



**Okaalo v National Environmental Tribunal (Constitutional Petition E248 of 2021)  
[2023] KEHC 22387 (KLR) (Constitutional and Human Rights) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22387 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E248 OF 2021**

**AC MRIMA, J**

**SEPTEMBER 21, 2023**

**BETWEEN**

**WILLIAM ANYANGU OKAALO ..... PETITIONER**

**AND**

**NATIONAL ENVIRONMENTAL TRIBUNAL ..... RESPONDENT**

**JUDGMENT**

1. William Anyangu Okaalo, the Petitioner herein, was charged with Contempt of Tribunal as a result of the remarks he made on 22<sup>nd</sup> March 2021 during proceedings before the National Environmental Tribunal, (hereinafter referred to as ‘the NET’ or ‘the Tribunal’ or ‘the Respondent’).
2. On 1<sup>st</sup> April 2021, the Tribunal read out the charge. The Petitioner pleaded not guilty. The matter was then set down for hearing on 5<sup>th</sup> May 2021.
3. The Petitioner made an oral application to be supplied with typed records of proceedings and the charge sheet. Only the typed proceedings were availed.
4. On the hearing date, the charge was read out and once again, the Petitioner pleaded not guilty.

**The Petition:**

5. Through the Petition dated 30<sup>th</sup> June 2021, supported by the Affidavit of William Anyangu Okaalo deposed to on a similar date, the Petitioner sought to contest the conduct of the proceedings before The Tribunal citing constitutional violations.
6. He pleaded that on the hearing date, the Tribunal purported to be ready with its decision before according him a hearing.



7. It was his case further that while presenting his evidence, the Chair of the Tribunal intermittently interrupted him with the aim of frustrating a legitimate answer to the charge he was facing.
8. The Petitioner claimed that the tribunal exhibited open bias by persistently warning and intimidating his Counsel as he presented his case and was allowed only five minutes to make submissions on points of law in violation his right to fair hearing.
9. The Petitioner posited that, subsequently, the Tribunal retired for five minutes and returned a guilty verdict, fully typed, an indication that the it had already decided the matter prior to the hearing.
10. To that end, the Petitioner pleaded that he was convicted for the offence of Contempt of Tribunal under section 127(2) of the Environment Management and Co-ordination Act, 1999 and fined a sum of Kshs. 100,000/- to be paid within 5 days. Failure which he would serve thirty days in prison.
11. It was his case that the totality of the procedure adopted by the Tribunal was not known to the law, violated *the Constitution* and denied him the right to fair trial under Article 50 and equal protection of the law provided for in Article 27 of *the Constitution*.
12. He asserted that he had legitimate expectation that he would be informed of the charge with sufficient details to answer to it and facilitated in order to prepare and present a defence.
13. The Petitioner claimed that he was not accorded the right to adduce and present exculpatory evidence which he had prepared. He asserted that the charge was one that required proof by the Tribunal of both actus reus and mens rea and to the extent that he did not make the offensive remarks willingly, there was no offence.
14. The Petitioner further averred that he made the remarks after the Chairman had signalled end of the day's proceedings. As such, the remarks could not be considered to have been made at the sitting of the Tribunal.
15. On the foregoing, the Petitioner asserted that his remarks could not in any way be considered to have interrupted the Tribunal's sittings and proceedings of that day.
16. He averred that he believed his microphone was muted when he made the remarks and was, therefore, not addressing the Tribunal when he consciously knew that the microphone was off.
17. The Petitioner posited that it case as a surprise when he learnt that his microphone was on and at the very first instance, the following day, offered an apology to the Tribunal.
18. Based on the foregoing, the Petitioner averred that there was no wilful intent, only mere unconscious self-expression of frustrations.
19. The Petitioner claimed that the violation of his right to fair hearing contravened his right to dignity under article 28 of *the Constitution*.
20. It was further his case that his prayer to the Tribunal to be supplied with typed copies of proceedings for purposes of an appeal or review was allowed but never complied with in violation of hight to information provided for under Article 35 of *the Constitution*.
21. It was his case that the purported video link of the proceedings had no value as he required typed documentary proceedings for purposes of appeal of review.
22. On the foregoing legal and factual background, the Petitioner prayed for the following reliefs;



- i. A declaration that the decision made by the Respondent on 27<sup>th</sup> May 2021 in the Contempt of the tribunal charge against the Petitioner violated the Petitioner's Article 50 of *the Constitution*.
- ii. A declaration that the said decision violated Article 48 of *the Constitution* on the right to access justice by not giving the Petitioner the chance to defend himself.
- iii. A declaration that the said decision violated Article 27 of *the constitution* on equality and freedom from discrimination to the extent that the Respondent denied the Petitioner the benefit of the rule of law and uniform application of the rules.
- iv. A declaration that the said decision violated Article 28 of *the Constitution* on the Petitioner's right to dignity, having been subjected to an unfair process and having his reputation damaged.
- v. A declaration that the said decision violated Article 35 of *the Constitution* on the Petitioner's right to access information.
- vi. A declaration that the said decision is unreasonable and disproportionate weighed against its intended consequence of ensuring justice is not impeded.
- vii. A declaration that the Respondent acted in bad faith and in abuse of the public trust arising out of its position as a public judicial institution.
- viii. A declaration that the tribunal's refusal to provide the typed proceedings and the typed proceedings to the Petitioner constitutes violation of *the Constitution* and the right to access information.
- ix. An order of certiorari bringing to this Court and quashed the proceedings and decision of the Respondent in National Environmental Tribunal Case No. 9 of 2019 made on the 27<sup>th</sup> May 2021 in the Contempt of Tribunal Charge against the Petitioner and any proceedings or actions taken subsequently or consequently in execution thereof for quashing.
- x. An order that the fine paid by the Petitioner in compliance with the impugned decision be refunded forthwith.
- xi. An award of general damages in favour of the Petitioner for violation of his fundamental rights by the Respondent.
- xii. Any other relief that the Honourable Court may deem just and fair in the circumstances.
- xiii. An order that the Respondent bear the costs of the Petition.

#### **The Submissions:**

23. The Petitioner filed written submissions dated 22<sup>nd</sup> November, 2021.
24. It was his case that actus reus and mens rea of his criminal culpability as provided for in section 127(2) (d) and section 133(2) of the Environmental Management and Coordination Act were not met.
25. In submitting that his offence was not proved the Petitioner relied on the case of Vimalkumar Bhimji Depar Shah Vs. Bidco Africa Limited [2016] eKLR where it was observed;

The outcome of contempt proceedings is a judgment and therefore a court of law ought not to render a judgment condemning a person without sufficient evidence being adduced as to the guilt of that person.



26. It was the Petitioner's case that there are instances where acts cannot ordinarily sufficient to amount to contempt as to sustain a conviction.
27. It was its case that the remarks were made after the proceedings had come to an end and could not be considered to have been made at the sitting of the tribunal.
28. It was his case that there was no wilful intent to make those remarks as they were mere unconscious self-expression of frustration.
29. The Petitioner relied on the decision in *Bodden vs Metropolitan Police Commissioner (1990)2 Q.B.397, 405, CA* where it was observed: -

In addition to the deliberate commission of the acts causing the interruption, the mental element of intending they should interrupt the proceedings of the court...in addition to the intention to interrupt the proceedings of the court, "wilfully" would in my judgment, also include the state of mind of an interrupter who knew that there was a risk that his acts would interrupt the proceedings of the court but nevertheless went on deliberately to do those acts.

30. Further support was drawn from the works of Sir David Eady & Prof. A. T. H Smith in *Arlidge, Eady & Smith on Contempt (2nd Edition)* where remarked as follows in page 136: -

... the courts have insisted that the requirements of mens rea applying in the criminal law generally should also operate in this context. Specifically, the mental element in those forms of criminal contempt not falling within the scope of the strict liability rule has been held to be an intention to interfere with the administration of justice. On the other hand, the court has been very ready to infer an intention from the surrounding circumstances.

31. In urging the Court to sparingly use the power of summary procedure in contempt proceedings, the decision in *Parashuram Detaram Shamdasani vs The King Emperor [1945] A.C. 264* was referred to where it was observed: -

.... Their lordships would once again emphasize that has often been said before, that this summary power of punishing for contempt should be used sparingly and only in serious cases. It is a power which a court must of necessity possess; its usefulness depends on the wisdom and restraint with which it is exercised.

32. It was the Petitioner's position that the Tribunal was required, even where it would have considered that an offence of the nature herein had occurred, to give room for apology and treat it as an ample response.

33. On the right to fair trial, the Petitioner submitted that the failure to allocate him reasonable opportunity to present his defence and submissions, the Tribunal failed to uphold the Petitioner's right to fair hearing under Article 50 of *the Constitution*.

34. The Petitioner buttressed his case by the decision in *Domenic Kariuki vs. Republic [2018] eKLR* where it was observed: -

The right to a fair trial was not one of those rights that could be limited under Article 24 of the Kenyan Constitution, 2010. Fair trial was the main object of criminal procedure, and it was the duty of the court to ensure that such fairness was not hampered or threatened in any manner.



35. As regards the right to fair administrative action, the Petitioner submitted that the decision by the Tribunal to charge the him with the offence of contempt of court suffices as an administrative action.
36. It was his case that the contempt proceedings against him were procedurally unfair for failure on the part of the Respondent to provide him with a copy of the charge sheet and allocate sufficient time to his advocate to address the tribunal.
37. With respect to the right to access information, the Petitioner submitted that despite making three requests to the Tribunal for copies of the proceedings and the typed judgment to enable him to exercise his right of appeal, the purported compliance with that request by sending email a link to the video of the proceedings which video had no value as the he needed documentary proceedings.
38. The Petitioner further asserted that the violation of his right to dignity was evident in the manner in which the Tribunal members s constantly referenced the Petitioner's legal career and did not cease to remind him that the proceedings would create a bloat in his career.
39. The Petitioner found support in *Rosemary Wanja Mwangiri & 2 Others vs. Attorney General & 2 Others*, [2013] eKLR where it was stated: -

The process of the court must not be misused or otherwise used as an avenue to settle personal scores. The criminal process should not be used to harass or oppress any person through the institution of criminal proceedings against him or her.

40. It was the Petitioner's case that Tribunal's decision to convict him on rushed and unfair trial was designed to deny him right to dignity.
41. In the end, the Petitioner urged Court to quash the conviction and the entire proceedings of the Tribunal. He referred to *Dr. Willy Kaberuka vs. Attorney General Kampala HCCS No. 160 of 199* where it was observed: -

... The plaintiff suffered injury to his reputation. He testified that the news of his appearance in court was published in a newspaper whose circulation is believed to be generally wide. He spent a period of over four months appearing in court on charges, which were hardly investigated by the defendant's servants. He must have suffered the indignity and humiliation. He is also entitled to recover damages for injuries to his feelings especially the possibility of serving a sentence... There are no hard and fast rules to prove that the plaintiff's feelings have been injured. The plaintiff's status in society is also a relevant consideration and for all these reasons the plaintiff is entitled to damages.

#### **The Respondent's case:**

42. The Respondent challenged the Petition through Grounds of Opposition dated 7<sup>th</sup> December 2021, filed by the Attorney General, and the Replying Affidavit of Bellinda Akello the Secretary of National Environmental Tribunal deposed to on 8<sup>th</sup> December 2021.
43. In the Grounds of Opposition, the Respondent stated that the Petitioner did not raise constitutional violations but rather took issue with the outcome of the proceedings before the tribunal which ought to have been raised as an appeal.
44. It was stated that the Petitioner's request of reviewing an order the had already complied with was unprocedural and academic.



45. It was its case that the Petitioner’s admission of liability of making derogatory statement in the office of a tribunal member warranted the Tribunal’s sanction of unbecoming conduct.
46. The Respondent declined that Petitioner’s apology stating that it was made only because the Petitioner had not switched off his microphone.
47. The Respondent stated that the Petition ought not be allowed since it would allow Advocates and members of the public to use derogatory remarks against judicial officers if they do not agree with directions issued, a dangerous precedent.
48. The Respondent urged this Court to make a finding that the Petition offends the Principle of Constitutional Avoidance set out by the Supreme Court in *Communications Commission of Kenya & 5 Others -vs- Royal Media Services Limited & 5 others* (2014) eKLR.
49. It was its case that the Petitioner cannot claim violation of Article 50 of *the Constitution* yet he admitted to being given an opportunity to instruct Counsel, answer charges and submit on the same.
50. In conclusion, the Respondent stated that the Petitioner was defective in form and substance, instituted in bad faith and ought to be dismissed for being an abuse of Court process.
51. In the Replying Affidavit, Ms. Akello deposed that on 22<sup>nd</sup> March 2021, when the proceedings, subject of this dispute were in session, directions were issued rescheduling the hearing to 29<sup>th</sup> March 2021 due to technical challenges.
52. Unhappy with the directions, the Petitioner uttered derogatory remarks against the Chair referring him to as “such a jerk”.
53. She deposed that the Chair directed that contempt proceedings against the Petitioner and accordingly was asked to prepare. It was her case that the Petitioner was informed that the proceedings would take place on 1<sup>st</sup> April 2021.
54. It was her deposition that on the hearing date, the charges were read out and the Petitioner pleaded not guilty. She deposed that the Petitioner was subsequently informed of the right to representation.
55. She deposed that on 6<sup>th</sup> April 2021, the Petitioner’s Counsel prosecuted his case for 40 minutes and upon conviction, mitigation and sentencing the Petitioner complied with the Orders.
56. He deposed that in view of the fact that the Petitioner had not filed an appeal, or review, the Petition is a bid to hoodwink the Court to sanitize the conviction yet he at all times admitted to making derogatory remarks in dishonour of the Tribunal.
57. In conclusion, it was her case that the Respondent followed statutory and constitutional provisions in conducting the proceedings against the Petitioner.

#### **The Submissions:**

58. In its written submissions dated 3<sup>rd</sup> February 2022, the Respondent submitted that if the Petitioner was of the opinion that the Tribunal was impartial or unwarranted, he ought to have approached the High Court to stay the said proceedings.
59. It was submitted further that if the Petitioner was dissatisfied with the orders issued, he had the opportunity to file an appeal and stay of execution rather than comply.
60. The Respondent reiterated that the Petition herein ought to have been instituted as an appeal or Judicial Review cause on alleged claim of violation of fair administrative action.



61. The decision in *Communication Commission of Kenya & 5 Others -vs- Royal Media Services & 5 Others* (2014) eKLR was referred to where the following was said: -
 

...we hold the view that the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> respondents' claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright infringement claim, and it was not properly laid before that Court as a constitutional issue.
62. To fortify the foregoing, the Respondent submitted that this Court ought to apply the Principle of Constitutional avoidance.
63. In rebutting constitutional violations, the Respondent submitted that the Petitioner's right to dignity was not set out with specificity.
64. With regard to the right to access information, the Respondent submitted that the Petitioner's request was acceded to and accordingly availed the proceedings, submissions, video recording and typed ruling.
65. It further was submitted that there is no evidence, as contemplated under [Access to Information Act](#), indicating that the Petitioner made any request for information and disallowed, as to entitle him to move to this court claiming violation of the right to access information.
66. It was the Respondent's further case that the Petitioner's right to fair administrative action was not violated since he was allowed to make representations, informed of the charge and instructed a counsel.
67. In conclusion, the Respondent asserted that the Petition is barred by the doctrine of constitutional avoidance. It was urged that the Petition is dismissed with costs.

#### **Analysis:**

68. A preliminary issue on the jurisdiction of this Court has been raised. In line with the Supreme Court in *Petition No. 7 of 2013 Mary Wambui Munene v. Peter Gichuki Kingara and Six Others*, [2014] eKLR, jurisdiction, being a pure question of law should be resolved on priority basis. That is the trajectory which this Court will follow.
69. A brief look at the concept of jurisdiction will suffice.
70. Jurisdiction is defined in *Halsbury's Laws of England* (4<sup>th</sup> Ed.) Vol. 9 as "...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.". *Black's Law Dictionary*, 9<sup>th</sup> Edition, defines jurisdiction as the Court's power to entertain, hear and determine a dispute before it.
71. In *Words and Phrases Legally Defined* Vol. 3, John Beecroft Saunders defines jurisdiction as follows:

By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.



72. That, jurisdiction is so central in judicial proceedings, is a well settled principle in law. A Court acting without jurisdiction is acting in vain. All it engages in is nullity. Nyarangi, JA, in Owners of Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Limited [1989] KLR 1 expressed himself as follows on the issue of jurisdiction: -

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...

73. Indeed, so determinative is the issue of jurisdiction such that it can be raised at any stage of the proceedings. The Court of Appeal in Jamal Salim v Yusuf Abdulahi Abdi & another Civil Appeal No. 103 of 2016 [2018] eKLR stated as follows: -

Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in Adero & Another vs. Ulinzi Sacco Society Limited [2002] 1 KLR 577, as follows:

- 1) .....
- 2) The jurisdiction either exists or does not ab initio ...
- 3) Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.
- 4) Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.

74. On the centrality of jurisdiction, the Court of Appeal in Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR stated that: -

So central and determinative is the jurisdiction that it is at once fundamental and overarching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain....

75. On the source of a Court’s jurisdiction, the Supreme Court of Kenya in Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others (2012) eKLR stated as follows: -

A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or



tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

76. And, in *Orange Democratic Movement v Yusuf Ali Mohamed & 5 others* [2018] eKLR, the Court of Appeal further stated: -

(44) .... a party cannot through its pleadings confer jurisdiction to a court when none exists. In this context, a party cannot through draftsmanship and legal craftsmanship couch and convert an election petition into a constitutional petition and confer jurisdiction upon the High Court. Jurisdiction is conferred by law not through pleading and legal draftsmanship. It is both the substance of the claim and relief sought that determines the jurisdictional competence of a court...

77. From the foregoing, it is sufficiently settled that a Court's jurisdiction is derived from *the Constitution*, an Act of Parliament or both.

78. Returning to the case at hand, the impugned proceedings were conducted before the NET. The entity is created under Section 125 of the *Environmental Management and Co-ordination Act*, No. 8 of 1999 (hereinafter referred to as 'the EMCA'). The EMCA was last amended in 2019 in a bid to align it with *the Constitution*.

79. The Preamble to the EMCA states that it is an Act of Parliament to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for matters connected therewith and incidental thereto. Under Section 130 of the EMCA, appeals against the decisions of NET lie to the Environment and Land Court.

80. The jurisdiction of the Environment and Land Court in respect to dealing with constitutional issues in respect of the matters the Court has jurisdiction to handle is, by now well rendered.

81. The matter was discussed in several cases where the Court in issue was the Employment and Labour Relations Court, a Court of equal status with the High Court and the Environment and Land Court courtesy of Article 162(2) of *the Constitution*. In those cases, which included, Prof. Daniel Mugendi v Kenyatta University and 3 others [2013] eKLR, United States International University -vs-Attorney General & 2 Others (2012) eKLR, Christopher Gatuiri v Commissioner of Police (2008) eKLR, Jane Frances Angalia v Masinde Muliro University of Science and Technology and Others (2010) eKLR, it was settled that Courts of equal status with the High Court are possessed of the jurisdiction to deal with constitutional issues arising within or out of the matters which those Courts have jurisdiction over.

82. The Petitioner herein avers infringement of constitutional rights during the judicial proceedings before the Tribunal. As such, any resultant challenge may take the form of an appeal, review, judicial review or a constitutional Petition. However, any such proceedings must fall within the confines of the Environment and Land Court and not the High Court.

83. To that end, therefore, the institution of this Petition before the High Court renders it otiose. This Court has no jurisdiction to entertain the matter.

84. Consequently, the Petition is hereby struck out with costs.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 21<sup>ST</sup> DAY OF SEPTEMBER, 2023.**

**A. C. MRIMA**

**JUDGE**

