premised on a wrong footing, because none of the constitutional provisions cited by the Petitioner have been violated by section 140 (b) of the Act.

### Submissions

7. The Petitioner submits that in matters involving interpretation of the Constitution or determination of the Constitutionality of the Acts of Parliament, the court ought to be guided by well settled principles, as set out in David Tinyefuza v Attorney General High Court Holden at Kampala Constitutional Petition No 1 of 1996, The Queen v Big M Drug Mart Ltd. [1996] LRC (Const.) and In Attorney v Salvatori Abuki Constitutional Appeal No 1 of 1998, South Dakota v North Carolina 792, US 268 1940 LED 448, Apollo Mboya v Attorney General and others, High Court of Kenya, Constitutional and Human Rights Division Petition No 472 of 2017 and Raphael Banku Obudra v Attorney General, Supreme Court Constitutional Appeal No, 1 of 2013. He urges that the impugned section creates an offence and punishment without precisely defining key terms and phrase like environmental standards, wasteful and destructive manner. The terms plastic carrier bags and plastic flat bags are vague and no attempt has been made to define what they are or differentiate them from the other class of bags considering that items like bread, cakes, sugar, salt, detergent among others are still packaged in polythene bags. It is on that basis that the Petitioner challenges the constitutional basis of the penalties meted out to him under the impugned section, in that they are harsh, cruel, punitive in the circumstances and against his fundamental rights and freedoms, bearing in mind that he was found in possession of only 10 packets of the banned plastic carrier bags. He urges that no reasonable standards are laid down to define guilt in a penal section and where no clear guidance is given to either law abiding citizens or authorities and courts, a section which creates an offence and which is vague as in the instant case must be struck down as being arbitrary and unreasonable, and cites Musser v Utar, 92 L Ed 562 and Winters v People of State of New York, 92 LEd 840. He urges that the impugned section is an unnecessary, unjustifiable and disproportionate restriction to his human rights and fundamental



freedoms and his dignity, because he is being forced to serve the harsh, cruel and punitive sentences, which violates his rights to equal benefit and enjoyment of the law, as the offence committed does not commensurate with the sentence. The impugned section serves no legitimate purpose and the restriction is unnecessary and unjustifiable in a free and democratic society. The impugned section spells out a blanket punishment of a fine of Kshs 2,000,000 or a term not exceeding 4 years, without specifying the punishment for a person found with 1, 10, 100, 1000 or even 10,000 plastic bags, and therefore it is vague to that extent, and cites *R v Novia Scotia Pharmaceutical* [1992] 2 SCR and *Skilling v United States*, 1.30 S Ct 2896[2010].

8. The Respondents urge that the petition does not meet the requisite threshold of a constitutional petition, and cite *Anarita Karimi Njeru v Republic No 1 (1979) 1KLR, 54*, *Mumo Matemo v Trusted v Human Rights Alliance* [2013] eKLR and *Kiambu County Tenants Welfare Association v Attorney General & another* [2017] eKLR. They urge that the Petitioner's remedy lies in the appellate hierarchy established in the *Constitution* but not in a petition for declaration of rights or violation thereto, and cite *Nicholas Kiptoo Koriri Arap Salat v Independent Electoral & Boundaries Commission & 7 others* [2014] eKLR, *Hoseah Sitinei v University of Eldoret & 2 others* [2016] eKLR and *Francis James Khasira v Public Service Commission & 2 others* [2016] eKLR. They urge that their actions did not infringe the rights of the Petitioner, as they were conducted in a fair and transparent manner, and cite *Stephen Takwenyi & Another v David Mbutia Githare & Others Nairobi (Milimani) HCC No 363 of 2009*.
9. The 2<sup>nd</sup> Interested Party urges that to declare section 140 of the Act as unconstitutional would be to rob the Authority legislative framework for enforcing all other standards and measures under the Act, and cite *Peter Bogonko v National Environment Management Authority* [2006] eKLR, *Olum & another v the Attorney General* [2002] 2 EA and *Republic v National Assembly and 6 Others exparte George Wang'ung'u* [2018] eKLR. It relies on the doctrine of presumption of Constitutionality and accuses the Petitioner of failing to demonstrate how his rights were violated, and cites *Adrian Kamotho Njenga v Council of Governors and 3 others* [2020] eKLR and *Friends of Lake Turkana Trust v the AG & 2 others* [2014] eKLR. It urges that they are in conjunction with the 1st Respondent at an advanced stage of promulgating the Environmental Management and Coordination (Plastics management) Regulations to stagger the penalties for plastics offences premised on a quantitative basis.

### Analysis and Determination

10. After critical consideration of the petition, the responses thereto and the submissions on record together with the authorities cited, the issue for determination is whether the prayers sought ought to be granted.
11. Section 140 of the Act provides for offences relating to standards as follows: 'Any person who— (a) contravenes any environmental standard prescribed under this Act; (b) contravenes any measure prescribed under this Act; (c) uses the environment or natural resources in a wasteful and destructive manner contrary to measures prescribed under this Act, commits an offence and shall be liable upon conviction, to a fine of not less than one year but not more than four years or to a fine of not less than two million shillings but not more than four million shillings, or to both such fine and imprisonment.'
12. Standard is defined under section 2 of the Act to mean the limits of discharge or emissions established under this Act or under regulations made pursuant to this Act or any other written law.
13. No attempt has been made to define key terms under the impugned section like environmental measures, environmental standards, wasteful and destructive manner.
14. This court finds that in providing a prescriptive mandatory minimum sentence for the offence under the impugned section, the same is unconstitutional as it takes away the court's sentencing discretion to



consider the mitigating circumstances like the quantity of the plastic carrier bags an offender is found in possession of and the circumstances under which the offence was committed. This court draws guidance from *Francis Karioko Muruatetu & another v Republic [2017] eKLR*, where the Supreme Court observed that,

' If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'over punishing' the convict.'

15. Consequently, this court finds that, to the extent that it takes away the court's sentencing discretion by providing a prescriptive mandatory minimum sentence, Section 140 of the Act is inconsistent with the *Constitution* and invalid.
16. Besides, providing a blanket sentence of a fine of Kshs 2,000,000 or imprisonment for a term of 1 year for all offenders regardless of the quantity of the carrier bags each is found in possession of is clearly an overkill! In a case where the offender has only a few sheets of paper, the imposition of the fine of Kshs 2,000,000/- would be killing an ant with a hammer! Invariably, such an offender would have to serve the prison sentence as he would never be able to pay the fine.
17. Indeed, the 2<sup>nd</sup> Interested Party (NEMA) has identified this default and, as shown in their written submissions dated January 16, 2023, seeks to cure the default 'to promulgate Environmental Management and Coordination (Plastics Management) Regulations to stagger the penalties for plastic offences premised on quantitative basis.'
18. While the court understands the need for deterrence in the case of use of plastics as a measure of protecting the environment, it also readily accepts that the imposition of a minimum mandatory sentence which takes away the discretion of the court in appropriate cases to impose a lower sentence is unconstitutional. As the constitutional judicial authority of the Republic, under Article 1(3) of the *Constitution*, the Court must always have discretion to pass suitable sentence in accordance with the law and the circumstances of the case.
19. The court finds that the Petitioner has made out a case for grant of orders (a), (b) and (c) of the Petition dated July 14, 2022.
20. For the avoidance of doubt, this decision is only applicable to this case and it does not outlaw the imposition of the sentence under section 140 of the Act in appropriate cases.

## Orders

21. Accordingly, for the reasons set out above, the court makes the following orders:
  1. The Court declares that the sentence under section 140 of Environmental Management and Coordination Act 2015 is a maximum sentence only and the court has discretion in imposing a suitable sentence in accordance with the circumstances of the case.
  2. The court revises the sentence imposed by the trial court herein by setting aside the fine of Kshs 2,000,000/- imposed under count III of the Charge Sheet and substitutes therefor the



sentence of a fine in the sum of Kshs 200,000/- and in default imprisonment for a period of three (3) months.

3. The High Court Criminal Appeal No E010 of 2022 shall be mentioned on June 27, 2023 for directions on compliance with the orders herein.

22. There shall be no orders as to costs.

Order accordingly.

**DATED AND DELIVERED THIS 12TH DAY OF JUNE, 2023.**

**EDWARD M. MURIITHI**

**JUDGE**

**APPEARANCES**

**Mr. Ashaba for the Petitioner.**

**Ms. Mbaiyaka for the 1 & 2 Respondents and 1<sup>st</sup> IP.**

**Mr. E. K. Gitonga for the 2<sup>nd</sup> IP.**

