



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A. C. Mrima, J.)

PETITION NO. 520 OF 2017

JIMI WANJIGI.....1ST PETITIONER

IRENE NZISA WANJIGI2ND PETITIONER

-VS-

INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

RULING ON SENTENCE

1. On 21st June, 2019 this Court (**Hon. Mwita, J.**) delivered a judgment in this matter.

2. In the judgment, the Court decreed as follows: -

a) A declaration be and is hereby issued that the 1st, 2nd and 3rd Respondents breached the petitioners' fundamental rights including the right to privacy guaranteed under Article 31 of the Constitution.

b) A declaration be and is hereby issued that the 1st, 2nd and 3rd Respondents' actions of confiscating the 1st Petitioner's licensed firearms was oppressive, unfair, unreasonable, irrational, abuse of power and illegal.

c) An order is hereby issued directing the 1st, 2nd and/or 3rd Respondent's to forthwith rerun to the 1st petitioner all firearms and ammunition taken from the petitioners' residence and in particular; one pistol make smith and Wesson Serial number SW99; One Glock Pistol Serial Number UAB 630; one Assault Rifle make Mini Archer Serial Number 2013/MIII attached with a Laser Serial UAB 646; One Assault Rifle make M4CQ Serial Number CN 005433/13; One Glock 19 Pistol Serial Number URG 798 and One Glock 19 Pistol Serial Number UAB 632.

d) The Respondents do bear cost of the petition.

3. One year later, the Petitioners filed a Notice of Motion dated 7th September, 2020 in an attempt to enforce the said judgment. The application sought for the following orders: -

1. That this application be certified urgent and be heard ex-parte in the first instance.

2. That the Honourable court do issue summons to Mr. George Maingi Kinoti, 3rd Respondent to attend to and appear before the Honourable Court on a date to be determined, to show cause why he should not be committed to jail or penalized for contempt of court.

3. That the 3rd Respondent, Mr. George Maingi Kinoti be committed to jail for six months; or penalized on such terms as the Honourable Court may determine, for contempt of court for having deliberately disobeyed orders of this court issued on the 21st June, 2019.

4. That in the alternate to Prayer 3 above, the 3rd Respondent, Mr. George Maingi Kinoti be committed to jail for a **SUSPENDED SENTENCE** of six months to take effect at such a time after he vacates office as the Director of Criminal Investigations for contempt of court for having deliberately disobeyed orders of this court issued on the 21st June, 2019.

5. That any other or further orders of the court guard towards protecting the dignity and authority of the court.

4. The application was strenuously defended.

5. On 11th February, 2021 this Court rendered a ruling on the said application.

6. The Court found the 3rd Respondent herein, Mr. George Maingi Kinoti, in contempt of the Court judgment and the resultant decree.

7. With a view to accord the 3rd Respondent yet another opportunity to purge the contempt, the Court made the following further orders: -

(a) The Director of Criminal Investigations shall within 30 days of service of this order comply with the judgment of this Court delivered on 21st June, 2019 and the resultant decree;

(b) This matter shall be fixed for a Mention on 25/03/2021 with a view to ascertain compliance and/or for further orders of the Court.

8. For some reasons, the matter did not proceed as scheduled up to the 12th July, 2021. On the said date, the Court heard the Counsel for the parties and fixed the matter for sentence hearing or a Notice to show cause why the Director of Criminal Investigations should not be sentenced for contempt of Court. The hearing was on 26th July, 2021.

9. When the matter came before Court on 26th July, 2021 Counsel Miss Mwangi who appeared for Mr. George Maingi Kinoti, informed the Court that the said Mr. George Maingi Kinoti had filed an Affidavit in response to the Notice to show cause. Counsel then requested that the matter do proceed in camera and also indicated that Mr. George Maingi Kinoti will be attending Court with a view of sharing some information with the Court. Counsel sought for another hearing date.

10. Amid serious objections by the Petitioners, the Court nevertheless allowed the application for an adjournment and rescheduled the hearing to 27th September, 2021.

11. The matter was virtually called out in the morning of 27th September, 2021. Counsel Miss Mwangi sought for time allocation. The matter was scheduled for 02:30pm in open Court.

12. When the matter was called out in the afternoon, Miss Mwangi informed the Court that there was no Court order requiring the personal attendance of Mr. George Maingi Kinoti. However, Counsel was ready to proceed with the sentence hearing.

13. The Court was taken aback by the turn of events on the part of Miss Mwangi in alleging that there was no order of the Court requiring the appearance of her client. To the Court's recollection, it was Miss Mwangi who had sought for an adjournment in order for her client to personally appear before Court for the sentence hearing. Be that as it may, since Miss Mwangi indicated her readiness to proceed with the sentence hearing, the matter was heard.

14. The contemnor, Mr. George Maingi Kinoti, relied on an Affidavit he swore on 22nd July, 2021 in showing cause why he should not be sentenced for contempt of Court. In the Affidavit which was drawn and filed by the Hon. Attorney General, the deponent clearly stated that the state of affairs in the whole matter had been properly explained to him by a State Counsel.

15. For completeness of the record, I will herein below reproduce the contents of the said Affidavit: -

1. THAT I am the Director of Criminal Investigations and hence competent to swear this Affidavit.

2. THAT I have read the pleadings filed by the Petitioner in this matter and the same has been explained to me by the State Counsel on record and I wish to state as follows.

3. THAT I had instructed/delegated my officers to deal and respond to the Petition herein and hence all the Affidavits have been deponed by the Investigating Officer C.I Maxwell Otieno.

4. THAT the State Counsel on record contacted me on 21/7/21 and duly informed me that the matter is coming up for Notice to show cause why I should not be sentenced for contempt of court.

5. THAT I am a state officer and I have at all times obeyed court Order as I have sworn to uphold the rule of law

6. *THAT on 31/1/2018 the then secretary Firearm Licensing Board Mr. Samuel Kimaru revoked the Petitioner's firearm licence and the same was communicated to the Petitioner.*
7. *THAT the Petitioner thereafter by virtue of the said revocation is not allowed to hold, possess or own a firearm until the Licence is reinstated by the Firearms Licensing Board.*
8. *THAT some of the firearms that are subject of petition do not belong to the Petitioner and as such they cannot be released to him as that would be a violation of the Firearm Act.*
9. *THAT some of the firearms that are subject to this Petition cannot be held by a civilian and as earlier deponed to in the affidavit of Maxwell Otieno, it will be against the Law, public interest and a threat to the national security to release the same to the petitioner.*
10. *THAT I am not the custodian of civilian firearms as the same are held by the Chief Firearm Licensing Officer.*
11. *THAT I have read the Affidavit of Maxwell Otieno wherein he deponed about the whereabouts of the Firearms in question; I wish to state that my office only hold guns that have been recovered from Crime Scenes, Police Issue and not the Civilian Firearms.(annexed hereto and marked as GK 2 is the said Affidavit)*
12. *THAT I am well aware that the Petitioner's Firearm License was revoked by the Firearm Licensing Board and not by my office and hence the Petitioner should pursue his firearms from Chief Firearm Licensing Board.*
13. *THAT the Petitioner has all along cited a wrong person for contempt of court as I do not hold any firearms belonging to the Petitioner as the same are held by the Licensing Board that revoked his license.*
14. *THAT I am aware that the Petitioner's Licenses have been previously revoked and the same were reinstated upon Appeal. He should pursue the same avenue for reinstatement of the same.*
15. *THAT I have not violated Court Order to warrant my sentencing because the Petitioner should pursue the Chief Firearm Licensing Board for his firearms.*
16. *THAT the contempt proceedings were misplaced and the Petitioner has cited the wrong person for contempt as the person mandated to deal with civilian firearms is the Firearm Licensing Board.*
17. *THAT I swear this Affidavit in opposition of the Notice to show Cause why I should not be committed to jail.*
18. *THAT what is deponed herein is true to the best of my knowledge save wherein the source is otherwise state.*

16. The gravamen of the foregoing response by Mr. George Maingi Kinoti was a reiteration of the position he took during the hearing of the contempt application. The position was that he was not about to bow to the orders of the Court. In essence, instead of Mr. George Maingi Kinoti showing cause why he should not be sentenced for contempt of Court, he re-opened the hearing of the application for contempt. Unfortunately, the application was long spent.

17. There is no doubt that Mr. George Maingi Kinoti made it absolutely clear that he was not about to obey the orders of the Court.

18. This Court had raised the issue of the failure of the Respondents to seek for a stay of execution of the judgment and the decree either before the Court of Appeal or this Court after lodging a Notice of Appeal. That was in paragraphs 48 to 50 of Ruling No. 1. This Court stated as follows: -

48. The judgment was rendered on 21st June, 2019. The Respondents timeously filed a Notice of Appeal. It is evenly dated. Since the lodging of the Notice of Appeal in June 2019, the Respondents have neither sought for nor obtained an order staying the judgment and the decree of the Court. That is over one and a half years ago. Counsel for the Respondents did not address this Court on why no stay of execution has ever been sought since. It is suprising that even after the Respondents were served with the application way back in September, 2020 still no action towards seeking an order of stay was taken.

49. It is, therefore, clear that the Respondents are not likely to comply with the judgemnt and decree of this Court. It is also clear that the Respondents are not intent in seeking any stay orders pending the outcome of the appeal.

50. The above analysis, therefore, yields that there is no single plausible reason why the judgment and the decree herein cannot be satisfied by the Respondents.

19. Ruling No. 1 was delivered on 11th February, 2021. The sentence hearing was on 27th September, 2021. That was a period of over six months. Still, even after Mr. George Maingi Kinoti was found guilty of contempt of Court neither his Counsel nor himself took any action towards either purging the contempt or seeking any stay orders. In other words, Mr. George Maingi Kinoti, stayed put and waited to see what the Court will do to him in the face of his outright defiance. That explains the reason why he reiterated his position that he was not going to comply with the orders of the Court at the sentence hearing.

20. Upon a careful consideration of the response by the contemnor, Mr. George Maingi Kinoti, this Court finds that he willfully chose not to

address the subject at hand. Instead, with the guidance of his Counsel, the contemnor took to his guns and remained defiant that he was not about to obey the orders of the Court. As said, Mr. George Maingi Kinoti, neither saw the need to seek a stay of the judgment and decree or any of the orders in place.

21. The trajectory taken by Mr. George Maingi Kinoti after he was found guilty of contempt of Court is an open further defiance of the Court orders. Instead of addressing the Court on why he should not be sentenced as he had already been found guilty, Mr. George Maingi Kinoti opted to revisit the spent contempt application.

22. **Article 2** of the Constitution *inter alia* declares the Constitution as the supreme law which binds all persons and all State organs at both levels of government. It also provides that the validity or legality of the Constitution is not subject to any kind of challenge and that any law that is inconsistent with it is void to the extent of that inconsistency. Further, any act or omission in contravention of the Constitution is invalid. Article 3 places an obligation upon every person to respect, uphold and defend the Constitution.

23. Speaking on the Constitution, *Ringera, J* in *Njoya and Others vs. Attorney General [2004] 1 KLR 232, [2008] 2 KLR (EP) 624 (HCK)* stated thus: -

... the Constitution is the supreme law of the land; it's is a living instrument with a soul and a consciousness; it embodies certain fundamental values and principles and must be construed broadly, liberally and purposely or teleologically to give effect to those values and principles.

24. In *Joseph Kimani Gathungu vs. Attorney General & 5 Others Constitutional Reference No. 12 of 2010* the Supreme Court of Kenya (Ojwang, JSC) stated as follows: -

A scrutiny of several Constitutions Kenya has had since independence shows that, whereas the earlier ones were designed as little more than a regulatory formula for State affairs, the Constitution of 2010 is dominated by "social orientation", and as its main theme, "rights, welfare, empowerment", and the Constitution offers these values as the reference-point in governance functions.

25. **Article 10** of the Constitution provides for the national values and principles of governance which bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements any public policy decisions. One of them is the rule of law.

26. In this case, it would readily come to the fore to any person directing his or her mind to the rule of law and the circumstances of the matter, that the best cause of action was for any party who is dissatisfied with any order of the Court to either lodge an appeal and seek stay orders or seek to review the said orders. In so doing, one will be playing within the confines of the rule of law. Unfortunately, that was not the case here.

27. One of the cardinal duties of this Court is to enforce the Constitution and the law. It is the very Constitution which makes it clear that no one is above the Constitution or any law. Like caged animals, one is free to move, but within the constitutional and legal confines. However, in this case, Mr. George Maingi Kinoti decided to and broke through the borders of the Constitution in not upholding the rule of law.

28. This Court is really at a loss as to why Mr. George Maingi Kinoti did not simply seek to stay the judgment and orders of this Court. Instead, he continued to defiantly violate the very Constitution which he ought to uphold.

29. The only reasonable conclusion in the unique circumstances of this matter is that Mr. George Maingi Kinoti has decided to openly disregard Court orders and does not even care to seek any orders of stay. That is very unfortunate and it is the height of impunity.

30. In the wake of this new constitutional dispensation based on the 2010 Constitution, it is imperative for anyone to certainly know that Kenya has undergone a governance transformation. It is not business as usual. The days of acting with impunity and nothing happens are long gone. As we are here today, it is the Constitution and the Constitution alone. If Kenyans feel that the Constitution in a way does not serve them well, there are options to that. Certainly, one of the options cannot be impunity.

31. I believe I said enough to derive the point that everyone has a duty to respect Court orders.

32. As once said by the 26th President of the United States of America, one Theodore Roosevelt: -

No man is above the law and no man is below it; nor do we ask any man's permission to obey it. Obedience to the law is demanded as a right; not as a favour.

33. The Court of Appeal in *Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR* stated as follows: -

The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by the Constitution. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy

34. As I come to end of this matter, I must share some happenings in affirming my calling and the oath of office as a Judge of the High Court of Kenya.

35. On appointment into office, I took the following oath: -

I,, a judge of the High Court do swear in the name of the Almighty God to diligently serve the people and the Republic of Kenya and to impartially do Justice in accordance with this Constitution as by law established, and the laws and customs of the Republic, without any fear, favour, bias, affection, ill-will, prejudice or any political, religious or other influence. In the exercise of the judicial functions entrusted to me, I will at all times, and to the best of my knowledge and ability, protect, administer and defend this Constitution with a view to upholding the dignity and the respect for the judiciary and the judicial system of Kenya and promoting fairness, independence, competence and integrity within it. So help me God.

36. I have, with the help of the Almighty God, endeavored to uphold the oath of office since then.

37. Recently, I handled a matter and issued some orders. The orders were directed towards some senior State officers. I was surprised to be approached by an emissary sent by one of the said State officers. The emissary had one clear message. That, I should stop being personal and cease to issue what was described as unfavorable orders. The message did not end there. I was further informed that if I do not heed to the warning, I will be dealt with firmly and finally using many other processes at their disposal.

38. I am not new to such threats and actual acts of violence against me. I recall during the last election cycle I handled an election Petition. Several emissaries were sent to me with instructions in the manner in which I was to determine the Petition. I declined the invitation and informed them that I will decide the matter purely on the basis of the law and evidence. Later, I made my position clear during one of the Court appearances.

39. That was not the end of the matter. My position immediately elicited a vicious reaction. My house was burgled into. It was ransacked. Things were thrown all over. Save for a safe which was carried away, everything was left in the house. The safe was abandoned some few kilometers from my house. In utter shock and surprise, everything in the safe was intact except the broken lock.

40. I have shared the foregoing not out of fear, but to affirm my position that I will endeavor to uphold the oath of office. I will, as usual, continue to discharge my functions in the best way possible without fear or favour. In the event, I err, I would be most grateful to be corrected within the rule of law.

41. I must also add that I have never imagined myself being personal to any of the parties in a matter. I deal with matters on the platform of neutrality and fairness coupled with balance and objectivity. I, therefore, urge the litigants who appear before me to be assured that their matters will be decided on the strength of the evidence and the law and that they should not even have an iota of any form of victimization or bias against any of them. If any party feels aggrieved by any orders of the Court, let them consider acting within the law. That is the only way we will all uphold the Constitution.

42. Having said so, I will now consider the most appropriate sentence in this matter. In doing so, I remain alive to the manner in which the contemnor has treated the orders of this Court. I am also alive to the fact that neither mitigations nor purging of the contempt was ever attempted.

43. In the end, I now make the following final orders: -

(a) Mr. George Maingi Kinoti is hereby sentenced to four (4) months imprisonment for contempt of Court.

(b) Mr. George Maingi Kinoti shall within seven (7) days surrender himself to the Officer-in-charge of Kamiti Maximum Prison with a view of serving the sentence.

(c) In the event that Mr. George Maingi Kinoti fails to avail himself as ordered above, a Warrant of Arrest will issue against him. The Warrant of Arrest shall be forthwith executed by the Inspector General of Police.

(d) In the further event that the Inspector General of Police fails to execute the Warrant of Arrest, the same shall remain valid and be executed at any time including when Mr. George Maingi Kinoti leaves the office of the Director of Criminal Investigations.

Orders accordingly.

DELIVERED, DATED and SIGNED at NAIROBI this 18th day of November, 2021

A. C. MRIMA

JUDGE

Ruling virtually delivered in the presence of:

Mr. Willis Otieno, Counsel for the Petitioners.

Miss. Mwangi, Counsel for Mr. George Maingi Kinoti.

