



**Mwinzi v Republic (Constitutional Petition E005 of 2024)
[2024] KEHC 14080 (KLR) (13 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14080 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CONSTITUTIONAL PETITION E005 OF 2024
LM NJUGUNA, J
NOVEMBER 13, 2024**

**IN THE MATTER OF ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLES
22(1)(2), 23(1)(3), 24(1)(A)(B)(C), 35, 165(3)(6)(7) OF THE CONSTITUTION OF KENYA
IN THE MATTER ARTICLES 25(C&D), 50(1&2(P)), 51(2),
27(1,2,4,5,6,7) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ARTICLES 20(1-4), 21(1), 47(1&2), 48, 258(1&2), 259 OF
THE CONSTITUTION OF KENYA, SECTION 136(C&D) OF THE CRIMINAL
PROCEDURE CODE AND SECTIONS 20(1), 8(1&2) OF THE SEXUAL OFFENCES ACT**

AND

**IN THE MATTER ARISING FROM THE CONVICTION AND SENTENCE IN
CRIMINAL CASE NO.12 OF 2019 AND 154 OF 2019 AT SIAKAGO LAW COURTS**

BETWEEN

JOHN MUKITI MWINZI PETITIONER

AND

REPUBLIC RESPONDENT

RULING

1. The petitioner filed an undated petition on 25th January 2024. He was charged with the offence of grievous harm contrary to section 234 of the Penal Code and the offence of defilement contrary to section 8(1) as read together with 8(2) of the *Sexual Offences Act*. The sexual offence was heard and determined, and the petitioner was convicted and sentenced to 35 years imprisonment. He was also convicted of the offence of grievous harm and he was sentenced to 5 years imprisonment and there is an appeal pending determination by the High Court.



2. Through the petition, the petitioner seeks re-evaluation of the evidence in the sexual offence. He has taken issue with the evidence adduced by one Dorcas Mwingi Ngari which persuaded the Judge who determined the appeal. He stated that the High Court has jurisdiction to order for the calling and re-examination of Safaricom Mobile data which will aid in exonerating him since he was not at the scene on the day of the incident. He prayed that the court allows his petition because the *Sexual Offences Act* has been assaulted in the face of the cited provisions of *the Constitution*.
3. In its grounds of opposition, the respondent opposed the petition, stating that it does not disclose any constitutional issue to be determined by the court. That the petitioner is seeking to have this court sit on appeal in its own decision. That the petitioner has sought leave to appeal out of time and the order has already been granted, thus he should proceed to file his appeal since the issues raised in the petition can be articulated through the appeal.
4. The application was canvassed by way of written submissions.
5. The respondent submitted that the petition does not meet the threshold for a constitutional matter since it does not raise issues of infringement of rights under *the Constitution*. It relied on the case of Anarita Karimi Njeru v Republic [1979] KECA 12 (KLR) and argued that the issues raised through the petition can be safely canvassed without touching on constitutional matters since none have been raised. That the petition challenges the findings of the trial court based on the evidence adduced thereat, yet those issues were already determined through HCCRA 21 of 2020.
6. That any other issues that the petitioner had with the findings of the trial court should be placed before the Court of Appeal. It was its argument that a constitutional petition is not open for issues that could be determined within an appeal. Further reliance was placed on the case of Gabriel Mutava v Managing Director Kenya Ports Authority & Kenya Ports Authority [2015] KEELRC 762 (KLR) and the respondent urged the court to dismiss the petition.
7. The issue for determination is whether the petition has merit.
8. The petitioner has asked the court to revisit the evidence of Dorcas Ngari and also to exercise its powers to call for further evidence in the form of Safaricom mobile data in the defilement case Siakago MCCR 12 of 2019, all in light of Articles 35(1&2), 22(1), 23(1), 165(3-7), 258(1) and 259 of *the Constitution*. The petitioner was convicted of the offence and sentenced to 35 years imprisonment. He appealed against the said decision and this court upheld the findings of the trial court.
9. For a constitutional petition to be determined as such, it must raise constitutional issues. That is, the petitioner ought to clearly state which of his constitutional rights and fundamental freedoms have been infringed and what recourse he seeks from the court. From a perusal of the petition herein, the petitioner has indeed cited provisions of *the constitution* but he has failed to demonstrate how his rights as espoused in those provisions, have been infringed. In fact, the issues he has raised are issues regarding the facts of the defilement case, which was already determined through a first appeal.
10. The doctrine of constitutional avoidance dictates that a court sitting to decide a constitutional matter must be able to identify a direct constitutional issue before it. Where the issue arising from the petition can be determined as a civil or criminal case, a constitutional court must avoid to address such an issue.



In the South African case of *S v. Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court 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.”

11. Further, in the case of *Sports and Recreation Commission v. Sagittarius Wrestling Club and Anor*, 2001 (2) ZLR 501 (S), the South African Court held thus:

“...Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights.”

12. I am also guided by the sentiments of the court in the case of *Anarita Karimi Njeru v Republic* [1979] KECA 12 (KLR)(supra). The issues of fact and law herein may be placed before the court of appeal as the avenue still remains open for the petitioner if he so wishes to do so.

13. That being said, I find that the petition lacks merit and the same is hereby dismissed.

14. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 13TH DAY OF NOVEMBER, 2024.

L. NJUGUNA

JUDGE

..... for the Petitioner

..... for the Respondent

