



**Gaolei v Parklands Police Station & 3 others (Petition E198 of 2022) [2023] KEHC 22322 (KLR)  
(Constitutional and Human Rights) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22322 (KLR)

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

**PETITION E198 OF 2022**

**HI ONG'UDI, J**

**SEPTEMBER 22, 2023**

**BETWEEN**

**QU GAOLEI ..... PETITIONER**

**AND**

**PARKLANDS POLICE STATION ..... 1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF THE NATIONAL POLICE  
SERVICE ..... 2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTION ..... 3<sup>RD</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The original Petition dated 5<sup>th</sup> May 2022 was amended twice culminating in the amended petition dated 18<sup>th</sup> January 2023. In the said amended petition the petitioner alleges violation of his constitutional rights under Articles 28, 29, 35, 39, 47, & 50 of the Constitution.
2. He thus seeks the following prayers:
  - a. A declaration that the Respondents by their acts or/and omissions have infringed he Petitioner's constitutional rights and freedom as envisaged in Constitution 2010 in Article 24(5), 28, 29, 39, 47 and 49 by unnecessary long investigation period.
  - b. A declaration that the Respondents by their acts or/and omissions have infringed on the petitioner's fundamental rights and freedom as envisaged in Constitution 2010 in Article 24(5), 39, 47 and 49 by holding his passport for an unspecified period of time.



- c. An order directing the 1<sup>st</sup> respondent to release the petitioner's passport and refund the petitioner's cash bail of Kenya Shillings One Hundred Thousand, or charge the petitioner forthwith in a competent court of law.
- d. A declaration that the petitioner's fundamental rights and freedom as envisaged in Constitution 2010 in Article 24(5), 39, 47 and 49 have been infringed upon by their acts or / and omissions and is deserving of damages to be assessed by this Honourable Court.
- e. Costs of this Petition.
- f. Any further relief or orders that this Honourable Court may deem just and fit to grant.

### **The Petitioner's Case**

3. The amended petition was not accompanied by a supporting affidavit. I therefore assume that it's supported by the initial supporting affidavit sworn on 5<sup>th</sup> May 2022 by Qu Gaolei (the petitioner). In it he avers that he is an adult Chinese national residing and working for gain in Nairobi. It's his deponement that China Qingjian International Group (Kenya) Limited Company was awarded a tender by Kenya Urban Roads Authority (KURA) to construct a 9.8 kilometers stretch municipal road along Ngong road within Karen area. The said company appointed Mr. Xu Yandong as director, shareholder and Managing director who was to oversee the construction. Things did not go well as the said Managing director colluded with others to deconstruct all the existing structures. As a result the Award was revoked by KURA.
4. A dispute arose between China Qingjian Group Limited and others while the Managing director had gone underground. It was at this point that the petitioner among other Chinese nationals was unstructured by the parent company in China to invite the two companies to ascertain their invoices and delivery notes. This did not go well and he was threatened by the director of Johdon Limited (Duke Nyabayo Oboso) He was only a consultant (QG-2).
5. He deposed that he went through a lot of harassment including arrest at the instance of the warring parties. Following their disagreements several suits have been filed in courts of law and under arbitration. He was even charged vide Criminal MCCR No. E651 of 2021 – Republic v. Qu Gaolei and MCCR No. E670 of 2021 Republic v Zhou Jia (QG-5). The matter was later withdrawn under section 87(a) CPC.
6. He stated that on 27<sup>th</sup> September 2021 upon fear of arrest an anticipatory bail application was filed and granted in the Criminal Division Nairobi. He later on appeared with his advocate at Parklands Police Station. Despite expressing himself he was locked up in the cells and denied bail on the direction of Johdon Limited. On 7<sup>th</sup> October 2021 he was taken to court and later to the police station where he was granted bail of shs.100,000/= on condition that he deposits his passport pending his being charged (receipt (QG-1).
7. His advocate did write a letter to the 1<sup>st</sup> & 3<sup>rd</sup> respondents and IPOA on his arbitrary arrest and harassment by the police, (QG-6). The police file was not ready upto the time of filing of this petition. He claims to have been mistreated as opposed to the treatment accorded to Duke Nyabayo Oboso. The arrest, detention and not being given police bond infringed on his fundamental rights and freedoms. The continued possession of his passport is another infringement of his rights. This has affected his movement in the country, his immigration status and work as he has not been able to process his work permit and travel back to China.



8. He depones that his cash bail of Shs.100,000/= plus his passport have been retained by the 1<sup>st</sup> respondent for a long time. To date he has not been contacted in respect of the progress of the investigations. This he says has infringed on his right to information. He deponed that his rights to freedom, security being taken to court promptly, fair administrative action that is expeditious, efficient, reasonable, lawful have all been infringed.
9. A further affidavit sworn on 22<sup>nd</sup> May 2023 by Lorraine Adhiambo Oluoch an advocate in the law firm of M/s Ondieki Orangi & Co. advocates and in conduct of this petition was filed. She gave a detailed account of what has transpired between the petitioner, herself, the investigating officer (Mr. Randu) the 1<sup>st</sup> respondent. All in all she averred that it is only the petitioner's passport which was released to him and not the cash bail of Kshs.100,000/=. She additionally deponed that the law firm of Ondieki Orangi & Company advocates still has the original police bond cash bail receipt dated 7<sup>th</sup> October 2021 meaning the said cash bail had not been refunded. She asked the court to strike out paragraph 3 of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents' submissions dated 15<sup>th</sup> March 2023 for being falsehoods.

### **The Respondents' Case**

#### **The 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> respondents' case**

10. They only filed a replying affidavit by Evands Randu Police Officer Force No. 85788 sworn on 18<sup>th</sup> May 2022 in respect of the Notice of Motion. The said officer is the Investigating Officer in the matter. I have perused the long supporting affidavit and find one or two points which are relevant to the petition. These are:
  - i. That the petition does not meet the threshold set out in the cases of *Anarita Karimi Njeru v Republic* 1979 KLR 154 page 156; and *Mumo Matemu v. Trusted Society and Human Rights Alliance & 5 others* [2014] eKLR.
  - ii. That investigations have revealed that the petitioner is a director at China Qingjian International Group (k) Limited and not a consultant as claimed. He has not presented any documents to show that he is a consultant.
  - iii. He averred that he completed investigations and forwarded the file to the 3<sup>rd</sup> respondent's officer on 6<sup>th</sup> April 2022 for direction which he is still waiting for.

#### **The 4<sup>th</sup> Respondent's case**

11. Counsel Christopher Marwa filed 3 grounds of opposition to the petition dated 28<sup>th</sup> June 2022. A summary of them is as follows:
  - i. The petition does not meet the threshold of constitutional petitions, and it does not raise any constitutional issues for deliberation.
  - ii. The 3<sup>rd</sup> & 4<sup>th</sup> respondents are independent offices and are not subject to control by any individual or organization. Reference was made to Article 157 of the *Constitution*.
  - iii. The 1<sup>st</sup> respondent acted under its mandate under 35 of the National Service Act which clearly stipulates the functions of the 2<sup>nd</sup> respondent. He also referred to the case of *Republic v Directorate of Criminal Investigation department & 4 others Ex-parte Edwin Harold Dayan Daude & 4 others* [2016] eKLR.
  - iv. That the 1<sup>st</sup> & 2<sup>nd</sup> respondents have a constitutional duty to investigate and can detain the passport for purposes of securing the petitioner where they are satisfied an offence has been



committed. Further that the 1<sup>st</sup>, 2<sup>nd</sup>, & 3<sup>rd</sup> respondents cannot be directed on how to discharge their statutory mandate. Petitioner has failed to establish that the ongoing prosecution in Anti-Corruption Court case No. E206 of 2021 – Republic v Nicholas Mwendwa Kithuku is unfair and unfounded.

- v. The petition is an abuse of the court process, is frivolous, and vexatious. It is not a matter requiring this court's intervention.

## The Parties' Submissions

### The Petitioner's submissions

12. These were filed by Ondieki Orangi & Co. advocates and are dated 23<sup>rd</sup> January 2023. Counsel submitted that the impounding of the petitioner's passport curtailed his movements as a non-citizen. This violated Article 13 of the *Universal Declaration of Human Rights* (UN General Assembly Resolution 21 (III) of 10<sup>th</sup> December, 1948 which declares:
1. "Everyone has the right to freedom of movement.
  2. Everyone has the right to leave any country including his own and to return to his country."
13. Counsel argued that at no point did the petitioner exhibit any intention of fleeing the country. Despite all this the 1<sup>st</sup> respondent has refused to release the petitioner's passport, to date. It's also argued that the investigations against the petitioner have become endless, and the 1<sup>st</sup> respondent continues to retain the said passport with full knowledge that the petitioner is a foreign citizen of Kenya. As a result the Petitioner's movements, business and bank transactions, have been curtailed. Failure to have the passport made the petitioner appear suspect.
14. Referring to Article 47 of the *Constitution*, he submitted that the petitioner had a right to fair administrative action that is expeditious, lawful and procedurally fair. The 1<sup>st</sup> respondent therefore has a duty to conduct investigations fairly, and without bias. In support of this argument he relied on the case of *George Joshua Okungu & another v Chief Magistrate's Court Anti-corruption Court at Nairobi & another* [2014] eKLR. He additionally submitted that the respondents as public officers are bound by the national values and principles of governance, as set out in Article 10 (2) of the *Constitution*. Further reference was made to the case of *George Bala v Attorney General* [2017] eKLR.
15. On whether the petitioner's right and fundamental freedoms can be limited under Article 24 of the *Constitution* counsel referred to the case of *Randu Nzai Ruwa & 2 others v International Security Minister & another* [2012] eKLR and argued that any limitation of a right must be fully justified. That there is no demonstration by the respondent to show that the petitioner was a flight risk. He remained in the country even after the passport was returned back to him on 22<sup>nd</sup> November 2022.
16. Next is whether the petitioner is entitled to the damages sought in the petition. Counsel while relying on the cases of:
- (i) *Florence Wamukanda & another v Attorney General & 2 others* [2016] eKLR
  - (ii) *Abubakar Shariff Abubakar v Attorney General & another* [2014] eKLR
- submitted that following the confirmation of the breach of the petitioners constitutional rights he is entitled to aggravated damages, for missing out on a number of opportunities because of the respondents' actions. Further that the cash bail is yet to be released to him.



### **The 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> respondents' submissions**

17. These were filed by Mr. Achochi Henry Nyabuto Senior Prosecution Counsel and are dated 15<sup>th</sup> March 2023. Counsel submitted that the petitioner was arrested and detained upon receipt of a complaint of obtaining goods by false pretences contrary to Section 313 of the Penal Code. Thus his arrest was not arbitrary, his human dignity was not abused and he was accorded an opportunity of being heard and admitted on bond. He submitted that the Petitioner had not demonstrated how Articles 24, 28, 29, 39, 47, & 49 of the Constitution had been infringed by the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> respondents. He had also not shown to the court the law on limitation of investigations.
18. Counsel further submitted that the passport No. EA5316576 for Qu Gaolei was released to advocate Lorraine Adhiambo Oluoch of P1051572/19 holder of ID No. 309 69065 on 21<sup>st</sup> November 2022. She was also to collect the cash bail, which was done. He argues that there was no infringement of the petitioner's constitutional rights. Further that the 3<sup>rd</sup> respondent had given direction to the 2<sup>nd</sup> respondent vide a letter dated 26<sup>th</sup> September 2022 to close the file because the investigations revealed the complaint to be more of civil than criminal in nature.
19. The 2<sup>nd</sup> respondent was further directed by the 3<sup>rd</sup> respondent to release the passport and cash bail to the petitioner. Lastly counsel while relying on the case of Bernard Masiga Ayienga v Director of Public Prosecutions & 2 others [2018] eKLR submitted that the 1<sup>st</sup> respondent investigated the complaint within the confines of the law and so there was no violation of the petitioner's constitutional rights.

### **The 4<sup>th</sup> respondent's submissions**

20. These were filed by Mr. Marwa Christopher and are dated 17<sup>th</sup> March 2003. Counsel raised only one issue for determination. The issue is whether the 4<sup>th</sup> respondent violated the petitioner's constitutional rights. He contended that there was no evidence demonstrating that the investigations were activated by malice or any other motive. Relying on the cases of Mumo Matem (*supra*) and Augustino Mbugua v Inspector General of Police & another [2020] eKLR counsel submitted that the petitioner had not discharged his burden of proof of the allegations of violations of fundamental rights and freedoms.
21. Counsel went further to argue that police officers are allowed to arrest anyone where in their view they believe that an offence has been committed. He referred to section 35 of the National Police Service Act which states as follows:

“The Directorate shall undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cybercrime among other; execute the directions given to the Inspector General by the Director of Public Prosecutions pursuant to Article 157 (4) of the Constitution; and investigate any matter that may be referred to it by the Independent police oversight authority.”

He thus submitted that the petitioner had not demonstrated how the alleged delay in the investigations had affected his fundamental rights. He relied on the case of *Republic v Director of Criminal Investigations Department & 4 others* (*supra*) to buttress this point.

### **Analysis and determination**

22. Having carefully considered the amended petition, all affidavits, parties' submissions, cited authorities and the law I find the main issue for determination to be whether the respondents violated any of the petitioner's constitutional rights. From the petitioner's background to this case, there were issues



- between two companies namely China Qingjian International group limited and Johdon Limited. The petitioner acknowledges that the complaint in the matter that led to his arrest is Johdon Limited. I will not delve into the merits and demerits of the complaint since this is not the forum for that.
23. In the replying affidavit by the investigating officer in response to the Notice of Motion the deponent gives details of the steps he took as an investigator. Again I will not rehash that here.
24. The only question that comes up is what the petitioner expected the police to do upon receipt of the complaint? Were they just to record it and sit on it? The answer is no. It is obvious that investigations had to be undertaken. The petitioner fearing arrest applied for anticipatory bail which was granted with direction for him to appear alongside his advocate at Parklands Police Station. This is indicated at paragraphs 26 & 27 of the amended petition as follows:
- i. He presented documents to the police to show that he was a consultant and not a director of the Chinese company.
  - ii. Further that with the above in mind the 1<sup>st</sup> respondent locked him up in their cells with direction from the complainant – Johdon Limited.
25. The above are very serious allegations which the petitioner ought to have established. Sections 107, 108 & 109 of the *Evidence Act* provide that he who alleges a fact must prove it. He who desires the court to rely on a fact must establish it. I have perused the documents herein and there is document to show that the petitioner was a consultant and not a director of the Chinese Company.
26. The police under Section 35 of the *National Police Service Act* have a duty to investigate complaints and crimes reported to them. The petitioner has not demonstrated that the 1<sup>st</sup> respondent was acting under the direction of the complainant Johdon Limited. It was the duty of the petitioner to demonstrate this allegation against the 1<sup>st</sup> respondent.
27. There is no dispute that the petitioner is a Chinese national working and doing business in Kenya. The main document that authorised him to be in the country is the Visa which is endorsed in the passport. What offence did the police commit in impounding the passport? Parties have agreed that the passport was released to the petitioner through his advocate on 21<sup>st</sup> November 2022 i.e. after 13 months of its being impounded.
28. As the matter stands the petitioner has never been charged with any criminal offence in respect of this complaint. This court expected the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> respondents to explain this delay which was never done infact the Investigating Officer did not file any reply to the petition. Instead it's Mr. Achochi their counsel who took it upon himself to state unsubstantiated facts in his written submission which is not the practice. The court will not rely on them at all.
29. It is true the petitioner's passport was held for 13 months undoubtedly there is no law dictating for how long exhibits should be held by the police.
30. My take on this is that the period should be reasonable especially in a case such as this where the suspect is not charged with any criminal offence. And where the period of delay in releasing it is unreasonable then it behoves the 2<sup>nd</sup> & 3<sup>rd</sup> respondents to justify the period of delay.
31. On the other hand the petitioner had to present to the court evidence showing the efforts he made to retrieve his passport. In this case neither of these has been done by the parties. So who is to blame? I find both parties to blame for the scenario that the petitioner found himself in as far as the issue of the passport is concerned.



32. In Lorraine Adhiambo’s further affidavit she confirms that it is the investigating officer who called to inform her that the ODPP had directed the 1<sup>st</sup> respondent to release the petitioner’s passport and cash bail of Kshs.100,000/=. She has not stated any efforts she made prior to this to have the items released. Article 24(5) of the Constitution provides that;

“24.

(5) Despite clauses (1) and (2), a provision in legislation may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service

- (a) Article 31—Privacy;
- (b) Article 36—Freedom of association;
- (c) Article 37— Assembly, demonstration, picketing and petition;
- (d) Article 41—Labour relations;
- (e) Article 43—Economic and social rights; and
- (f) Article 49—Rights of arrested persons.”

33. In view of the fact that there was a complaint against the petitioner which was being investigated and in view of the fact that the petitioner is a non-citizen of Kenya the police did not commit any offence in withholding his passport as long as the investigations were ongoing. The petitioner partly contributed to the delay in release of his passport. So whatever he may have suffered in terms of not travelling home (China) and / or missing out on business opportunities was partly contributed to by himself. Had the respondent been wholly to blame, I would have awarded him.

34. On the issue of the issue of the cash bail paid to the police there is no evidence of a release of the same. Even on this Mr. Achochi gave some explanations in his submissions, but there is no evidence to support them. The investigating officer never swore any affidavit to confirm the release of the money. Unless proved otherwise the assumption is that the Kshs.100,000/= cash bail is still with the 1<sup>st</sup> respondent and it must be released to the petition. There is no reason for the continued withholding of the said cash bail.

35. In view of the above my finding is that:

- a. There is no strict proof of the violation of the petitioner’s rights as pleaded. Prayers A, B & D are therefore dismissed.
- b. There is proof that the 1<sup>st</sup> respondent has not refunded the petitioner’s cash bail of Kshs.100,000/=.
- c. The prayer for release of the petitioner’s passport has been overtaken by events and is thus dismissed.
- d. The 1<sup>st</sup> respondent to release the cash bail of Kshs.100,000/= to the petitioner within 14 days, from today. Failure to comply will lead to interest at court rates being charged on the said sum and the petitioner will be at liberty to execute.
- e. Half costs to be paid to the petitioner by the 1<sup>st</sup> respondent.



36. Orders accordingly.

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

**H. I. ONG'UDI**

**JUDGE OF THE HIGH COURT**

