



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO. 21 OF 2019

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)
PRACTICE AND PROCEDURE RULES 2013**

AND

**IN THE MATTER OF: CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLE 22 OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: CHIEF MAGISTRATES COURT AT SHANZU MISCELLANEOUS CRIMINAL APPLICATION NO. 13
OF 2009 (REPUBLIC VERSUS PAUL JESSIE MUNGATIA)**

BETWEEN

1. PAUL JESSE MUNGATIA
2. CAROLINE NKATHA GITONGA
3. JAMES MURIUNGI CHABARI
4. CHARLES GUANTAI.....PETITIONERS

VERSUS

1. HONOURABLE D. ODHIAMBO, RESIDENT MAGISTRATE, SHANZU
2. ALICE OCHOLA
3. OFFICE OF DIRECTOR OF PUBLIC PROSECUTIONS
4. DIRECTOR OF CRIMINAL INVESTIGATIONS
5. MARTIN OTIENO OMUMBO
6. MALEYA KAGASI ABISALOM
7. P.C OKELLO JUMA
8. DOUGLAS MOROWA.....RESPONDENTS

JUDGMENT

The Petition

1. The Petition before the court dated 8th March, 2019 prays for the following orders:

- a) A declaration that the 4th Respondent neglected its obligations to advocates or prosecution counsel under its payroll on the decision in Michael Rotich versus Republic or in the alternative, a declaration that the 2nd Respondent was aware of that decision and of the provisions of articles 25, 49 and 50 of the Constitution but opted to disregard them in order to assist her kinsman.
- b) Orders of certiorari under Article 23 to quash orders given by the 1st Respondent on 5th March, 2019.
- c) An order for immediate release of the 1st Petitioner on condition that if he is to be charged with any disclosed offence he will present himself to the Magistrate's Court at Mombasa.
- d) An order giving bail pending arrest of the 2nd, 3rd and 4th Petitioners (in consideration that they were detained without trial and without being taken before a court for 9 days) on condition that they will present themselves to the magistrates Court at Mombasa when required to do so. The Court to consider that they need to attend their infant children in Meru and that they have exhausted all their resources being away from home for close to 2 weeks.
- e) A declaration that the 1st, 2nd, 6th and 7th Respondents have no immunity under the Constitution or any written law in the circumstances of this Petition and that they are individually liable to the Petitioners in their personal capacity it being the law in Kenya that the state does not and cannot sanction civil servants or state officers to violate citizen's rights.
- f) An order compelling the 4th and 7th Respondents jointly and severally to refund to the 2nd Petitioner Kshs. 13,000.00
- g) An order compelling the 4th and 6th Respondents jointly and severally to refund to the 3rd Petitioner the sum of Kshs. 7,000.00
- h) A mandatory injunction compelling the 4th and 6th Respondents jointly and severally to repair the 4th Petitioner's car and return it to his home in Meru at their cost and if the engine is found have seized to replace that engine or the whole of motor vehicle registration number KBV 296 G
- i) Damages for kidnapping or unlawful and illegal arrest be awarded to the 2nd, 3rd and 4th Petitioners.
- j) Damages for illegal search and seizure be assessed and paid to the 4th Petitioner.
- k) Punitive and aggravated damages for unlawful, illegal and malicious detention and imprisonment to be assessed and paid to the Petitioners by the Respondents jointly and severally.
- l) A declaration that he 1st, 2nd, 3rd and 4th Respondents were aware or ought to have been familiar with the decision of this court in Michael Rotich versus Republic [2016 eKLR] and that they intentionally colluded in the unlawful and illegal detention of the 1st Petitioner with a further declaration that the 1st, 2nd, 3rd and 4th Respondents are incompetent or incapable of understanding and applying that decision and article 25 (c), 48, 49 and 50 of the Constitution.
- m) A declaration that Misc. Criminal Application No. 13 of 2019 ought not to have been filed at Shanzu and that the filing of the application at Shanzu Law Courts amounted to forum shopping.
- n) A declaration that the arrest of the 2nd, 3rd and 4th Petitioners at Meru on 23.2.2019 and 24.2.2019 and their removal and transfer to Mombasa before any complaint was recorded or reported to any police station amounted to kidnapping and therefore a terrorist act.
- o) A declaration that the 6th Respondent trespassed upon the 4th Petitioner's motor vehicle registration Number KBV 296 G when he forcefully drove that vehicle from Meru to Mariakani without the authority of the 4th Petitioner as well as assessment and payment of damages for the unauthorized use of that vehicle.
- p) An order of prohibition prohibiting the 1st Respondent and any other magistrate at Shanzu from hearing any matter of any dispute between the 5th Respondent and the Petitioners including any Criminal Case or application.
- q) An order of prohibition or injunction prohibiting the 2nd, 3rd, 4th, 5th, 6th or 7th Respondents from arresting the 2nd, 3rd and 4th Petitioners.
- r) Costs of and incidental to this Petition be paid by the Respondents jointly and severally.

2. The petition is supported by the Verifying Affidavit sworn on 8/3/2019 by James Muriungi Chabari and a Supplementary Affidavit sworn by Triphosa Ncororo Jesse.

3. The petition revolves around the alleged arrest of the Petitioners and their subsequent alleged mistreatment by the State and/or its agents. The Petitioners' case is that the 3rd and 4th Petitioners were arrested in Meru on 23/2/2019 by the 7th and 8th Respondents. The 4th Petitioner was subsequently released on cash bail and ordered to report to the police station in Meru on the 24/2/2019. On the 24/2/2019, the 3rd and 4th

Petitioners were bundled in Motor Vehicle Registration number **KBV 296G** (one of the suit vehicles) and driven to Mombasa. The Petitioners aver that this was wrong because there is a police station in Meru and there was no need of driving the suit vehicle all the way to Mombasa. The 2nd Petitioner, on the other hand, was arrested by the 7th Respondent on the 24/2/2019 in Meru and later released on police bond and issued with a requisition to compel attendance in Mombasa. The 2nd Petitioner arrived in Mombasa on the 27/2/2019. The 2nd, 3rd and 4th Petitioners were then directed to report at the Regional Police Headquarters every day from the 27/2/2019 at 8:00 am upto 6:00 p.m. until the 4/3/2019 when, on alleged legal advice, they refused to be subjected to the continued alleged detention without trial and illegal confinement.

4. The Petitioners' case is that the 5th Respondent is abusing his office by ordering his juniors to arrest, detain and intimidate the Petitioners in order to settle a private dispute with the 1st Petitioner. When the 1st Petitioner returned to Mombasa on the 4/3/2019 and attempted to resolve their differences with the 5th Respondent, he was arrested, fingerprinted and ordered to immediately pay Kshs. 1,000,000/= failure to which he was to be jailed. The 1st Petitioner was later locked up at Central Police Station when he failed to raise the Kshs. 1,000,000/=. On the 5/3/2019, he was taken to Shanzu Law Courts at around 1:00 pm to face charges when the 2nd Respondent sought to have the 1st Petitioner held in detention in violation of the 1st Petitioner's rights. The 1st Respondent ordered that the 1st Petitioner be held at the Central Police Station for 5 days pending investigation.

5. The reason for the arrest given to the Petitioners in Meru was that they evaded payment of duty for motor vehicles. However, when they arrived in Mombasa they were informed that they were involved in theft of motor vehicles. The Petitioners aver that motor vehicle registration KBR 259 G was sold by the 1st Petitioner to the 3rd Petitioner in 2013, while the 4th Petitioner had purchased motor vehicle registration NO. KBV 296G from the 1st Petitioner in 2013.

6. The Petitioners state that the alleged mistreatment of the Petitioners arises from the fact of alleged ethnic bias in the prosecution of the matter. The Petitioners state that this is so because they believe that:

- a) the complaint (the 5th Respondent) is Luo by tribe.*
- b) the 7th Respondent who is the investigating officer is a Luo.*
- c) the prosecuting Counsel is a Luo.*
- d) the magistrate, Honorable D. Odhiambo is a Luo.*
- e) the 6th Respondent is Luo or speaks Luo.*
- f) there are Law Courts at Mombasa within a walking distance from central police station.*
- g) the complainant resides in Mombasa and works at Regional Police Headquarters Coast, which is within walking distance from Mombasa Law Courts.*
- h) no explanation was given to the Petitioner as to why the complainant a Luo needed a Luo prosecutor, a Luo investigating officer or a Luo judicial officer or why he had to be driven to Shanzu in order to be placed under continued detention by a Luo Judicial officer.*
- i) the police station nearest to Shanzu Law Courts within Mombasa County is Bamburi Police Station. No explanation was offered why the 1st Petitioner was held at Central Police Station or why he was driven from Central Police Station to Shanzu and returned to the said station.*
- j) the prosecutor and the magistrate were headhunted in order to assist a kinsman in the illegal detention without trial to force him to settle a civil dispute.*

7. For the foregoing reasons the Petitioners aver that their rights have been violated and hence the petition.

The Response

8. The 2nd and 3rd Respondents opposed the petition vide a Replying Affidavit sworn on 27/5/2019 by ALICE OCHOLA who avers that on 5/3/2019 she was the Counsel on duty at the prosecution office when the 7th Respondent went to their offices and informed her of the case, and that he needed an application as required under Article 24 of the Constitution, to be presented before court to detain the 1st Petitioner for 24 more hours. The 2nd Respondent then prepared the Application (Misc. Application No. 13 of 2019) and presented the same to Court. The 2nd Respondent avers that she was not head hunted by the 7th Respondent and that she does not know any of the parties in the case, and the application wasn't drafted to assist the complainant, investigating officer and 6th Respondent as alleged or at all.

9. The 2nd Respondent further states that the Office of the Director of Prosecution does not have a say as to which judicial officer should handle which matter once a case has been lodged in court, and that the decision on the same is purely administrative. The 2nd Respondent states that the court which issued the Order is a Senior Principal Magistrates' Court which falls under the Chief Magistrates' Court in Mombasa, and thus the 1st Respondent is competent to hear and determine matters emanating from Bamburi and Shanzu area. She further

avers that issues of sufficiency of evidence and or ownership of the suit motor vehicles are issues that ought to be left to the trial court. The 2nd Respondent avers that the 1st Petitioner was arrested on 4/3/2019 at 1711 Hours vide OB 115 /4/3/2019, and arraigned in court on 5/3/2019 before the 24 Hours had lapsed and was then informed as to why he would be detained for another 5 days.

10. The 5th Respondent opposed the Petition vide a Replying Affidavit sworn on 28/5/ 2019 by himself. He avers that he had initially reported the theft of the suit motor vehicles to the Tononoka Police Post and obtained an OB No. 6/17/02/2019. When the 1st Petitioner was booked the police booked him with OB No. 110/2/3/2019. The 5th Respondent's case is that the 1st Petitioner first sold the 5th Respondent's two vehicles Registration KBR 259 G and KBV 296 G to the 3rd Petitioner without the 5th Respondent's consent and thus necessitating the charge against the 1st, 2nd, 3rd and 4th Petitioners. That the criminal case against the Petitioners is legally and procedurally sound and the same should be allowed to run its full course.

11. The 7th Respondent opposed the petition vide a Replying Affidavit sworn on 27/5/2019 by himself. He avers that the complainant, (the 5th Respondent) reported at Tononoka Police Post that in 2015 he gave his pastor (1st Petitioner) two motor vehicles KBR 259 G and KBV 269 G for church services but later the said pastor disappeared. He later spotted the vehicle near the Methodist Church in Mombasa, and wanted police assistance to take it. He was referred to County DCI Headquarters in Mombasa for investigations, and that is when the case was given to the 7th Respondent who investigated and established that the 1st Petitioner was in the business of importing and selling cars in Tudor, Mombasa. The investigations revealed that the 1st Petitioner sold the motor vehicle KBR 259 G to the 3rd Petitioner and later sold KBV 296 G to the 5th Respondent. The 6th, 7th and 8th Respondents managed to recover the said Motor vehicle in Meru, necessitating the transportation of some of the Petitioners from Meru to Mombasa to record statements before the County DCI and also to take plea. The 7th Respondent states that the investigations and trial is not ethnically motivated as alleged by the Petitioners.

Submissions

Petitioners Submissions

12. The Petitioners filed their submissions on 8/8/2019. Mr. **Kamundi** Learned Counsel for the Petitioners submitted that the 2nd, 3rd and 4th Petitioners were arrested in Meru and brought to Mombasa where they recorded statements on 25/2/2019 but were never charged for a period of up to 2 weeks, but were required to report, and actually reported to the Police station everyday between 6 a.m. to 6 p.m. with no reason being given to them as to why they were arrested.

13. Counsel submitted that the issue raised by the Petitioners is that of the trial taking a tribal approach in prosecution of the Petitioners. **Mr. Kamundi** submitted that according to the 5th Respondent who is the complainant in the criminal case, the 1st Petitioner was arrested in Tudor and charged at the Shanzu Law Courts, despite the fact that the charge sheet indicated that the 1st Petitioner was to be charged at the Chief Magistrate's Court at Mombasa. Counsel submitted that charging the Petitioners in Shanzu Court is a clear indication that all the Respondents were head hunted for a specific reason. Counsel further submitted that the 1st Petitioner imported the vehicles from Japan, registered them in his own name and used them as security for a loan and the 1st Petitioner has the keys and physical possession of the vehicles which he has had for several years in Meru. Therefore, the vehicles legally belong to the 1st Petitioner and the intended criminal prosecution is a witch hunt undertaken in violation of the Petitioners' constitutional rights.

2nd and 3rd Respondents Submissions

14. **Mr. Fedha**, Learned Counsel for the 2nd and 3rd Respondents submitted that the 5th Respondent vide OB 6/17/02/2019 at Tononoka Police Station, made a report alleging that the 1st Petitioner had swindled money from him. The Police then forwarded the file to the 2nd and 3rd Respondents who recommended that the Petitioners be investigated through a miscellaneous application dated 5/3/2019. Counsel submitted that the Petitioners' rights have not been violated in the recommendation that they be arrested and prosecuted as provided for under Article 157 of the Constitution. Counsel relied on **Betty Jemutai Kimeiya vs. Republic [2018] eKLR** and **Justus Ateri Malunda & Another Vs EACC & 4 Others**. Counsel further submitted that the Petitioners have not demonstrated how Article 22 of the Constitution has been violated and that there is no evidence to prove the allegations that the Petitioners have suffered any damages as a result of the 2nd, 3rd and 7th Respondents actions, and the fact that the 1st, 2nd and 5th Respondents are from the Luo Community does not justify their allegation of bias.

The 5th Respondents Submissions

15. **Mr. Muinde**, Learned Counsel for the 5th Respondent submitted that the actions alleged to have been committed by the 1st Petitioner amount to criminal actions which should be prosecuted accordingly. Counsel further submitted that the claim that the 5th Respondent head hunted the other Respondents to assist him in alleged illegal detention of the 1st Petitioner without trial to force him settle a civil dispute is not true as the complaint of the 5th Respondent is criminal in nature. Counsel submitted that allegations of bias based on tribal backgrounds of the Respondents has no merit and is backward and outdated thinking.

Determination

16. The Petition before the Court concerns several allegations against the Respondents. Among the allegations are that some of the Petitioners were arrested in Meru and transported all the way to Mombasa under traumatic and illegal circumstances in violation of their rights, and were brought to Mombasa for purposes of taking plea. In the process they lost both money and time, and for the 2nd and 3rd Petitioners, they were separated from their young children who were left in Meru.

17. The Petitioner further allege damage and/or loss to their motor vehicles and pray for damages and aggravated damages for alleged losses and violations.

18. Further the Petitioners aver that they are being charged and prosecuted before a headhunted team belonging to one community. They allege complainant herein the 5th Respondent is a Luo; the Prosecutor a Luo; and the trial Magistrate also Luo. The Petitioners therefore see a pre-determined end of the criminal trial and plead with the court to either remove the trial from the trial Magistrate or altogether stop the Criminal proceedings.

19. Central to the said criminal trial is the dispute about ownership of two motor vehicles KBR 259G and KBV 296G which the 5th Respondent alleges to have bought from the Petitioners and fully paid their purchase price. This is denied by the Petitioners. It therefore seems to me that the allegations in this petition are clearly intertwined with the ownership of the suit motor vehicles and the alleged violations of their rights appurtenant to those motor vehicles. To the extent that the police have investigated the allegations of theft of the said motor vehicles; and to the extent that the DPP has already charged the Petitioners for the alleged crime, it is the finding of this court that the alleged prosecution is properly founded, and the truth of the said allegations can only be determined in the said criminal court.

20. The Petitioners aver that their rights and freedoms under Articles 22, 23, 25 and 49(1) (g) have been violated. While Article 157 of the Constitution 2010 vests state powers of prosecution in the Director of Public Prosecution (DPP) to institute and undertake criminal proceedings against a person before any court (other than a court martial) which decision is discretionary and without direction of anyone, the exercise of that power must be within the law and in accordance with the dictates of Article 157 (11) of the Constitution which states:

“In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interest of administration of justice and the need to prevent and avoid abuse of the legal process”.

21. Once the court has found as I have done, that the charges preferred against the Petitioner before the Principal Magistrate at Shanzu Law Courts were constitutionally conceived, then allegations of violations of the Petitioner’s rights are not legally founded. Those allegedly violated rights must now remain to be vindicated in the said criminal proceedings, where the Petitioners must submit themselves and be vindicated purely on evidence. This court will therefore not go into the merits of the criminal trial.

22. It is the finding hereof that the Respondents have acted within their constitutional mandate under Article 157(6) and Article 157(11) of the Constitution 2010 in charging the Petitioners with the said criminal offences.

23. The Petitioners further allege bias because all the prosecuting team and the trial magistrate allegedly according to them come from the same tribe. The Petitioners allege that the prosecuting team was “*headhunted*” in order to convict the Petitioners. This is a view which has not been supported by any facts or evidence of bias or possible bias. Further the Petitioners did not provide any proof either in the form of a DNA or otherwise that the Respondents belong to any particular community in Kenya, or that they are not Kenyans. Nevertheless, the Court has powers over the place of criminal trial. The law as regards the powers of the High Court to change venue of a criminal hearing is found in Section 81 of the Criminal Procedure which provides as follows:

“81(1) Whenever it is made to appear to the High Court—

a. that a fair and impartial trial cannot be had in any criminal court subordinate thereto; or

b. that some question of law of unusual difficulty is likely to arise; or

c. that a view of the place in or near which any offence has been committed may be required for the satisfactory trial of the offence; or

d. that an order under this section will tend to the general convenience of the parties or witnesses; or

e. that such an order is expedient for the ends of justice or is required by any provision of this Code,

it may order—

i. that an offence be tried by a court not empowered under the preceding sections of this Part but in other respects competent to try the offence;

ii. that a particular criminal case or class of cases be transferred from a criminal court subordinate to its authority to any other criminal court of equal or superior jurisdiction;

iii. that an accused person be committed for trial to itself.”

24. The power of the Court to transfer any specific case from one subordinate Court to another under this provision is aimed at meeting the ends of justice, and to satisfy the principles of fair trial. The Petitioners are convinced – whether rightfully or wrongly - that since the complainant is a Luo, the Investigating Officer is a Luo, the Prosecutor is a Luo and the Presiding Magistrate is a Luo, then, the Petitioners being Merus, will not receive justice in the criminal trial. It is unfortunate that the Petitioners think like that. But, they are entitled to think as they please, and are still entitled to go through a trial which they perceive to be fair. In that case, the trial in the criminal case, the subject matter of the Petition herein, will henceforth proceed in the Chief Magistrates’ Court at Mombasa before any other magistrate other than the 1st Respondent herein.

25. It is the finding hereof that although there are many prayers sought in the petition, the Petitioners failed to prove the allegations in the petition as required in law, and the orders sought therein are not merited. However, there is merit in transferring the criminal trial mentioned herein to be done at the Chief Magistrates' Court in Mombasa. The Petitioners shall therefore take plea in the Chief Magistrates' Court at Mombasa within 21 days from today. Until then, the Petitioners are hereby released on free bond to end on the date they take the said plea.

26. The costs for the petition are for the Respondents.

That is the Judgment of the Court.

Dated, Signed and Delivered at Mombasa this 9th day of June, 2020.

E. K. OGOLA

JUDGE

Judgement delivered via MS Teams in the presence of:

Ms. Waswa for 2nd Respondent

Mr. Kinyua for Petitioners

Ms. Ogega for 2nd and 3rd Respondents

Mr. Makuto holding brief Muinde for 5th Respondent

Mr. Kaunda court Assistant