



**Rutere v Inspector General, National Police Service & 3 others (Petition E156 of 2022)
[2023] KEHC 22244 (KLR) (Constitutional and Human Rights) (15 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22244 (KLR)

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

PETITION E156 OF 2022

M THANDE, J

SEPTEMBER 15, 2023

BETWEEN

PURITY KAARI RUTERE PETITIONER

AND

INSPECTOR GENERAL, NATIONAL POLICE SERVICE 1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 4TH RESPONDENT

JUDGMENT

1. In her Petition dated 12.4.22, the Petitioner seeks the following reliefs:
 - a. A Declaration; and is hereby issued, that the decision by the Senior Resident Magistrate at Kibera, Hon. C.K Mwaniki in Kibera Criminal Case No. E843 of 2021 (now Makadara Criminal Case No. 2268 of 2021) on an Application dated 17th February 2021 (Miscellaneous case No. E250 of 2021) be set aside.
 - b. A Declaration; and is hereby issued against the Respondents declaring that detaining the Petitioner's Motorcycle for over 20 months pending the hearing of criminal proceedings violated her equality before the law as well as full and equal enjoyment of her rights under Article 27 (1) and (2) of *the Constitution* and was therefore unable to enjoy equal benefit to other individuals owning immovable assets.
 - c. A Declaration; and is hereby issued, that the unreasonable detention of the Petitioner's motorcycle violated her property rights under Article 40 of *the Constitution* of Kenya and the



same had the effect of imposing vicarious liability on her in criminal proceedings she was not party to.

- d. Declarationbe; and is hereby issued, that the detainment of depreciating assets as exhibits beyond a reasonable time is a breach of Article 40 of *the Constitution* of Kenya, 2010.
 - e. In the alternative to (b) above, a Declarationbe; and is hereby issued, that courts be directed to dispense with perishable/depreciating exhibits within a reasonable time to facilitate the release of the same to owners; notwithstanding the fact that such owners are not party to criminal proceedings touching on the same.
 - f. A Declarationbe; and is hereby issued that courts take alternative measures to ensure the integrity of judicial proceedings involving the production and identification of exhibits that are prone to wear and tear if detained in police quarters other than detaining the same at the police stations.
 - g. An order for General Damagesbe; and is hereby issued to the Petitioner, to be borne by the respondents jointly and severally for infringement of her property rights with respect to her now worn out Motorcycle.
 - h. Costs of the Petition.
2. The Petitioner's case as set out in the Petition and her affidavit sworn on even date is that she is the registered owner of motorcycle registration number KMFD 804D, which is currently held at Kasarani Police Station. On 20.8.2020, officers of the 1st and 2nd Respondents arrested the Petitioner's rider, one Sunny Mugendi Nyaga (Sunny) and placed him in custody for the offences of robbery with violence and gang rape. Sunny together with one Gideon Mwangi were subsequently charged with the offences in Makadara Criminal Case No. E2268 of 2021 (formerly Kibera Criminal case No. E843 of 2020).
 3. At the same time of Sunny's arrest, the motorcycle was impounded and held at Kasarani Police Station, to be used as an exhibit in the criminal trial. In spite of the Petitioner's pleas to the 1st and 2nd Respondents to release the motorcycle, they have declined to do so and the same continues to waste away and depreciate in the police yard. She then filed Miscellaneous Application No. E250 of 2021, in the trial Court seeking release of the motorcycle. The application was however dismissed by the Senior Resident Magistrate C.K. Mwaniki for being preemptive as the motorcycle was yet to be produced as an exhibit. The prosecution was directed to expedite the production of the motorcycle. At the time of the filing of the Petition herein, the motorcycle was yet to be released to the Petitioner, and continues to be held for over twenty months at the Kasarani Police Station and has subsequently been affected by wear and tear and has been reduced to scrap.
 4. The 1st, 2nd and 4th Respondents opposed the Petition vide a replying affidavit sworn on 11.10.22 by Joseph Mburugu, prosecution counsel in the office of the 4th Respondent. He conceded that Sunny and Gideon were arrested and charged as stated by the Petitioner. The motorcycle was seized as it was believed to have been used at the time of the commission of the offence and is currently at the police station. Plea in the criminal case was taken on 25.8.2020 and the accused persons pleaded not guilty. The matter set for hearing on 28.10.2020, on which date the accused persons were not produced in court as they were in isolation at the Nairobi Remand due to the Covid 19 pandemic.
 5. The Respondents asserted that in dismissing the Petitioner's application for release of the motorcycle, the trial Magistrate agreed with the 4th Respondent that the motorcycle being an exhibit could only be released after its production in Court. Subsequently, the matter was slated for 12.4.21, on which date it did not proceed as the 2nd accused person was not produced before court from the Nairobi



Remand. The matter was transferred to Makadara Laws Courts under Criminal Case No. 2268 of 2021 and fixed for mention on 31.8.21 and hearing on 11.1.22. On the said date the 2nd accused's counsel sought adjournment though the prosecution was ready to proceed with 2 witnesses and the matter was rescheduled to 30.5.22. On that date, the 2nd accused who had changed advocates sought an adjournment and the matter stood over to 31.8.22 for hearing. On the said date, 3 witnesses testified and the remaining two witnesses were to testify on 31.1.23.

6. In light of the foregoing, the Respondents contend that the Petitioner has not demonstrated any liability on the part of the 1st, 2nd and 4th Respondents with respect to the delays in the trial that may have in turn occasioned delays in production and subsequent release of the motorcycle to the Petitioner. Further that the Petitioner has failed to demonstrate that the actions of the 1st, 2nd and 4th Respondents were actuated by malice or any improper motive resulting in violation of her constitutional rights. She has also not demonstrated breach of her constitutional rights. They urged that the Petition be dismissed with costs.
7. The 3rd Respondent filed grounds of opposition dated 10.2.23. The grounds in summary are that the motorcycle is lawfully held pursuant to Makadara Criminal Case No. E2268 of 2021 (Formerly Kibera Criminal case No. E 843 of 2020) where Sunny, a rider employed by the Petitioner has been charged with the offence of robbery with violence and gang rape. The motorcycle is an exhibit in the case and is being held at the Kasarani Police Station. Further, that the issue of release of motorcycle has already been pronounced in Miscellaneous Application No. E 250 of 2021 arising from Kibera Magistrate's Court Criminal Case No. E843 of 2020 vide a ruling delivered on 18.3.21. The trial court in its ruling observed that the application was preemptive and that the motorcycle had not yet been produced as an exhibit, and proceeded to dismiss the application.
8. The Court has considered the parties' written and oral submissions together with the authorities cited.
9. The law, is that this Court may only exercise that jurisdiction which has been conferred upon it by *the Constitution*, statute or both. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR the Supreme Court succinctly stated:

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 counsel 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.

10. This Court derives its jurisdiction principally from Article 165(3) of *the Constitution* which provides as follows:

Subject to clause (5), the High Court shall have—

- (a) unlimited original jurisdiction in criminal and civil matters;
- (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
- (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;



- (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
- (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191; and
- (e) any other jurisdiction, original or appellate, conferred on it by legislation.
11. The unlimited original jurisdiction of the High Court in civil and criminal matters includes the jurisdiction to hear any question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened, a question respecting the interpretation of *the Constitution*, the determination of the question whether any law is inconsistent with or in contravention of this Constitution or whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, *the Constitution*.
12. The Petitioner has claimed that her rights have been violated by the Respondents by detaining her motorcycle for an inordinately long period of time. She unsuccessfully sought redress in the Magistrate’s Court and now seeks that the ruling of the learned Magistrate be set aside.
13. In her application dated 17.2.21 in the lower Court, the Petitioner sought the following orders that:
1. This Application be certified as urgent.
 2. The motorcycle of Registration Number KMGD 804D, Boxer BM 150, which is currently being held by the Divisional Criminal Investigations Officer (DCIO) at Kasarani be released to Purity Kaari Ruteere, the Applicant herein.
 3. The Respondents do appear in person or by their duly authorised representatives to show cause why the said motorcycle should not be released forthwith to the Applicant.
 4. Pending the hearing of this summons inter partes, the 2nd Respondent be directed to release the Applicant’s motorcycle on such terms and conditions as this Honourable Court deems fit to grant.
 5. The Court declares that the Applicant’s right to property under *the Constitution* of Kenya, 2010 have been infringed.
 6. Costs of this Application be provided for.
14. In his ruling on 18.3.21, the learned Magistrate declined to grant the Application and stated:
- I have considered the application and the response thereto. To my mind, the application is preparative (sic) given that the motorcycle has not been produced as an exhibit. Therefore, for this reason I decline to issue the orders sought. Hearing on 12/4/21.



15. It is trite that the mandate of this Court is to consider whether the Petitioner's rights were violated. The Petitioner's complaint as I understand it, the Respondent's have violated her rights to equality under Article 27(1) and to property under Article 40 of *the Constitution* by holding the motorcycle for a period of over 20 months and that the learned Magistrate erred in his ruling dismissing her application for the release of the motorcycle.
16. Section 177 of the Criminal Procedure Code provides as follows, regarding property found on accused person:

Where, upon the apprehension of a person charged with an offence, any property is taken from him, the court before which he is charged may order—

 - a. that the property or a part thereof be restored to the person who appears to the court to be entitled thereto, and, if he be the person charged, that it be restored either to him or to such other person as he may direct; or
 - b. that the property or a part thereof be applied to the payment of any fine or any costs or compensation directed to be paid by the person charged.
17. Provision has been made in the law regarding release of property taken from an accused person upon apprehension. It is the court before which such person is charged that may order the release of such property. Any application for release of such property may therefore only be made to such court. In the case of *Dickson Natsio Mukuba v Republic* [2017] eKLR Sitati, J. considered the import of Section 177 of the Criminal Procedure Code and stated:
 8. In light of the above provisions, the instant application cannot stand as the orders sought cannot be granted because the applicant was not charged before this court. Secondly, the applicant's claim is against third parties who are not the police. The applicant ought to have made this application before the Mumias Principal Magistrate's Court which heard and determined Criminal Case No. 1262 of 2014.
 9. Further I agree with the prosecution counsel that Section 177 of the CPC envisages a situation where the property is still available and is in the hands of law enforcers. Clearly the alleged property is not in the hands of law enforcers nor is there evidence that the property is still available.
18. By her filing the Application before the Magistrate's court for the release of the motorcycle, the Petitioner followed due process as set out in the law. The question that then begs is whether having failed to get the orders sought in the lower court, the Petitioner's redress lies in the constitutional court.
19. The Criminal Procedure Code has conferred upon the High Court the power of revision. Section 362 of the provides:

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.
20. In exercise of its revision jurisdiction, the High Court may call for and look at the record of any criminal proceedings in a subordinate court. This is done for the purpose of ascertaining the correctness, the legality or the propriety of any proceedings in that court.
21. Section 364 provides the powers of the Court on revision as follows:



1. In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—
 - a. in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
 - b. in the case of any other order other than an order of acquittal, alter or reverse the order.
 - c. ...

22. My considered view is that the issues raised by the Petitioner are not matters for this Constitutional Court. Her remedy lies in the revision process where the Court will be able to review the record and make a finding as to whether all evidence was considered and whether the lower court arrived at a just finding and alter or reverse the order complained of. As such the Court exercising its revision jurisdiction is better placed to offer an efficacious remedy as opposed to this constitutional court, which does not have the benefit of the record and cannot go into issues of merit.

23. It is well settled that a court will decline to decide a constitutional question when a matter may be properly decided on another basis. This is the doctrine of constitutional avoidance. What the doctrine means is that while this Court can indeed hear and determine the matter, it restrains itself from entertaining the same because there exists another appropriate forum that can hear and determine the matter effectively.

24. The doctrine of constitutional avoidance was expounded by the Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR. The Court held as follows: -
 - (256) The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v. Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”
 - (257) Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (*Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936)).
 - (258) From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd 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. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court.

25. And in *Uhuru Muigai Kenyatta v Nairobi Star Publications Limited* [2013] eKLR, Lenaola, J. (as he then was) stated:

I need say no more. Where there is a remedy in Civil Law, a party should pursue that remedy and I say so well aware of the decision in *Haco Industries* (supra) where the converse



may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in AG vs S.K. Dutambala Cr. Appeal No.37 of 1991 (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions.

The complaint in this case is not so serious as to attract Constitutional sanction.

26. It can be discerned from the foregoing that where another legal course is available through which a matter can be properly decided and which can give an applicant the relief sought, such course should be pursued and the constitutional court should decline to determine a constitutional issue in such matter.
27. The Court of Appeal in the case of Peter O. Ngoge v Francis ole Kaparo & 4 Others [2007] eKLR, the Court of Appeal stated:

Similarly in *Harrickson v Attorney General of Trinidad and Tobago* [1980] AC 265, Lord Diplock stated:-

“The notion that whenever there is failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by the chapters of *the Constitution* is fallacious ... the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

28. The Petitioner being aggrieved with the decision of the lower Court, her remedy lay in moving the High Court by way of revision under Section 362 of the Criminal Procedure Code. Having found that there exists a remedy in statute law, which the Petitioner ought to have pursued, this Court must refuse to be bogged down by a matter which is so plainly provided for under statute. In this regard, I associate myself with the sentiments expressed by Mativo, J. (as he then was), in Mombasa Petition No. E002 of 2022, *Jean Bosco Muhayimana & Another v Jimmy Irengi aka Jimmy Mwachuga & Others* (unreported). The Learned Judge stated:

The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved. In Kenya, the Supreme Court stated in *Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others* (at para 256) that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis. In the South African case of *S v Mhlungu* (supra) Ketrledge AJ, stated in the dissenting opinion respecting the principle of avoidance (at paragraph 59), that he would lay down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed. And in *Ashwander v Tennessee Valley Authority*¹ the U.S. Supreme Court held that it would not decide a constitutional question which was properly before it if there was also some other basis upon

¹ 297 U.S. 288, 347 (1936).



which the case could have been disposed of. Currie and de Waal² opine that the principle of constitutional avoidance is of crucial importance in the application of the Bill of Rights. The author's state: -

“When applying the Bill of Rights in a legal dispute, the principle of avoidance is of crucial importance. As we have seen, the Bill of Rights always applies in a legal dispute. It is usually capable of direct or indirect application and, in a limited number of cases, of indirect application only. The availability of direct application is qualified by the principle that the Bill of Rights should not be applied directly in a legal dispute unless it is necessary to do so.”

29. I similarly agree with Mutungi, J, who in the case of *Grays Jepkemoi Kiplagat v Zakayo Chepkoga Cheruiyot* [2021] eKLR, had this to say about the practice of filing constitutional petitions in claims that are civil in nature:

Although I have in my foregoing discussion adverted to grounds (c) and (d) of the preliminary objection that there are no Constitutional issues that warrant adjudication by the Court and that the Petition may very well constitute an abuse of the due process of the court, I need to observe that parties are increasingly filing matters that are essentially Civil matters and christening the same as Constitutional Petitions which is not proper. Where there is the alternative remedy of filing a suit in the ordinary Civil Courts, a party ought not to invoke the jurisdiction of the Constitutional Court.

30. It is not in doubt that Article 165(3) of *the Constitution* confers upon the High Court unlimited original jurisdiction in civil and criminal matters, including the jurisdiction to hear any question with respect to the interpretation of *the Constitution*. In particular and relevant to the matter herein, under Article 23 this Court has jurisdiction accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. The jurisdiction of this Court may however be limited by *the Constitution* and statute in certain instances. The Court may thus only exercise that jurisdiction which has been conferred upon it by *the Constitution*, statute or both.

31. In the case of *Eliud Wafula Maelo v Ministry of Agriculture & 3 others* [2016] eKLR, the Court of Appeal considered the question of limitation of the jurisdiction of the High Court and stated as follows:

11. The jurisdiction of the High Court in particular matters or instances can be ousted or restricted by statute. In *Halsbury's Laws of England*, Volume 10 at paragraph 319, the learned authors state:

“The subject's right of access to the courts may be taken away or restricted by statute.”

...

Paragraph 723 states:

“Where a tribunal with exclusive jurisdiction has been specified by a statute to deal with claims arising under the statute, the County Court's jurisdiction to deal with those claims is ousted, for where an Act creates an obligation to and enforces the performance of it in a specified manner only, the general rule is that performance cannot be enforced in any other manner.”

² I Currie & J De Waal *The Bill of Rights Handbook* (2013) 72.



12. In *Narok County Council V Trans-mara County Council* (supra) this Court held that:
- “... though section 60 of *the Constitution* gave the High Court a limited jurisdiction, it did not cloth it with jurisdiction to deal with matters that a statute had directed should be done by a Minister as part of his statutory duty.”
13. In determining whether a court has jurisdiction in a particular matter, a court cannot consider the provisions of *the Constitution* only. Regard must also be taken of relevant statutes. That is what was stated by the Supreme Court In *The Matter of the Interim Independent Electoral Commission* [2011] eKLR:
- “[29] Assumption of jurisdiction by courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent.”
14. Similarly, in *Suleiman IbrahimvAwadh Said*[1963] E. A. 179, Windham, C. J. held that section 33 of the *Rent Restriction Act* of Tanzania excluded concurrent jurisdiction of the High Court in respect of a matter which could be handled by the Rent Restriction Board.
32. Our courts have time and again stated that where a clear procedure for redress has been provided by law, such procedure must be followed to the letter. One such case is *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR where the Court of Appeal stated:
- In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.
33. This Court is being asked to overturn the finding of the lower Court through this constitutional Petition. As indicated above, the Court cannot do so, as adequate provision has been made under statute for redress for a party dissatisfied with the decision of the lower Court.
34. It is also trite that a wrong decision by a court of competent jurisdiction does not equate to violation of the fundamental rights of a losing party. This was the holding in the case of *Methodist Church in Kenya Trustees Registered & Another v rev. Jeremiah Muku & Another* [2012] eKLR where the Court of Appeal stated:
- In *Maharaj v Attorney General of Trinidad and Tobago (No. 2)* [1979] AC 385, the Privy Council said at page 399 – para D.
- “In the first place, no human right or fundamental freedom recognized by Chapter I of *the Constitution* is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person’s serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court.
35. After carefully considering the Petition before me, it is quite clear in my mind that the Petition is not properly laid before this Court as a constitutional issue. As such, this Court invokes the doctrine of avoidance and declines jurisdiction. Accordingly, the Petition dated 12.4.22 being devoid of merit is hereby dismissed with costs to the Respondents.

DATED AND DELIVERED IN NAIROBI THIS 15TH DAY OF SEPTEMBER 2023

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M. THANDE

JUDGE

In the presence of: -

.....for the Petitioner

.....for the 1st, 2nd & 4th Respondents

.....for the 3rd Respondent

.....Court Assistant

