



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 248 OF 2019

**IN THE MATTER OF : ARTICLES 19, 20, 21(1), 22(1), 23(1) AND (3) AND 165 (3) (a),
(b), (i), 11, 6 and 7 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010;**

AND

**IN THE MATTER OF : ARTICLES 25(a), 27(1), 27(2), 28, 29(a), 29(f),
51(1), 29(d), 29(f) OF THE CONSTITUTION OF KENYA, 2010;**

AND

**IN THE MATTER OF: SECTION 56(3), 59, THE FIFTH SCHEDULE SECTION 3, 7, 9 (D), 14,
THE SIXTH SCHEDULE 4, 5, AND 8 OF THE NATIONAL POLICE SERVICE ACT, NO. 11A OF 2011;**

AND

IN THE MATTER OF: RULE 4 OF THE EVIDENCE (OUT OF COURT CONFESSIONS) RULES, 2009;

-BETWEEN-

BILLY SIMON KINUTHIA.....PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

SAFARICOM PLC.....PROPOSED INTERESTED PARTY

RULING

THE PETITION

1. The Petitioner through a petition dated 21st June, 2019, and filed on 24th July, 2019, seeks the following reliefs :-

a) That a declaration be issued that detaining the Petitioner without justification and without informing him of the reasons of detention, holding him incommunicado, holding him in deplorable and inhumane conditions, threatening him with death using physical assault, beating him, torturing him and using verbal abuse and coercing to reveal the pass code to his mobile phone an iphone 7 by the 2nd Respondent that resulted in the petitioner breaking his ribs was a violation of the Petitioner's rights protected in Article 29 of the Constitution on freedom and security of the person;

b) A declaration that the petitioner's right to freedom from torture and cruel, inhuman or degrading treatment or punishment under Articles 25(a), 27(1), 27(2), 28, 29(a), 29(f), 51(1), 29(d), 29(f) of the constitution 2010 were contravened by the 2nd Respondent;

c) That an Order of certiorari be issued quashing the evidence collection by the 2nd Respondent from the petitioner's iphone 7, whose collection was occasioned by physical harm, holding him incommunicado, holding him in deplorable and inhumane conditions, threatening him with death, beating him and torturing him is hereby unconstitutional and further contravention of THE EVIDENCE (OUT OF COURT CONFESSIONS) RULES, 2009 RULE 4;

d) That an order of certiorari be hereby issued removing into this court and quashing the entire proceedings against the Petitioner before the Chief Magistrates Court at Milimani Law Courts in Criminal Case No. 962 of 2019;

e) That an order for exemplary and punitive damages be and is hereby issued against the 1st and 2nd Respondents jointly and severally, in their individual personal and official capacities on account of their gross violation of the Petitioner's fundamental freedoms and rights as enumerated in the Petition;

f) Any other or further orders, writs, as the court may deem appropriate;

g) Costs of the suit plus interest;

THE PROPOSED INTERESTED PARTY'S APPLICATION

2. The Proposed Interested Party, through its Notice of Motion dated 9th September, 2019 supported by an affidavit of Daniel M. Ndaba, sworn on even date, seeks the following orders:-

a) That Safaricom PLC be added to these proceeding as an interested party;

b) That the costs of this application be awarded to the proposed interested party;

3. In a nutshell, the application is premised on the grounds that the criminal proceedings in Nairobi Chief Magistrate Court Criminal Case No. 962 of 2019;R vs Simon Billy Kinuthia & Brian Wamatu Njoroge, which the petitioner sought to quash arose from a complaint lodged by the proposed interested party vide its letter dated 30th May, 2019.

4. The proposed interested party avers that there was a data breach at its premises and the data was obtained from its servers which is the subject of the criminal proceedings.

5. It is averred further that the criminal case has a significant impact on its defense should any regulator or authorized body commence administrative action it.

6. The Applicant further state, that it has information necessary for the court to reach a fair and just determination and enlisted the said information among others that the Petitioner was its employee and abused his position in the proposed interested party's company resulting to a breach of his contractual and statutory duty to the proposed Interested Party.

7. The Applicant sought to be given an opportunity to be heard before such a fundamental case is quashed.

THE PETITIONER'S RESPONSE

8. In response to the proposed interested party's application vide a Replying Affidavit dated **11th October, 2019** sworn by the Petitioner on even date, the petitioner averred that upon lodging a complaint, the mandate is upon the relevant authorities to follow up on the complaint and that the proposed interested party's role ceases once its complaint is lodged.

9. Further it is urged that this Petition is mostly concerned with the infringement of Petitioner's constitutional rights rather than criminal litigation which is a preserve of the criminal courts and therefore the proposed interested party was not a necessary party to the proceedings.

10. The Petitioner opposes the proposed Interested Party's application, on the grounds, that the joinder of party who has not made allegations against violation of his rights as to fair trial, is prejudicial to the Petitioner, and contrary to the rules of natural justice.

11. The Petitioner prayed for dismissal of the said application.

THE PROPOSED INTERESTED PARTY'S SUBMISSIONS

12. The proposed interested party through its submissions, dated **29th, June, 2020**, submits that, Safaricom PLC, being the complainant in **Nairobi Chief Magistrate Court Criminal Case No. 962 of 2019; R vs Simon Billy Kinuthia & Brian Wamatu Njoroge**, had a right to be joined in this Petition, since it has an identifiable stake or legal interest in the proceedings.

13. Further it is stated that the interest the Applicant has is, that confidential data of safaricom's subscribers, which was unlawfully copied,

hence it has a duty to its subscribers and the Communications Authority of Kenya, the regulator, to ensure culprits whether it be the Petitioner or any other person are brought to book. The Applicant cited **Section 5 and 27A (2) of the Kenya information and communications Act Cap 411A** in support of their assertions.

14. In addition the Applicant cited the case of **Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others [2017] eKLR**, and **Joan Akoth Ajuang & another v Michaels Owuor Osodo - Chief Simur Kondiek, Ukwala Location & 3 others; Malaika Foundation (Proposed Interested Party) [2020] eKLR**, in support of its case.

15. The Applicant prayed that its application be allowed.

THE PETITIONER'S SUBMISSION

16. The Petitioner through his submissions, dated **13th, July, 2020**, admitted that even though, he was a former employee of the proposed interested party, he had been aggrieved by the 2nd Respondent, who beat him resulting in broken ribs, he thus sought redress, against the respondents and not the proposed interested party.

17. It is further submitted, that he sought redress against the officers of the 2nd Respondent, who caused injuries on his person and also, that he is contesting the use of evidence, that was sought out from him using force and threats. He urges therefore the reliefs he sought had no bearing on the proposed Interested Party.

18. The Petitioner cited the case of **Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others [2017] eKLR and Skov Estate Limited & 5 others v Agricultural Development Corporation & another [2015] e KLR**, in support of his case.

19. The Petitioner prayed, that the proposed interested party's application be dismissed.

BACKGROUND OF THE PETITION

20. The Petitioner was a former employee of the proposed interested party and worked in different capacities from varying promotions.

21. On the 7th June, 2019, while the petitioner was going about his business, police officers from the department of criminal investigations arrested him, and took him to their offices in Kiambu Road, for investigations.

22. The Petitioner contend that he was questioned for over one and a half hours, and upon inquiring on why information was needed from him, he was met with physical harm with the police officers roughing him, causing him harm, untold physical harm, resulting to injuries on his person.

23. It is further stated that he was coerced, harassed, tortured, to reveal private company information by the police officers, and for fear of his life, occasioned by the physical harm and threats, he revealed his pass codes for the police officers, to acquire the information, that they needed.

24. The Petitioner was therefore presented to Court on 11th, June, 2019, where he was charged and later released on a cash bail, of Kenya Shillings one million.

25. The Petitioner avers, he sought medical assistance where he was diagnosed, with a myriad of illnesses among them broken and fractured ribs.

26. It is for this reason, that the petitioner seeks the intervention of this Honourable Court, on grounds, that his fundamental rights and freedoms as enshrined in the Constitution, are being and will continue to be infringed by the respondents.

ANALYSIS AND DETERMINATION

27. Having carefully considered the Petition, dated **21st, June, 2019**, the proposed Interested Party's application, dated **9th, September, 2019** and the Petitioner's response, and submissions, by all the parties, there arise one single issue for determination:-

i. Whether the proposed interested party has met the threshold to be enjoined in these proceedings.

28. The issue on the eligibility of a proposed interested party to be joined as a party, in any proceedings is well settled. in the Court of Appeal case of **Moses Wachira Vs Niels Bruel & 2 Others** (Supra) the Court quoted the Supreme Court in **COMMUNICATIONS Commission of Kenya & 4 others vs. Royal Media Services Limited & 7 Others** (supra) and pronounced itself on who "**an interested party**" is and held as follows:

"In determining whether the applicant should be admitted into these proceedings as an interested party we are guided by this Court's decision in the Mumo Matemo case where the court (at paragraphs 14 and 18) held:

"An interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she

is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. Similarly in the case of Meme v. Republic, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:

(i) Joinder of a person because his presence will result in the complete settlement of all the question involved in the proceedings;

(ii) Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;

(iii) Joinder to prevent a likely course of proliferated litigation.

We ask ourselves the following questions: a) what is the intended party's state and relevance in the proceedings and b) will the intended interested party suffer any prejudice if denied joinder.?" (Emphasis added)

29. Further, the *Black's Law Dictionary, 9th Edition* on page 1232 defines "an interested party" as:

"A party who has a recognizable stake (and therefore standing) in the matter." (Emphasis added)

30. Under Order 1 Rule 10(2) of the Civil Procedure Rules, it states;

"(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added." (Emphasis added)

31. Also noteworthy, the joinder of an interested party in the proceedings, was well elucidated, by this court, in the case of *Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others [2017] eKLR*, where the Court stated;

"Rule 2 of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013[1] defines an interested party as follows:-

"Interested Party" means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation;" (Emphasis added)

Rule 7 (2) provides that a Court may on its own motion join any interested party to the proceedings before it. The broad principles which should govern disposal of an application for joinder are that the court can, either on an application made by any interested party or on its own motion direct any person as party to be enjoined in the proceedings.

Regarding the exercise of the courts discretion on its own motion in applications of this nature, like all discretions, it must be exercised judiciously based on sound principles.[2] Importantly, the main purpose of joining parties is to enable the court to deal with matter brought before it and to avoid multiplicity of suits. It is a fundamental consideration that before a person can be joined as party, it must be established that the party has an interest in the case. In addition, it must be clearly demonstrated that the orders sought in the suit would directly and legally affect the party seeking to be enjoined.[3]

It must be emphasized that, among others, the purpose of joinder of parties is to avoid multiplicity of suits. It is a mandate of the court that as far as possible all matters in controversy between the parties should be completely and finally determined and all multiplicities of legal proceedings concerning any of the matters be avoided. In this regard, it would be appropriate and in the interest of justice that all matters touching and concerning the subject matter of the suit in the case at hand be determined finally and completely to avoid litigating over the same matters again; which dictates that the Applicant be joined as a party to the suit. (Emphasis added)

32. Following the aforementioned case laws, the basis of joining an interested party, to proceedings in a nutshell are, that the proposed interested party ought to have an identifiable stake or genuine legal interest or duty in the proceedings, before the court but the entity is not a party to the proceedings. It is also of relevance, that the said party ought to be able to assist the Court, in resolving all the disputes in the said matter, to avoid multiplicity of legal proceedings concerning the matter and save on Courts valuable time as well as reducing case backlog.

33. It is noted, that the proposed Interested Party, in its application dated 9th, September, 2019, posited, that it was the complainant in the criminal proceedings in *Nairobi Chief Magistrate Court Criminal Case No. 962 of 2019; R vs Simon Billy Kinuthia & Brian Wamatu Njoroge*, which the petitioner sought to quash, in this Petition under (prayer c of the petition), which arose from a complaint lodged by the proposed interested party, vide its letter dated 30th, May, 2019, (Annexure DN-1).

34. Further it is noted, that, the proposed Interested Party, averred it had necessary information to assist this Honourable Court, reach a fair and just determination which includes:-

a) *The Petitioner was the proposed Interested Party's employee holding the position of senior manager, networks & M-Pesa*

systems Auditor;

b) The Petitioner's duties included foreseeing, identifying and eliminating risk to the proposed interested party's system to ensure that the privacy of data in its custody is not breached;

c) The Petitioner abused that position and breached his contractual and statutory duty to the proposed Interested Party and the owners of the data.

d) There is sufficient evidence, separate from the contested piece of evidence, justifying the continuance of the criminal proceedings, for instance, there is evidence obtained from the petitioner's own laptop which he voluntarily handed over to the proposed Interested Party for forensic examination.

35. Considering, all the aforesaid averments of the proposed Interested Party, it is clear, that it has demonstrated, that it has an identifiable stake or genuine legal interest, being the complaint in *Nairobi Chief Magistrate Court Criminal Case No. 962 of 2019;R vs Simon Billy Kinuthia & Brian Wamatu Njoroge*, which the Petitioner seeks to quash in this Petition.

36. Further, the nature of the criminal proceedings, involves question of confidential data of safaricom subscribers, which it avers to have been unlawfully copied, and the proposed interested party, has a legal duty to protect its subscribers, from such unlawful acts. This has been stipulated under *Section 27A (2) of the Kenya Information and Communications Act, Chapter 411A*, which provides;

“(2) A telecommunication operator shall ensure that—

(a) existing subscribers register their SIM-cards within such time period as may be prescribed;

(b) proper physical or electronic records are kept of the information referred to in subsection (1) and any change in such information;

(c) the registration details of a subscriber are kept in a secure and confidential manner, and shall not be disclosed without the written consent of the subscriber. (Emphasis mine)

37. It is clear, from the above Section, that the proposed Interested Party, has a clear legal interest, in this matter. The arguments by the Petitioner, that he seeks redress for violation of his constitutional rights, which involve the respondents and not the proposed Interested Party do not hold water in view of the proposed Interested Party's averments herein. This is because it turns out that, there is a clear connection of the dispute, between the proposed Interested Party, the Petitioner and the Respondents, and all their involvement in this Petition will assist, this Honourable Court, sufficiently resolve all the disputes pertaining to this matter. This will also aid in avoiding multiplicity of proceedings litigating on the same subject matter herein.

38. Upon perusal of the petition herein, the petitioner seeks redress on infringements of his constitutional rights, caused by the Respondents on a complaint instituted by the proposed Interested Party. Further, the Petitioner, seeks an order to quash the proceedings in *Nairobi Chief Magistrate Court Criminal Case No. 962 of 2019;R vs Simon Billy Kinuthia & Brian Wamatu Njoroge*, in which the proposed interested party, is the complainant and key prosecution witness. I find, that there is necessity of the proposed Interested Party, to be part of these proceedings and assist this Honourable Court, in determining all the issues in controversy in this Petition.

39. The upshot is that the Applicant, has met the threshold for it, to be enjoined in these proceedings. I further find that in the interest of substantial justice the proposed Interested Party, should be enjoined in these proceedings as an Interested Party. The application dated 9th, September, 2019, is allowed.

40. Accordingly the Proposed Interested Party, M/s Safaricom PLC is enjoined in these proceedings as an Interested Party. The Interested Party to file and serve response to the Petition within 15 days from the date of this Ruling.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 3RD DAY OF JUNE, 2021.

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J. A. MAKAU

JUDGE