



**Nzaku v Advocates Disciplinary Committee, the Law Society of Kenya;
Kirathe (Interested Party) (Petition E285 of 2022) [2024] KEHC 15753 (KLR)
(Constitutional and Human Rights) (13 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15753 (KLR)

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

PETITION E285 OF 2022

EC MWITA, J

DECEMBER 13, 2024

BETWEEN

STEVEN NZAKU PETITIONER

AND

**THE ADVOCATES DISCIPLINARY COMMITTEE, THE LAW SOCIETY OF
KENYA RESPONDENT**

AND

MUCHIRI KIRATHE INTERESTED PARTY

JUDGMENT

Background

1. The petitioner, an Advocate practicing in the name and style of Messrs. Nzaku & Nzaku Advocates has challenged the decision issued by the respondent on November 8, 2021.
2. The petitioner represented the interested party in Employment and Labour Relations Cause No. 1966 of 2015. A difference arose between the petitioner and interested party, prompting the interested party to file of a complaint before the Advocates Disciplinary Committee (ADC) (the respondent) being Miscellaneous Cause No. 139 of 2019.
3. The petitioner filed a replying affidavit on May 22, 2019 in response to that complaint. On November 3, 2020, the interested party filed a further affidavit which the petitioner argued was without leave. The matter came up for plea on July 15, 2019 and the petitioner entered a plea of not guilty. The matter was then fixed for hearing on 13th January 2020.



4. On that date, 13th January 2020, the matter was adjourned on the request by the interested party's counsel and was rescheduled for 6th April 2020 to allow for compliance by the parties. On that date, the respondent did not sit because of a lockdown due to Covid-19.
5. When the matter came up on 1st March 2021, the petitioner's counsel sought an adjournment which was opposed by the interested party's counsel who asked that the matter do proceed under rule 18 of the Advocates (Disciplinary Committee) Rules, 1990. The matter was adjourned and the hearing set for 10th May 2021.
6. The petitioner stated that when the matter came up for hearing on 10th May 2021, the respondent disregarded the petitioner's plea to cross examine the interested party and directed the matter to proceed under rule 18 of the Advocates (Disciplinary Committee) Rules 1990. Judgment was reserved for 11th October 2021, but the day was declared a public holiday.
7. On 14th October 2021, the petitioner received a notice dated 12th October 2021 for delivery of Judgment through the office and personal emails from the Law Society of Kenya indicating that judgment would be delivered on 18th October 2021 but judgment was not ready on that day.
8. On 18th February 2022 at 18:26PM, the petitioner received an email through the office address attaching a cause list for 21st February 2022 and a link for the meeting showing that the matter was slated for mitigation and sentencing on that day.
9. On 21st February 2022, the petitioner's advocate informed the respondent that the matter was pending judgment. However, the secretary (the CEO) indicated that the matter was for mitigation and sentence as judgment had been delivered on 8th November 2021. A further date for the mitigation and sentencing was again set for 13th June 2022.

Petitioner's case

10. The petitioner argued that although judgment was delivered on 8th November 2021, it is dated 11th August 2021 and was delivered without notice to him or his advocates. The petitioner asserted that he was convicted for an offence or act which was not contained in the interested party's complaint before the respondent and as such he had no opportunity to defend himself over that offence.
11. The petitioner maintained that the respondent failed to consider that he had successfully represented the interested party before the ELRC and as such no prejudice had been caused to the interested party.
12. The petitioner argued that that in the judgment, the respondent failed to consider the weight of evidence tendered and the circumstances of the matter and was arrived at without observing the principles of natural justice. The petitioner took the position that the respondent acted ultra vires the law governing the process of challenging or enforcing legal fee agreement between a client and an advocate under the *Advocates Act* and as provided for under sections 45 and 47 in arriving at the decision to order or direct the petitioner to tax his bill of costs.
13. The petitioner argued that the respondent's decision and actions were unreasonable; were in breach of the principles of proportionality; were laced with malafides and violated the legal principle of legitimate expectation. They further violated articles 2(1) & (2), 24(1) 25(a) & (b), 28, 29(d) & (f), 47, 48 and 50(1) of *the Constitution*.
14. The petitioner relied on article 22 of *the constitution* and the decision in *Wilson Olal & 5 others v Attorney General & 2 others* [2017] eKLR for the proposition that this court has the mandate to protect and uphold *the constitution* in matters of protection of human rights.



15. The petitioner cited the decision in *Salim Juma Onditi v Minister for Local Government & Ors* [2008] eKLR for the argument that the respondent could not have reached the decision it did if it had exercised its discretion properly thus, violated principles natural justice, acted ultra vires, acted with improper motive, acted unreasonably, against the principle of proportionality and legitimate expectation.
16. The petitioner further relied on article 47 of *the constitution*, sections 4(3) (f) and 4(4) of the *Fair Administrative Action Act*, 2015 and the decision in *Republic v Kenya School of Law & 2 others, ex-parte Juliet Wanjiru Njoroge & 5 others* [2014] eKLR to support his case.
17. The petitioner again argued that the respondent violated article 27(1) of *the constitution* in arriving at its decision by considering the interested party's affidavit evidence which should have been disregarded. He relied on rule 9 of the Commissioners for Oaths (Fees on affidavits) Rules and the decisions in *Francis A. Mbalanya v Cecilia N. Waema* [2017] eKLR and *Kenya National Union of Nurses v Kiambu County Public Service & 5 others* [2019] eKLR.
18. The petitioner maintained that both the process and the decision by the respondent were tainted with illegalities, hence unconstitutional. He relied on the decision in *Republic v Council of Legal Education & Commission for University Education Ex-Parte Mount Kenya University* [2016] KEHC (KLR) and urged the court to grant the declarations and orders sought in the petition.

Respondent's case

19. The respondent opposed the petition through a replying affidavit and written submissions. The respondent stated that it is empowered under section 60 of the *Advocates Act* to receive complaints by any person as against an advocate for professional misconduct.
20. According to the respondent, the petitioner received instructions from the interested party to represent him in ELRC Cause No. 1966 of 2015-Muchiri Kirathe v Teachers Service Commission. Although the interested party paid legal fees the petitioner did not attend court a number of times when the cause was scheduled to come up in court and failed to update him on the progress of the cause. The interested party withdrew instructions and sought a refund of Kshs. 130,000 and return of documents which the petitioner failed to do. Aggrieved, the interested party filed a complaint before it under section 60(3) of the *Advocates Act* for professional negligence and misconduct.
21. The respondent contended that the complaint filed established a prima facie case; opened a cause No. 139 of 2019 and ordered that the petitioner be called upon to take plea. The petitioner plea de not on 15th July 2019 and was directed to file and serve a replying affidavit within 21 days which he complied with. The matter was then fixed for hearing on 13th January 2020.
22. On 13th January 2020, the interested party's counsel sought leave to file a supplementary affidavit which was granted and the matter was fixed for mention on 6th April 2020 to confirm compliance but due to the Covid 19 pandemic a hearing was rescheduled for 1st March 2021 and the petitioner was informed of the hearing date through a notice dated 15th February 2021.
23. On 1st March 2021, the petitioner's advocate sought an adjournment on the premise that the petitioner was not ready to proceed with the hearing as he was engaged elsewhere. The request for adjournment was opposed by the interested party's advocate but the hearing was deferred to 10th May 2021.
24. The respondent contended that in view of the declarations of measures restricting the committee's operations due to the Covid-19 pandemic, it (respondent) exercised its discretion and directed that the hearing do proceed under rule 18 of the Advocates (Disciplinary) Rules The petitioner's counsel was present when the directions were issued on 10th May 2021 and did not raise opposition. Counsel



did also indicate that he was keen to cross examine the interested party on the contents of his affidavit. Judgment was reserved for 18th October 2021 in the presence of counsel for both parties.

25. The respondent argued that the petitioner was served with notices for delivery of judgment by email and was furnished with a link to join to join a zoom hearing. The judgment was delivered on 8th November 2021 but the petitioner was absent despite service. Judgment dated 11th August 2021 was delivered in favour of the interested party. Sentencing and mitigation was scheduled for 21st February 2022.
26. It is the respondent's position that the petitioner was duly served with hearing notices, judgment notices and the complaint and all other pleadings in the complaint. He was also given an opportunity to be heard thereby complying with rule 18 of the Advocates (Disciplinary Committee) Rules and the rules of natural justice.
27. The respondent denied violating the petitioner's rights asserts guaranteed under articles 27, 28, 29, 48 and 50 of *the Constitution*. The interested party's supplementary affidavit was filed with leave granted on 13th January 2020. It also complied with sections 53 and 60(3) of the *Advocates Act*.
28. The respondent argued that even though the judgment was dated 11th August 2021 but delivered on 8th November 2021, the petitioner did not demonstrate that he had suffered any prejudice. The petitioner did not meet the threshold for granting the prayers sought and relied on the decisions in Anarita Karimi Njeru v attorney General [1979] eKLR; Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR.
29. The respondent again cited decisions. among others, of Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 [2015] eKLR; Uhuru Muigai Kenyatta v Nairobi Star Publications Limited [2013] eKLR; Maggie Mwauki Mtaleki v Housing Finance Company of Kenya Ltd [2015] eKLR and Meme v Republic & another [2004] eKLR that the petitioner had an alternative remedy in seeking to have its judgment set aside.
30. According to the respondent, the petition challenges the merits of the decision which amount to asking this court to sit on appeal over its decision which jurisdiction falls elsewhere. The respondent argued that this court is only mandated to interrogate the legality of the process and relied on Orange Democratic Movement v Yusuf Ali Mohamed & 5 others [2018] eKLR.
31. The respondent maintained that it did not act ultra vires its powers in ordering of the petitioner to file a bill of costs since section 60(4), (6) and (9) of the *Advocates Act*, empowers it to so act.

Determination

32. I have considered this petition, the response and arguments by parties. The issue for determination is whether the respondent's decision violated petitioner's rights and fundamental freedoms. The petitioner argued in affirmative while the respondent took a contrary position.
33. The facts of this petition are largely undisputed. The petitioner and interested party were advocate-client. The petitioner acted for the interested party in some matter but their relationship took a turn. The interested party filed a complaint before the respondent and after investigations, a cause was registered and the petitioner took a plea of not guilty. Parties were directed to file pleadings which was done; the matter was set down for hearing; was heard and a judgment dated August 11, 2021 was delivered on November 8, 2021, the respondent finding in favour of the interested party.
34. The petitioner argued that although judgment was delivered on November 8, 2021, it is dated August 11, 2021 and was delivered without notice to him or his advocate. The petitioner also argued that he



- was convicted for an offence that was not contained in the interested party's complaint and as such he had no opportunity to defend himself over that offence.
35. The petitioner further argued that the respondent failed to consider that he had successfully represented the interested party before the ELRC and as such no prejudice had been caused to the interested party; that the respondent failed to consider the weight of evidence; there was violation of the principle of natural justice; the respondent acted ultra vires the law governing the process of challenging or enforcing a legal fee agreement between a client and an advocate under the Advocates Act which is provided for under sections 45 and 47 in ordering or direct the petitioner to file his bill of costs for taxation.
 36. The petitioner's arguments were countered by the respondent. It argued that it acted within the law, did not violate the rules of natural justice and the petitioner's counsel did not seek to cross examine interested party when directions were issued that the matter do proceed under rule 18.
 37. I must state from the outset that this court is not sitting on appeal over the respondent's decision. It has been moved under article 22 (1) of the constitution which grants every person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or threatened. The court then exercises its jurisdiction under article 23(1) as read with article 165, to determine the application for redress of any denial, violation, infringement of, or threat to rights or fundamental freedoms.
 38. In this respect, the petitioner has to establish to the satisfaction of the court that his rights and fundamental freedoms have been infringed, denied or threatened for the court to respond positively and grant an appropriate relief as required by article 23(3) of the constitution. The essence of such relief must be to ensure that the rights enshrined in the constitution are protected and enforced. (Fose v Minister of safety and Security 1997 (3) SA 786 (CC)).
 39. I have carefully considered the petitioner's grievances in this petition. The core of these grievances is that the rules of natural justice were violated as he was not given an opportunity to cross examine the interested party since the matter proceeded under rule 18 of the Advocates (Disciplinary Committee) Rules.
 40. The record of the proceedings for 10th May 2021 before respondent shows that counsel for both parties were present on that day and were ready to proceed. The respondent then directed that the matter would proceed under rule 18. Counsel for the petitioner did not object and did not inform the respondent that he wished to cross examine the interested party.
 41. Furthermore, rule 18 of the Advocates (Disciplinary Committee) Rules confers on the respondent discretion to direct that a matter proceeds on the basis of affidavits evidence. It was not enough for the petitioner to complain regarding invocation of rule 18. He was required to show that the respondent wrongly exercised its discretion in invoking that rule and, if so, how.
 42. Allegations on violation of the rules of natural justice through invocation of rule 18 was also not established as the petitioner's counsel was present but did not object to the matter proceeding under that rule or intimate the desire to cross examine the interested party.
 43. Regarding notices on delivery of judgment, I note that the respondent sent notices on delivery of judgment. And the argument that notice was not served is not sufficient to establish non service as this is an allegation made in the petition and has been countered in the response. It is not an issue this court can resolve through affidavit evidence. The petitioner did not also demonstrate the prejudice he may have suffered if the notice was served since, he is aware of the outcome of the matter.



44. The petitioner again raised the issue of the date of the judgment and the date of delivery. According to the petitioner, whereas the judgment is dated 11th August 2021, it was delivered on 8th November 2021. As I have stated elsewhere in this judgment, this court is not sitting on appeal over the respondent's decision. The petitioner did not show that the date of the judgment and its date of delivery had in any way violated his rights and fundamental freedoms so that his court can remedy the violations. The petitioner did not also show any prejudice he may have suffered as a result of the different dates.
45. I also note from the record of respondent's proceedings that counsel for the interested party had sought leave to file a supplementary affidavit contrary to the petitioner's argument that the supplementary affidavit was filed without leave.
46. The petitioner came to this court seeking redress for constitutional remedy due to violation of his rights and fundamental freedoms enshrined in the Bill of Rights. He was required to demonstrate that the respondent's action(s) violated the constitution and his rights and fundamental freedoms.
63. Article 19 of the constitution is plain that the Bill of rights is an integral part of our democratic state and the framework for social, economic and cultural policies. The Article also makes it plain that the purpose of recognizing and protecting human rights and fundamental freedoms is to, among others, preserve the dignity of the individual. Article 19 also affirms that human rights belong to each individual and are not granted by the state. They are only subject to the limitations contemplated by the constitution.
63. Human rights and fundamental freedoms are for enjoyment to the greatest extent possible and not for curtailment. In this respect, the Court of Appeal stated in Attorney General v Kituo Cha Sheria & 7 others [2017] e KLR, that "rights have inherent value and utility and their recognition, protection and preservation is not an emanation of state largesse because they are not granted, nor are they grantable, by the State."
63. The Court of Appeal emphasized that under article 20, the Bill of Rights applies to all law and binds all State organs and all persons so that no one is exempt from its dictates and commands. Rights attach to all persons by virtue of their being human and respecting rights is not a favour done by the state or those in authority. They merely follow a constitutional command to obey.
63. In this respect, petitioner had to satisfy this court that his rights and fundamental freedoms were violated or infringed by the respondent for the court to respond as required of it by article 23(3) and grant an appropriate relief because, as the Constitutional Court of Uganda stated held in Tinnyefuze v Attorney General of Uganda (Constitutional Petition No. 1 of 1996) [1997] UGCC 3, "if a petitioner succeeds in establishing breach of a fundamental right, he is entitled to the relief in exercise of constitutional jurisdiction as a matter of course."
63. In this petition, the petitioner did not discharge the obligation by demonstrating any of the violations he alleged. The concerns raised in the petition would be raised in an appeal but not as violations of the constitution and fundamental rights and freedoms. I see none of these violations here.

Conclusion

63. Having considered the petition, response and argument as well as the constitution and the law, the conclusion I come to, is that the petitioner did not prove that the respondent violated any of his rights and fundamental freedoms in the Bill of Rights. Consequently, and for the above reasons, this petition fails and is dismissed. I make no order on costs.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF DECEMBER 2024



E C MWITA
JUDGE

