



**TWW v KJH & 2 others (Petition E267 of 2021) [2024] KEHC 12070 (KLR)
(Constitutional and Human Rights) (9 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12070 (KLR)

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

PETITION E267 OF 2021

LN MUGAMBI, J

OCTOBER 9, 2024

BETWEEN

TWW PETITIONER

AND

KJH 1ST RESPONDENT

CHILDREN'S COURT (NAIROBI - MILIMANI) 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

Introduction

1. The Petition dated July 10, 2021 is supported by the Petitioner's affidavit in support sworn on even date.
2. The Petition challenges the constitutionality of the contempt of Court Orders issued by the Children Court against the Petitioner. Aggrieved, the Petitioner filed the instant suit alleging that the unlawful act was in violation of her constitutional rights.
3. The Petitioner in light of this seeks the following relief:
 - a. A declaration that pursuant to Section 5 of the *Judicature Act*, Cap 8 Laws of Kenya the Subordinate courts lack jurisdiction and judicial authority to entertain contempt proceedings and or punish for contempt other than contempt committed on the face of the court.
 - b. A declaration that the ruling and order issued on the 9th July 2021 by the Hon. G.M.Gitonga (PM) in the Children Case No.E039 OF 2021 between KJH(Kinyanjui J.Harrison) and T.W.W (TabbyRose Wanja Wamwitha) holding the Petitioner herein in contempt of the court's orders



dated the 14th January,2021 and 6th April,2021 and ordering the Petitioner to appear before court for sentencing on the 12th July, 2021 at 1130hours or any other day or time, is unlawful and unconstitutional for being in breach of Section 5 of the Judicature Act, Cap 8 Laws of Kenya as read together with Articles 10, 27, 28, 29, 48 and 50 of the Constitution.

- c. This Court be pleased to issue a judicial review order of certiorari bringing to this court and quashing the proceedings of the Children's Court Case number E039 OF 2021 between KJH (Kinyanjui J.Harrison) and T.W.W (Tabby Rose Wanja Wamwitha) of the 7th July 2021 and its consequential orders issued on the 9th July 2021 for being unlawful and unconstitutional and in violation of Section 5 of the Judicature Act, Cap 8 Laws of Kenya as read together with Articles 10, 27, 28, 29, 48 and 50 of the Constitution.
- d. This Court be pleased to order the Respondents to compensate the Petitioner for the violation and threatened violation of her rights and fundamental freedoms.
- e. Costs of this Petition be awarded to the Petitioner.
- f. Any other order or relief that this Court may be pleased to issue in the circumstances.

Petitioner's Case

4. The Petitioner stated that with the 1st Respondent, they are the parents to JHH who is the subject of Children's Court Case No. E039 of 2021.
5. She deponed that the 1st Respondent filed an application for contempt of court dated 21st May 2021 before the Children's Court accusing her of failing to comply with the Court's order dated 14th January 2021 and 6th April 2021. She contested these allegations through the grounds of opposition that were filed therein.
6. The Children Court in a Ruling dated 7th July 2021 found her guilty contempt of court and directed her to appear before it on 12th July 2021 for sentence despite her explaining the difficulties of complying with the said Court order, key reason being that the Children's Report that the Court had ordered on 22nd January 2021 to be availed had not been filed by the Children officer. She is aggrieved that despite that, the Court went ahead and found to be in contempt of court.
7. She alleges that she lives in fear of being imprisoned by the subordinate court which does not have the jurisdiction and authority in law to punish her for contempt except that which is committed in the face of the Court.
8. She contends that the authority to punish for contempt of Court is the sole preserve of the High Court and the Court of Appeal. Further that the Court relied on the Contempt of Court Act No.46 of 2016 which was declared unconstitutional. Equally she argues that the Court in issuing its pronouncement was in breach of Section 5(1) of the Judicature Act.
9. For this reason, she asserts that unless this Court suspends the Court's order, she will continue to live in fear and risk possible arrest at the detriment of the minor being that she is the primary care giver. She contends further that as a result of the 2nd Respondent's actions her rights under Articles 28, 29 and 50 of the Constitution are threatened with violation.



1st Respondent's Case

10. The 1st Respondent filed grounds of opposition dated 23rd July 2021 and a replying affidavit sworn on even date. A further supplementary affidavit sworn on 17th September 2021 was also filed in support of his case. The Petition is opposed on the premises that:
- i. The application and Petition are an abuse of Court process.
 - ii. The matters pleaded and Orders sought by the Petitioner in both the Motion and the Petition violate the doctrine of exhaustion within the context of Section 11(5) of the *Fair Administrative Action Act*.
 - iii. The Court is divested of jurisdiction to interfere with the statutory and constitutional Judicial process in the Chief Magistrates Court criminal jurisdiction in furtherance of the arrest of a statutory mandate conferred by Section 10 of the Magistrates Courts Act, as amended in 2015 to grant jurisdiction to punish for Contempt of court.
 - iv. The allegations raised herein touch on the merits of the case in the lower court's statutory jurisdiction to punish for contempt of Court, outside the purview of this Court.
 - v. There are no constitutional breaches against the Petitioner cited with precision or capable of redress demonstrated in the Motion and the Petition.
 - vi. The Petition does not stipulate what constitutional provisions were allegedly violated by the 2nd Respondent, warranting the intervention of the Court as sought, contrary to what are the mandatory demands of Rule 10(2)(c) of *Legal Notice 117 of 2013*.
 - vii. The Petitioner is guilty of material non-disclosure in that she lodged a Notice of Preliminary Objection in the Children's Court Case framing the very same Objections as such the proceedings herein constitute an abuse of Court process.
 - viii. The Petitioner appeared before the 2nd Respondent, on 15th July, 2021 and her admission of her Contempt of Court as contained in the Order of even date divests this Court of jurisdiction to entertain these proceedings.
 - ix. The Petitioner has failed to meet the set legal threshold for such a Constitutional Petition for the grant of the pleas she seeks.
 - x. The Petition is bad in law as there is no valid Affidavit forming the sub-stratum for the Petition and so the same is unsustainable in law.
 - xi. The constitutional protections availed to the Petitioner in the Contempt of Court proceedings under Article 25(c) and Article 50(1) of *the Constitution* of Kenya are sufficient protections afforded her and have not been shown to have been impinged, compromised, or otherwise vitiated against the Petitioner at any stage.
 - xiii. The Petitioner's Motion is vexatious.
11. Furthermore, the 1st Respondent in his replying affidavit in addition to reiterating his grounds of opposition alleges that the Petitioner misapprehended the legal underpinning of the contempt of court proceedings.
12. He asserts that the proceedings were based on Section 10 of the Magistrates Court Act which grants the Magistrates' court unlimited jurisdiction to punish for contempt. Nonetheless, he avers that the



Petitioner who was heard by the Children’s Court did not raise the issue of jurisdiction. Furthermore, that the Court followed the due process and rendered its verdict as guided by the law. He asserts therefore that the orders sought herein, is the Petitioner’s attempt to set aside the valid order of the Children’s Court issued on 7th July 2021.

13. He states that the Petitioner also on 10th June 2021 appealed before the High Court Family Division (Nairobi High Court Civil Appeal Family Division FA E056 of 2021) against the Children’s Court Ruling. Accusing the Petitioner of forum shopping, he stresses that he only learned of these proceedings on 16th August 2021 as the Petitioner had conveniently avoided serving him.
14. For this reason, he contends that this Court lacks jurisdiction to entertain the instant Petition by virtue of being res judicata as provided under Section 6 of the *Civil Procedure Act*.
15. He adds that the Petitioner who is in breach of the Children’s Court orders has barred him access to their son and as such this Court should not aid her culpability. He equally challenges the alleged report dated 10th July 2021 that was to form part of the Children’s officer report. This is because the doctor’s credentials were not stated.
16. He furthermore avers that the Petitioner appeared before the Children’s Court on 15th July 2021 and admitted to being in contempt of court. She as well issued an apology and so her sentencing was suspended. He proclaims in view of this that the Petitioner rushed to this Court without disclosing material facts and intent on keeping their son away from him. Moreover, he alleges that the Petition does not disclose any violation of constitutional violations. He posits thus that the Petition is an abuse of the Court process.
 - a. Furthermore, since the subject matter of this suit had been resolved, all other issues raised ought to be determined by the Children’s Court hence this Court ought to exercise restraint. To that end he is convinced that the Petition is ripe for dismissal with costs to him.

Parties’ Submissions

17. It is noted that the Parties herein have not filed submissions to the Petition. The only submissions that were filed were in response to the Petitioner’s application dated 11th February 2022 seeking withdrawal of the Petition.

Analysis and Determination

18. Majority of the issues that had been raised in the Petition have since been become moot as they got resolved along the way. On 10th March, 2023; Justice Mrima, while rendering this Court’s Ruling in this matter observed as much. He stated:

“ 17. As stated above, the Petition mainly challenges the constitutionality of the Children’s/Magistrates’ Court to punish for contempt of Court. That is a serious constitutional issue which transcends the personal boundaries of the Petitioner and the 1st Respondent into the public interest litigation spectrum. It is indeed in great public interest that this Court expresses itself on this important issue.

18. Given the nature of the Petition herein, this Court is of the firm position that the Petition herein ought to, instead, proceed to full hearing. In making this finding, this Court is alive to the fact that there some aspects of the Petition



which the parties compromised in filing the consent in the Magistrate’s Court.
Such matters, therefore, do not need to be part of this Petition...”

19. This Court is also of the firm view that it will be unnecessary and not prudent use of judicial time to attempt addressing issues that are no longer real controversies between the parties. This Court adopts the principle as elaborated in *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others* (2016) eKLR where the Court explained as follows:

“By justiciability it is meant a matter “proper to be examined in courts of justice” or “a question as may properly come before a tribunal for decision”: see Black’s Law Dictionary 9th Ed, pp 943-944. In other words, courts should only decide matters that require to be decided. Thus in *Ashwander –v- Tennessee Valley Authority* [1936] 297 U.S 288, the US Supreme Court stated that courts should only decide cases which invite “a real earnest and vital controversy”... Conversely, the court is also prevented from determining an issue when it is too late. When an issue no longer presents an existing or live controversy, then it is said to be moot and not worthy of taking the much-sought judicial time...”

20. Similarly, the Court in *Natural World Mombasa Safaris Ltd v Karuri (Civil Appeal E045 of 2022)* [2022] KEHC 9979 (KLR) (Civ) (7 July 2022) (Ruling) stated as follows:

“

14. The issue of “mootness” of a ruling, order or judgment has been discussed in several decisions relied upon by both parties to this application. Black’s Law Dictionary 10th Edition defines the term “moot” to mean – having no practical significance, hypothetical or academic, and a “moot case” as a matter in which a controversy no longer exists, a case that presents only an abstract question that does not arise from existing facts or rights”.

15. The Court of Appeal in *Okiya Omtatah Okoiti & 2 others vs Attorney General & 4 others* [2020] at paragraph 65, while citing the case of *Daniel Kaminja & 3 others (suing as Westland Environment Caretaker Group) vs County Government of Nairobi* [2019] e KLR, Mativo J stated that:

“A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. Mootness arises when there is no longer an actual controversy between the parties to a court case and any ruling by the court would have no actual practical impact”.

16. And that:

“No court of law will knowingly act in vain ... a Suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity.

17. The doctrine of mootness was further discussed in the case *National Assembly of Kenya & another vs Institute of Social Accountability & 6 others* [2017] e KLR when the court rendered that:

“...it is clear that the mootness doctrine is not an abstract doctrine. Rather, it is a functional doctrine founded mainly on principles of Judicial economy and functional competence



of the courts and the integrity of the Judicial System... the court will inevitably consider the extent to which the doctrine advances the underlying principles, the certainty and development of the law particularly *the constitution* law and public interest.”

21. Upon careful scrutiny, it is apparent that the only issue pending for determination in this matter is:
The constitutionality of the Magistrates’ Court to punish for contempt of Court.
22. In determining a matter on constitutional grounds, the Court is called to apply certain key principles. *The Constitution* under Article 259 provides the guide as follows:
 1. This Constitution shall be interpreted in a manner that—
 - a. promotes its purposes, values and principles;
 - b. advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
 - c. permits the development of the law; and
 - d. contributes to good governance.
 2. If there is a conflict between different language versions of this Constitution, the English language version prevails.
 3. Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking.
23. The Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (2014) eKLR summarized the salient principles of constitutional interpretation as follows:

“

“(137) This, in our perception, is an interpretive conundrum, that is best resolved by the application of principle. This Court has in the past set out guidelines for such matters of interpretation. Of particular relevance in this regard, is our observation that *the Constitution* should be interpreted in a holistic manner, within its context, and in its spirit. In the Matter of the Kenya National Human Rights Commission, Sup. Ct. Advisory Opinion Reference No. 1 of 2012; [2014] eKLR, this Court [paragraph 26] had thus remarked:

“...But what is meant by a holistic interpretation of *the Constitution*? It must mean interpreting *the Constitution* in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what *the Constitution* must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result” [emphasis supplied].

(138) In *Speaker of the Senate & Another v. Attorney-General & 4 Others, Sup. Ct. Advisory Opinion No. 2 of 2013*; [2013] eKLR, [paragraph 156], this Court further explicated the relevant principle:

“The Supreme Court of Kenya, in the exercise of the powers vested in it by *the Constitution*, has a solemn duty and a clear obligation to provide firm and recognizable reference-points



that the lower Courts and other institutions can rely on, when they are called upon to interpret *the Constitution*. Each matter that comes before the Court must be seized upon as an opportunity to provide high-yielding interpretative guidance on *the Constitution*; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents. The Court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship. It is to the Courts that the country turns, in order to resolve these contradictions; clarify draftsmanship gaps; and settle constitutional disputes. In other words, constitution making does not end with its promulgation; it continues with its interpretation. It is the duty of the Court to illuminate legal penumbras that Constitutions borne out of long drawn compromises, such as ours, tend to create. The Constitutional text and letter may not properly [capture] express the minds of the framers, and the minds and hands of the framers may also fail to properly mind the aspirations of the people. It is in this context that the spirit of *the Constitution* has to be invoked by the Court as the searchlight for the illumination and elimination of these legal penumbras.”

24. The law upon which Magistrates’ Courts may punish for contempt of Court is provided for in the Magistrates’ Courts Act under Section 10 which states as follows:

Contempt of Court

1. Subject to the provisions of any other law, the Court shall have power to punish for contempt.
2. A person who, in the face of the Court —
 - a. assaults, threatens, intimidates, or insults a magistrate, court administrator, judicial officer, or a witness, during a sitting or attendance in Court, or in going to or returning from the Court;
 - b. interrupts or obstructs the proceedings of the Court; or
 - c. without lawful excuse disobeys an order or direction of the Court in the course of the hearing of a proceeding, commits an offence.
3. In the case of civil proceedings, the willful disobedience of any judgment, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court constitutes contempt of court.
4. In the case of criminal proceedings, the publication, whether by words, spoken or written, by signs, visible representation, or otherwise, of any matters or the doing of any other act which—
 - a. scandalizes or tends to scandalize, or lowers or tends to lower the judicial authority or dignity of the court;
 - b. prejudices, or interferes or tends to interfere with, the due course of any judicial proceedings; or
 - c. interferes or tends to interfere with, or obstructs or tends to obstruct the administration of justice, constitutes contempt of court.
5. A police officer, with or without the assistance of any other person, may, by order of a judge of the Court, take into custody and detain a person who commits an offence under subsection (2) until the rising of the Court.



6. The Court may sentence a person who commits an offence under subsection (1) to imprisonment for a term not exceeding five days, or a fine not exceeding one hundred thousand shillings, or both.
 7. A person may appeal against an order of the Court made by way of punishment for contempt of court as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the Court.
 8. The Chief Justice may make Rules to regulate procedures relating to contempt of court.
25. The question thus becomes, Can Parliament confer jurisdiction to punish for contempt in the Subordinate Court as it did with the Magistrates' Court above? The answer lies in Article 169 of *the Constitution*. Article 169 (1) defines what constitutes the subordinate courts and these include:
- a) Magistrates' courts
 - b) the Kadhis' Courts
 - c) the Courts Martial; and
 - d) Any other Court or local tribunal as may be established by an Act of Parliament, other than courts established as required by Article 162 (2).

Article 169 (2) is what gives authority to Parliament to confer jurisdiction upon subordinate courts through legislation and reads thus:

“Parliament shall enact legislation conferring jurisdiction, functions and powers on the courts established under clause (1).”

26. The power to confer jurisdiction on the Magistrate's Court to punish for contempt having been done through legislation as directed by Parliament cannot therefore be unconstitutional. The long-held position that a Magistrate Court cannot punish for contempt changed with the amendments introduced by Parliament to give the Magistrate Court the power to punish for contempt as was articulately affirmed by the Court of Appeal in *Ramadhan Salim v Evans M. Maabi T/A Murhy Auctioneers & another* [2016] eKLR where the Court held as follows:

“Did the learned magistrate then have jurisdiction to cite and punish the alleged contemnors for the breach?

This Court in *Kyoga Hauliers Limited v Long Distance Truck Drivers & Allied Workers Union* [2015] eKLR held as follows:-

“The power to deal with contempt of court is provided for under Section 5(1) of the *Judicature Act*, Section 63(c) of the *Civil Procedure Act* and Order 40 Rule 31 of the Civil Procedure Rules. Of importance in the determination of this issue is however Section 5(1) of the *Judicature Act*, since Section 63(c) of the *Civil Procedure Act* and Order 40 Rule 31 of the Civil Procedure Rules are concerned with disobedience of an order of temporary injunction and resultant consequences which are punishment in the form of imprisonment or attachment and sale of the contemnor's property.” [Emphasis added]

Similarly, in *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others* [2014] eKLR, this Court, constituted differently, expressed itself as follows:-

“..... the only statutory basis of contempt of court law in so far as the Court of Appeal and the High Court are concerned is Section 5 of the *Judicature Act*. In addition, Section 63(c) of



the *Civil Procedure Act* provides that a disobedience of an order of temporary injunction will attract punishment in the form of imprisonment or attachment and sale of the contemnor's property. [Emphasis added]

Besides the foregoing, Section 5(1) of the *Judicature Act* provides that:-

“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England and that power shall extend to upholding the authority and dignity of subordinate courts.” [Emphasis provided]

From the above, it does appear that the magistrate did not have jurisdiction to entertain the contempt proceedings as he correctly held. That jurisdiction belonged to the High Court or Court of Appeal. It is instructive that when the High Court and this Court exercise that jurisdiction, it extends to the contempt committed in the subordinate court. The only jurisdiction the magistrate's court could exercise when dealing with contempt of court is, if it is committed in the face of the court. However, the *Magistrates' Courts Act*, 2015 which came into force on 2nd January 2016 now gives the magistrate's courts unlimited jurisdiction to punish for contempt...”

27. The Court in *re ZJA & TA (Minors)* [2020] eKLR equally discussed the traditional approach which it also rightly observed is no longer applicable. It stated:

“27. Prior to the enactment of the magistrate's *Act No. 46 of 2016* which came to force on 2nd January 2016, magistrates had no jurisdiction to punish for contempt save for acts of contempt on the face of it or disobedience of orders with regard to grant of temporary injunction under order 40 of the *Civil Procedure Act*. During that time, jurisdiction to punish for contempt was a preserve of the High court as a court with original jurisdiction pursuant to section 5(1) of the *Judicature Act*.”

28. The Court went on to find as follows in the matter.

“30. In view of the above provision, I am in agreement with the respondent that the court with original jurisdiction is the court which issued the impugned orders and not this court. See *HAO v PLS* (2017)eKLR. It is trite that jurisdiction is key and the cornerstone of litigation and without it a court cannot move a step further hence it should down its tools. See *Owners of the Motor Vessel “Lillian S” v. Caltex Oil (Kenya) Ltd* (1989)eKLR.

31. Having held as above, this court cannot proceed to determine the merits on the contempt proceedings for doing so will usurp the authority of the Magistrate's Court and further prejudice its determination should a similar application be filed in the same court. It will also curtail the parties' right of appeal in case of an appeal.”

29. Correspondingly, in *GO v ACG* [2022] eKLR the Court found as follows:

“9. Under section 10(1) and (3) of the Act, the magistrates' court can, in civil proceedings, cite and punish any person who willfully disobeys its judgment, decree, direction, order, or breaches an undertaking he has given to the court... This means that, if the applicant felt that the respondent had wilfully



disobeyed the orders issued on 27th November 2018 by the Children Court he ought to have filed a notice of motion before the same court seeking that she be found guilty of contempt of the orders and be punished for it. He instead came before the wrong court.”

30. Since *the Constitution* has given authority to Parliament to confer jurisdiction on the Magistrate Court, which it has granted by legislation as directed by *the Constitution*, I find no basis in the contention that it is unconstitutional for the Magistrate Court to punish for contempt other than contempt committed on the face of the Court when the Magistrates Court Act is wide in its application.
31. In view of the foregoing, I find no merit in this Petition which is dismissed accordingly. I concur with earlier observations expressed by Justice Mrima that the issue of jurisdiction of the Magistrate Court extends beyond the interest of the Petitioner hence I make no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 9TH OCTOBER, 2024.

L N MUGAMBI

JUDGE

