



**Biko v Director of Public Prosecutions & 3 others (Constitutional Petition 30 of 2018)  
[2023] KEHC 22330 (KLR) (Constitutional and Human Rights) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22330 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION 30 OF 2018**

**HI ONG'UDI, J**

**SEPTEMBER 22, 2023**

**BETWEEN**

**BONIFACE LUM AMUNGA BIKO ..... PETITIONER**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 2<sup>ND</sup> RESPONDENT**

**NATIONAL BANK OF KENYA ..... 3<sup>RD</sup> RESPONDENT**

**CAPITAL MARKETS AUTHORITY ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The chamber summons dated March 14, 2022 was brought under section 1A, 1B & 3A of the [Civil Procedure Act](#); and rule 11(2) of the <http://kenyalaw.org/caselaw/cases/view/16050> *Advocates (Remuneration) Order*. The applicant seeks the following orders;
  - a. That this Honourable Court be pleased to review and/or set aside the decision of the Taxing Master Hon. T. E. Marienga issued in the Ruling of 1<sup>st</sup> March 2022 in respect of the Bill of Costs dated November 22, 2021.
  - b. That this Honourable Court be pleased to re-assess the fees under items 1, 5, 22, 49, and 108 (being the instruction and getting up fees) of the 3<sup>rd</sup> respondent's Bill of Costs dated November 22, 2021 accordingly.
  - c. That in the alternative and without prejudice to the foregoing, this Honourable Court be pleased to remit the Bill of Costs to another Taxing Officer for review and reconsideration with



appropriate direction to the Registrar to reduce items 1, 5, 22, 49, and 108 being the instruction and getting up fees.

- d. That this honourable court be pleased to make such other and/or further orders as it may deem just and fit to grant.
  - e. That the costs of this Application be provided for.
2. The application is supported by the grounds on its face and the affidavit of the applicant sworn on 14<sup>th</sup> March 2022. In summary the Applicant is challenging the taxed bill of costs under items 1, 5, 22 & 49. These are on the element of instruction fees and getting up fees. His argument is that the fees awarded by the Taxing Officer (DR) is too high considering that the Petition was never heard as it was struck out for the Court's lack of jurisdiction. He suggested that a reasonable and fair instruction fee should have been Kshs.45,000/= and getting up fee of Kshs.15,000/=.
  3. He has averred that the DR correctly found that the time taken to complete the matter did not justify complexity, and the petition did not raise anything other than the day chores of legal practitioners. That despite making the said finding she assessed the legal fees at an unreasonable and excessive figure.
  4. The applicant in his supplementary affidavit sworn on 10<sup>th</sup> May 2022 and in response to the grounds of opposition, deponed that the said grounds were baseless, ill-informed and a ploy well calculated to mislead the Court. He simply reiterated what is in his supporting affidavit.
  5. The 3<sup>rd</sup> respondent filed the following grounds of opposition in response. They are dated March 29, 2022.
    1. There is no error of principle in the assessment of costs and the assessed costs are not manifestly excessive to justify interference by the Judge. <http://kenyalaw.org/caselaw/cases/view/16050> *Kipkorir, Titoo & Kiara Advocates v Deposit Protection Fund Board* NRB CA Civil Appeal No. 220 of 2004 [2005] eKLR.
    2. The reference is without merit, based on a misinterpretation of the Advocates Remuneration Order and should be dismissed with costs for reasons that:
      - i. The award of Kshs.100,000/= as the instruction fees – this is the minimum fee for a defended petition under Schedule 6A 1 of 2014 at paragraph 1 (J) (ii) of the Advocates Remuneration Order.
      - ii. The award of instruction fees for applications as distinct items from the Instruction fees to defend the petition (items 1, 5, 22, 49) has been carried out as provided for under schedule 6A1 of the Advocates Remuneration Order subhead “matters arising during proceedings”. Fees for the applications are charged separately. *Republic v medical Practitioners & Dentist Board & 2 others Ex-parte: Mary A. Omamo-Nyamogo* [2017] eKLR.
      - iii. Getting up fees is assessed at 1/3 of the instruction fees under schedule 6A paragraph 2 of the ARO as assessed.
    3. The reference is an abuse of the Court process and should be dismissed with costs to the 3<sup>rd</sup> respondent.



## The Parties submissions

### The Petitioner/Applicants submissions

6. These are dated June 22, 2022 and filed by Kimani & Michuki advocates. Counsel's main issue is whether the taxing officer erred in principle to warrant the court reviewing and / or setting aside the decision delivered on 1<sup>st</sup> March 2022. In reference to the said decision he submits that the DR clearly indicated that the matter was not complex in any form or manner nor did it contain any novel questions of law. On this he referred to the case of <http://kenyalaw.org/caselaw/cases/view/16050> *Republic vs. Ministry of Agriculture & 20 others exparte Muchiri W'Njuguna* (2006) eKLR where J. B. Ojwang J (as he then was) stated that the complex elements in the proceedings which guide the exercise of the taxing officer's discretion must be specified cogently and with conviction. It's his submission that the taxing officer and 3<sup>rd</sup> respondent did not set out any complexity or novelty in the matter. Therefore to him the Taxing Officer erred in more than doubling the amount in instruction fees, which amounted to punishing the petitioner.
7. In reference to schedule 6 Rule A 1 J (1) of the [\*Advocates \(Remuneration Order\)\*](#) counsel submitted that the matter before Court did not qualify for a figure of Kshs.100,000/= as set out in Schedule 6 Rule A 1 (J) 1 (ii). He thus submitted that it should have been taxed at Kshs.45,000/= with getting up fees of Kshs.15,000/= under item 108 on the Bill of costs.
8. While relying on the case of [\*National Oil Corporation Limited v Real Energy Limited and another\*](#) [2016] eKLR and others, Counsel argued that this court should find that the Taxing Officer erred in awarding the Kshs.100,000/= to the 3<sup>rd</sup> respondent and proceed to review it, with costs to the Applicant.

### The 3<sup>rd</sup> respondent's submissions

9. These are dated July 8, 2022 and were filed by Hamilton Harrison & Matthews advocates. Counsel submits that there is no error of principle evident in the assessment of the 3<sup>rd</sup> respondent's costs to justify interference by this Court. Referring to the cases of [\*National Oil Corporation Limited v Real Energy Limited & another\*](#) and [\*Otieno, Ragot & Company Advocates v Kenya Airports Authority\*](#) [2021] eKLR, he submitted that there was no "error of principle" on record to make this court interfere with the taxation of the 3<sup>rd</sup> respondent's bill of costs. That the court cannot simply interfere with the taxation of the said bill because the award is high in the petitioner's opinion.
10. Counsel further contends that the DR took into account all the relevant factors and that did not in itself determine the matter to be complex. He cites Rule 6 A 1 (J) of the [\*Advocates \(Remuneration Order\)\*](#) which lists the factors to be taken into account as follows:

"To present or oppose an application for a Constitutional and Prerogative Orders such fee as the taxing master in the exercise of his discretion and taking into consideration the nature and importance of the petition or application, the complexity of the matter and the difficulty or novelty of the question raised the amount or value of the subject matter. The time expended by the advocate..."
11. He argues that the DR at no point taxed the bill relying on Rule 6A 1 (J) (ii) as claimed by the Applicant at paragraph 14 of the submissions. Counsel relies on the Court of Appeal case of [\*Aktar Shamid Butt & another v David Kinusu T/A Sifuna & Company Advocates\*](#) [2009] to argue that even in a matter that is not complex, the instruction fees can be enhanced. Further reference has been made to the case of



12. Counsel has further argued that there were three (3) distinct applications whose fees must be taxed separately and so the sum of Kshs.100,000/= was not excessive & should not be interfered with. He adds that the figure of Kshs.45,000/= under Rule 6A1(j) (ii) is the minimum, and there was no error committed by the DR.

### **Analysis and determination**

13. Upon due consideration of the chamber summons/ Reference, grounds of opposition, submissions, cited authorities and the law I find the issue falling for determination to be whether the decision by the DR on taxation dated March 1, 2022, should be set aside. The Reference herein is in respect of the 3<sup>rd</sup> respondent only. The DR taxed the bill at Kshs.383,400/33 (Kenya Shillings three hundred and eighty three, thousand, four hundred and thirty three cents only). Taxed off was Kshs.769,983/67 (Kenya Shillings seven hundred and sixty nine thousand, nine hundred and eighty three and sixty seven cents only).
14. The bill of costs filed by the 3<sup>rd</sup> respondent comprised of 156 items. The applicant has issues with Items 1, 5, 22 & 49 only. All these items relate to instruction fees. A total of Kshs.695,000/= was claimed by the 3<sup>rd</sup> respondent on these items in the bill of costs dated November 22, 2021.
15. It is not disputed that this matter proceeded to full hearing and Makau J delivered a Judgment dated September 30, 2021. In the Judgment His Lordship identified five (5) issues as falling for determination. The first issue was whether the court had jurisdiction to hear and determine the issues raised therein. In the final analysis he found that the court had no jurisdiction and he dismissed the petition. The reason for dismissing it was because the matter had proceeded to full hearing. It is not therefore correct to state that because the petition was dismissed for want of jurisdiction not much had been put in by the 3<sup>rd</sup> respondent.
16. The whole purpose of taxing a bill is to ensure justice to both the client and advocate. Further that the general level of remuneration of advocates must be such as to attract recruits to the profession. See (i) *Royal Media Services v Telkom Kenya Limited & 13 others* [2020] eKLR by Martha Koome J (as she then was), (ii) *Premchand Raichand Limited & another* [1972] EA 162.
17. The general principle is that on reference to a Judge from taxation by the Taxing Officer, the Judge will not normally interfere with the exercise of discretion by the Taxing Officer unless the said officer erred in principle in assessing the costs. The case of *Kipkorir, Tito & Kiara Advocates vs. Deposit Protection Fund Board* [2005] eKLR is clear on this.
18. I have read through the DR's Ruling and the reasons for taxing the impugned items at Kshs.100,000/= instead of Kshs.695,000/=. This is set at paragraphs 16 – 25 of the Ruling. She considered all the issues, the law and relevant case law. The reasons she gave for reducing the instruction fees are very sound.
19. As stated the petition was not struck out based on a preliminary objection but upon hearing it.
20. There may have been no complex issues, but the court considers other issues. This matter was filed on 26/01/2018 and finalized on 30/9/2021 – (over three (3) years). The record shows that there were three interlocutory applications and instructions had to be taken on them besides the petition, and responses had to be filed.
21. The getting up fees is therefore allowed at 1/3 of the instruction fees. Item 108 which had sought for Kshs.216,667/= was reduced to Kshs.33,333/33 and Kshs.183,333/67 taxed off.



As has been held in several decisions, the Taxing Officer exercises discretion in taxation matters. The High Court may only interfere with the exercise of that discretion if there is a good reason/reasons to do so. See : (i) *Maronge & Company Advocates v Kenya Airports Authority* Kisumu Court of Appeal Civil Appeal No. 262 of 2012 [2014] eKLR, (ii) *KTDA Limited v JM Njenga & Company Advocates High Court* [2008] eKLR, (iii) *Otieno Ragot & Company Advocates v Kenya Airports Authority* [2021] eKLR.

22. From the above analysis I do not find any reason to make this Court fault the Taxation decision by the DR dated March 1, 2022. I therefore find no merit in the Chamber Summons/Reference dated March 14, 2022 which I hereby dismiss with costs.

Orders accordingly.

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2023 IN OPEN COURT AT MILIMANI, NAIROBI.**

**H. I. ONG'UDI**

**JUDGE OF THE HIGH COURT**

