



**Wangui v County Government of Trans-Nzoia (Constitutional Petition
E002 of 2023) [2024] KEHC 14144 (KLR) (13 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14144 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CONSTITUTIONAL PETITION E002 OF 2023
AC MRIMA, J
NOVEMBER 13, 2024**

BETWEEN

PIUS KAMAU WANGUI PETITIONER

AND

COUNTY GOVERNMENT OF TRANS-NZOIA RESPONDENT

JUDGMENT

Background:

1. Pius Kamau Wangui, the Petitioner herein, is the owner of the motor vehicle registration No. KAY 261B [hereinafter referred to as ‘the motor vehicle’]. It is a Public Service Vehicle operating under Kitale Shuttle Services.
2. It was alleged that on 4th January 2023, as the motor vehicle made its way off Kitale main stage enroute to Nairobi, uniformed County Government officers of Trans-Nzoia County Government, the Respondent herein, without warning, threw spikes on the road puncturing the wheels of the Petitioner’s vehicle.
3. The Petitioner’s driver was accused of picking and dropping passengers outside designated areas. Consequently, the passengers were ordered to find alternative means to Nairobi while the motor vehicle was commandeered to the County Parking yard.
4. The Petitioner claimed he was fined Kshs. 13,000/- to secure the release of the motor vehicle.
5. On 10th January 2023, the Petitioner requested the release of his motor vehicle in vain.
6. The Petitioner was aggrieved that the Respondent acted in flagrant breach of *the Constitution*, the County Government Act and Regulations since he had not committed anything unlawful. He then filed a Petition which is subject of this judgment.



The Petition:

7. Through the Petition dated 26th January 2023, the Petitioner sought to vindicate the alleged constitutional infractions visited upon him by the Respondent's unwarranted conduct. He sought the following reliefs;
 - a. A declaration that the Petitioner's rights and freedoms were contravened and grossly violated by the Respondent by illegal impounding of his motor vehicle registration No. KAY 261B which is constitutionally mandated to run and manage.
 - b. A declaration that the Petitioner is entitled to the payment of damages and compensation for the violation and contraventions of his fundamental rights and freedoms under the aforementioned provisions of *the Constitution* by dint of attachment of his business chattel Reg. No. KAY 261B which amounts to interference with ownership of property and a conservatory order and or injunction do issue restraining the Respondent from violating *the constitution* and County Government Act.
 - c. General Damages, exemplary damages and moral damages on aggravated scale under *the Constitution* of Kenya and loss incurred for the Constitutional conduct by the County Government and its agents made out as hereunder;Kshs. 5,000/- for loss of business with interest thereon at Court rates from 4/01/2023 to date of payment.Kshs. 11,000/- for loss of trye.
 - d. Any further Order, writs, directions as this honourable court may give.
8. Filed together with the main Petition was an application by way of a Notice of Motion which the Petitioner sought the release of his motor vehicle pending the hearing and determination of the main suit.

The Petitioner's submissions:

9. The Petitioner urged his case further through written submissions dated 24th April 2023. It was his case that the Respondent failed to put appropriate legislation in place in the daily running of its affairs and that it had also failed to induct discipline and professionalism in the County Enforcement personnel. He, in particular, submitted that the Respondent failed to pass legislation for management and collection of public finance under the County Finance Act and the Regulation especially for parking and control of motor vehicles under the relevant County Traffic regulation.
10. The Petitioner was further aggrieved that the Respondent had failed to put in place mechanisms for disciplining rogue, insufficient and wayward employees leaving consumers of their services under their mercy. As a result, the Petitioner asserted that his right to non-discrimination, inherent dignity, privacy and not to have his possession seized, right to property and to fair administrative action guaranteed under Article 27, 28, 31(h), 40 and 47 respectively were violated.
11. As regards the plea for damages, the Petitioner referred to the decision in Joram Nyage Mutegei -vs- KENHA (2017) eKLR where it was observed that: -

.... The Petitioner has the right to do business and earn a living and continued retention of his vehicle's registration plate is a violation of his right given the circumstance of the case. The Law is to be followed and where there is no evidence, any purported action of retaining the vehicle registration is unacceptable.



12. The Petitioner further relied on the decision in *Crywan Enterprises Limited -vs- KRA (2013) eKLR* where the Court observed that statutory bodies ought to exercise power within the law.
13. It was its case that it is entitled to damages to the tune of Kshs.3 million. To that end, the Petitioner drew support from the case of *Bernard Muhilana Shimanyula -vs- AG & 7 Others (2020) eKLR* where it was observed that a monetary award for constitutional violation was not confirmed to an award of compensatory damages in the traditional sense.

The Respondent's case:

14. The Respondent challenged the Petition through the Replying Affidavit of Eliud Nabimba, its enforcement officer, deposed to on 18th May 2023.
15. It was his deposition that the Petition is an abuse of process, frivolous and incompetent deserving to be struck out. It was its case that the motor vehicle was picking around three passengers at show ground area and in the process, its enforcement officers stopped it and put the spikes between the front and the rear tires.
16. He deposed that the Petitioner's driver despite being asked not to move the vehicle, since he was under arrest for picking up passengers at undesignated area, ignored the orders and drove over the spikes thus deflating the tires.
17. It was his case that the motor vehicle was impounded and towed to the Respondent's yard and the Petitioner was asked to pay the requisite fine for the impounding the motor vehicle and the towing charges under *Trans-Nzoia County Finance Act*. He further deposed that the Respondent did not in any manner violate the fundamental rights and freedoms of the Petitioner and as such the Petition ought to be struck out.

The Respondent's submissions:

18. The Respondent filed written submissions dated 26th October 2023. It was its case that the County Government and the County Assembly are two distinct entities. The latter is mandated to formulate laws and the former implements. As such, the Respondent contended that it did not violate the Petitioner's constitutional rights and freedoms as far as promulgation of legislation was concerned.
19. In response to the claim of violation of the Petitioner's rights as a result of impounding the vehicle, the Respondent submitted that it was the Petitioner who contravened Sections 2 and 12 of the *Municipal Board of Kitale (Matatu Termini) bylaws* and the enforcement officers acted within their mandate when they stopped and impounded the Petitioner's vehicle.
20. The Respondent urged the Court to note that the Petitioner did not rebut or deny the claim of dropping and or picking passengers from an undesignated place. Further, the Petitioner did not dispute that the monies paid were fine and towing and impounding charges. The Respondent submitted that the Petitioner, therefore, failed to substantiate the allegations as set out in the Petition in respect of any infringement of the law in impounding of the vehicle.
21. In asserting the position that constitutional rights and fundamental freedoms are not absolute, the Respondent cited the case of *Marius Wahome Gitonga -vs- Kenya National Highways Authority (2019) eKLR* where it was observed that it would a cookery of all sensibleness to penalize the Respondents for imposing a fine, when they acted within what the law provides.



22. The Respondent claimed further that the Petition lacked the competency required of constitutional petitions for failing to specifically plead how his rights have been violated. It submitted that the Petitioner failed to substantiate the manner in which *the Constitution* was violated.
23. On the question of damages, it was its case that the Petitioner was not entitled since the actions of its enforcement officers was within the confines of the law. It was further its submission that the Petitioner submitted a delivery note indicating that he cancelled the journey and refunded the passengers but did not avail the receipts tendered to that effect. The case of Swaleh C. Kariuki & Another -vs- Violet Owiso Okuyu (2021) eKLR was referred to where it was observed: -
- ... that a party must present actual receipts of payment made to substantiate loss or economic injury. It is not enough for a party to provide pro forma invoices sent to the party.
24. The Respondent maintained that the Petitioner did not prove any infringement on its part to warrant payment of any damages.

Analysis:

25. From the pleadings, the responses, the arguments advanced in submissions and the decisions referred to, the issues that arise for determination are as follows: -
- i. Whether the Petition meets the threshold required of Constitutional Petitions.
 - ii. Depending on (i) above, whether the Petition is merited.
26. Going forward, this Court will now interrogate the issues in seriatim.

Whether the Petition meets the threshold required of Constitutional Petitions:

27. The Respondent's first line of defence stems from the contention that the Petition is incompetent and ought to be struck out. In its submissions, it argued that the Petitioner merely cited some constitutional provisions but failed to substantiate the extent and the manner in which his constitutional rights and fundamental freedoms were violated.
28. This Court will, hence, take a brief tour of the threshold question in constitutional Petitions.
29. For a Petition to attain the propriety test required of constitutional Petitions, it must meet the threshold as was set out in the longstanding case of Anarita Karimi Njeru -vs- Republic (1979) eKLR. In Nairobi High Court Constitutional Petition No. E406 of 2020 Renita Choda vs. Kirit Kapur Rajput (2021) eKLR, this Court discussed the question comprehensively as follows: -
33. Long before the downing of the new constitutional dispensation under *the Constitution* of Kenya 2010, Courts have variously emphasized the need for clarity of pleadings. I echo the position.
34. *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (commonly referred to as 'the Mutunga Rules') also provide for the contents of Petitions. Rule 10 thereof provides seven key contents of a Petition as follows: -
- Form of petition.
10. (1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.
- (2) The petition shall disclose the following—



- (a) the petitioner's name and address;
 - (b) the facts relied upon;
 - (c) the constitutional provision violated;
 - (d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
 - (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
 - (f) the petition shall be signed by the petitioner or the advocate of the petitioner; and
 - (g) the relief sought by the petitioner.
35. Rule 10(3) and (4) of the Mutunga Rules also have a bearing on the form of petitions. They provide as follows: -
- (3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.
 - (4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.
36. Rules 9 and 10 are on the place of filing and the Notice of institution of the Petition respectively.
37. The Supreme Court in *Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others* case (supra) had the following on Constitutional Petitions: -
- Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru vs. Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.
38. Both parties are in agreement with what a constitutional issue is. They both referred to *Fredricks & Other vs. MEC for Education and Training, Eastern Cape & Others* case (supra) where the Court, rightly so, delimited what a constitutional issue entails and the jurisdiction of a Constitutional Court as follows: -
- The Constitution* provides no definition of 'constitutional matter'. What is a constitutional matter must be gleaned from a reading of *the Constitution* itself: if regard is had to the provisions of... Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with *the Constitution*, as well as issues concerning the status, powers and functions of an organ of State.... the interpretation, application and upholding of *the Constitution* are also constitutional issues. So too is the question of the interpretation



of any legislation or the development of the common law promotes the spirit, purport and object of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of *the Constitution*, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly on extensive jurisdiction...

38. In the United States of America, a constitutional issue refers to any political, legal, or social issue that in some way confronts the protections laid out in the US Constitution.
39. Taking cue from the foregoing, and broadly speaking, a constitutional issue is, therefore, one which confronts the various protections laid out in a Constitution. Such protections may be in respect to the Bill of Rights or *the Constitution* itself. In any case, the issue must demonstrate the link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened or threatened and the manifestation of contravention or infringement. In the words of Langa, J in *Minister of Safety & Security vs. Luiters*, (2007) 28 ILJ 133 (CC): -
... When determining whether an argument raises a constitutional issue, the Court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the Court to consider constitutional rights and values...
40. Whereas it is largely agreed that *the Constitution* of Kenya, 2010 is transformative and that the Bill of Rights has been hailed as one of the best in any Constitution in the world, as Lenaola, J (as he then was) firmly stated in *Rapinder Kaur Atal vs. Manjit Singh Amrit* case (supra) ‘... Courts must interpret it with all liberation they can marshal...’
41. Resulting from the above discussion and the definition of a constitutional issue, this Court is in agreement with the position in *Turkana County Government & 20 Others vs. Attorney General & Others* case (supra) where a Multi-Judge bench affirmed the profound legal standing that claims of statutory violations cannot give rise to constitutional violations.
30. The factual foundation of this dispute is not in contest. Both parties share the common ground that the motor vehicle was impounded by the enforcement officials of the Respondent on allegation of stopping and picking passengers at an undesignated area. Therefore, for the facts to ascend into a finding that there are constitutional issues, the Petitioner had the obligation to not only disclose the constitutional provisions violated, but to also disclose the manner of violation and importantly, the nature and manifestation of the injury caused to him.
31. As was observed by the Supreme Court in *Communications Commission of Kenya & 5 Others - vs- Royal Media Services Limited & 5 Others* the Petitioner had the obligation to draw the link between it, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement.
32. With the foregoing in mind and having appreciated the Petition, it is manifest that at the heart of the dispute is how the Respondent regulates traffic within the county. In order for the dispute to be categorized as raising constitutional issues, the Petitioner bore the obligation to draw the nexus between the Respondent’s conduct and how it was inconsistent with *the Constitution*.
33. This Court has perused the Petition. It is quite comprehensive and the cause of action was well captured. It has the factual background, the constitutional foundations including various Articles of *the Constitution*, regional and international instruments, several local legislative provisions, the particulars of unconstitutionality and the reliefs sought.



34. The manner in which the Petition was tailored satisfies the criteria discussed in Communications Commission of Kenya & 5 Others -vs- Royal Media Services Limited & 5 Others. This Court, therefore, finds no difficulty in holding that the Petition raises constitutional issues.
35. Having answered the first issue in the affirmative, the focus now turns to the second issue.

Whether the Petition is merited:

36. The Respondent once again fronted a scathing attack on proof of the Petition. On the basis of Sections 107, 108 and 110 of the *Evidence Act*, the Respondent contended that the alleged infringement was not proved.
37. To the contrary, the Petitioner posited that there was ample evidence in support of the Petition and that the evidence attained the threshold of the proof required in law.
38. The matter before Court is a constitutional Petition. Like other disputes, the conduct of constitutional Petitions is generally governed by *the Constitution* and the law.
39. Article 159(2)(d) of *the Constitution* call upon Courts and Tribunals to administer justice without undue regard to procedural technicalities.
40. Speaking of the essence of Article 159(2)(d) of *the Constitution*, the Supreme Court of Kenya in *Law Society of Kenya v. The Centre for Human Rights & Democracy & 12 Others, Petition No. 14 of 2013* held that: -

Article 159(2) (d) of *the Constitution* is not a panacea for all procedural shortfalls.

41. And, in *Patricia Cherotich Sawe v Independent Electoral & Boundaries Commission (IEBC) & 4 others* [2015] eKLR the Supreme Court further held that: -

Not all procedural deficiencies can be remedied by Article 159....

42. The practice and procedure in constitutional Petitions are further provided for under the Mutunga Rules.
43. Rule 20(1) of the Mutunga Rules is on the manner in which constitutional Petitions ought to be heard. Such Petitions may be heard by way of affidavits or written submissions or oral evidence. Rule 20(3) of the Mutunga Rules provide that a Court may upon application or on its own motion direct that the Petition or part thereof be heard by oral evidence. Rule 20(4) and (5) of the Mutunga Rules provide for the summoning and examination of witnesses.
44. The conduct of constitutional Petitions is also guided by various laws. For instance, the *Evidence Act* applies to matters generally relating to evidence. The *Evidence Act* is clear on its application to constitutional Petitions and affidavits in Section 2 thereof. The provision provides as follows: -
 1. This Act shall apply to all judicial proceedings in or before any Court other than a Kadhi's Court, but not to proceedings before an arbitrator.
 2. Subject to the provisions of any other Act or of any rules of Court, this Act shall apply to affidavits presented to any Court.
45. Sections 107(1), (2) and 109 of the *Evidence Act* are on the burden of proof. They state as follows:



- (1). Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

and

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

46. The burden of proof on a Petitioner in a constitutional Petition was also addressed by the Supreme Court in *Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others* case (supra).
47. As said stated before, the Petition was heard by way of affidavit evidence. The Respondent was categorical from the filing of its Response to the Petition that it was not agreeing with the Petitioner's allegations and called for strict proof.
48. One of the contestations related to whether the Respondent formulated the requisite legislation to regulate the operations of public service vehicles within the county. On this issue, the Respondent took a two-pronged approach. First, that the duty to make any laws governing the County rested with the County Assembly which was not a party in the proceedings, and, second, that indeed there was the necessary legislation in place.
49. Having addressed its mind to this sub-issue, so to say, this Court finds that, one, it is the prevailing legal position that the duty to make any legislation governing the affairs within the Respondent lies with the County Assembly. Truly, that entity is not part of these proceedings. Two, the Petitioner by himself detailed the necessary laws in place that regulate the operations of public service vehicles within the County. He carefully and correctly pleaded in the Petition and traced the relevant laws from *the Constitution*, international instruments, local legislation and lastly to the Municipal Board of Kitale (Matatu) By-Laws, 2020. The Petitioner went further to reproduce By-Laws 12 [on Stopping and Parking] and By-Law 25 on the penalty upon contravention of By-Law 12.
50. This Court, therefore, finds and hold that, unlike the contention by the Petitioner, there is instead, the necessary legislative authority regulating the operations of the public service vehicles within Kitale town in place. The Petitioner, therefore, seems to have answered the very question he raised in his pleadings. In a nutshell, the allegation of lack of the necessary legislation hereby fails and is disallowed.
51. Next is the aspect as to whether the Respondent's officers acted within the law in impounding the motor vehicle. The record has it that the Petitioner posited that there were no designated places for stopping and picking passengers within Kitale town. However, as already found above, that position is contrary to the provisions of the Municipal Board of Kitale (Matatu) By-Laws, 2020 and to the Petitioner's own averments. This Court, hence, finds that the Municipal Board of Kitale (Matatu) By-Laws, 2020 designated specific areas for public service vehicles to stop and pick passengers within Kitale town. The Court further notes that the Respondent's disposition that it was the driver of the motor vehicle who recklessly engaged the motor vehicle into motion after its officers placed spikes between the tyres and directed the driver not to drive off was not contravened. The disposition was on oath vide the Replying Affidavit of Eliud Nabimba, one of the Respondent's enforcement officers. This Court, therefore, finds as much.



52. The foregoing discussion, hence, solidifies the position that the Respondent put in place the necessary legislation to regulate the matatu business within Kitale town; that the driver of the motor vehicle stopped and picked passengers at an undesignated place within Kitale town; that the Respondent's officers impounded the motor vehicle for breaching the law; that they placed spikes between the tyres, but nevertheless, the driver knowingly and recklessly drove off and bursted the tyres. Further, the motor vehicle was eventually towed to the County Parking yard and the Petitioner accordingly fined. Upon the intervention of this Court, the Petitioner paid the requisite fines and penalties amounting to Kshs. 13,000/= into Court pending the determination of the Petition. The motor vehicle was subsequently released to the Petitioner.
53. The above set of circumstances finds favour with the Respondent. There being evidence that the motor vehicle was impounded for flouting the law and that it was the driver thereof who intentionally drove past the spikes, then the Petitioner's allegations appear not to have any legal legs to stand on. This Court finds no fault on the part of the Respondent.
54. The Petition was, therefore, not proved despite the Petitioner's extensive and comprehensive pleadings. The Petitioner, just like any other person, has the unequivocal duty to comply with the law. That is the only way the constitutional imperative that this country is governed by rule of law under Article 10 of *the Constitution* will prevail.
55. The second issue is, therefore, answered in the negative. Having dealt with the two issues herein, the discussion has now to come to an end.

Disposition:

56. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 and later elected to the Judicial Service Commission thereby mostly being away from the station. Apologies galore.
57. In the end, the Petition is hereby determined as follows: -
- a. The Petition is hereby disallowed.
 - (b) The amount of Kshs. 13,000/= paid into Court by the Petitioner shall be released to the Respondent.
 - (c) The Petitioner shall shoulder the costs of the Petition.

Orders accordingly.

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

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Wanyonyi, Learned Counsel for the Petitioner.

No appearance for Miss Jeruto, Learned Counsel for the Respondent.

Chemosop/Duke – Court Assistants.

