



REPUBLIC OF KENYA

IN HIGH COURT OF KENYA AT CHUKA

CONSTITUTION PETITION NO. 7 OF 2019

IN THE MATTER OF ARTICLES 2(1), 3(1), 19, 21 (1) 25(a), 28, 29, 35(1) (b), 48, 49(1a, 1f), 50(1) AND 244 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 25(a), 28, 29, 49(1a,1f), AND 51(10 OF THE CONSTITUTION OF KENYA, 2010

AND

INT HE MATTER OF THE PREAMBLE AND ARTICLES 7, 9, 10, 16, 17, 25(a), 26 OF THE INTERNATIONAL COVENANTS ON CIVIL AND POLITICAL RIGHTS

AND

IN THE MATTER OF THE PREAMBLE AND ARTICLES 1,2,3,5,6,7,8,12 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

IN THE MATTER OF CHUKA CHIEF MAGISTRATE'S CRIMINAL CASE NO.852 OF 2018

BETWEEN

JACKSON MURITHI AKWALU.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE OFFICER COMMANDING

STATION- CHUKA POLICE STATION.....2ND RESPONDENT

AMOS CHERUIYOT.....3RD RESPONDENT

KENNETH MURITHI.....4TH RESPONDENT

IRENE KEMBOI.....5TH RESPONDENT

ABUBAKAR OMAR.....6TH RESPONDENT

LINDA KAJUJU.....7TH RESPONDENT

CHIEF MAGISTRATE'S COURT AT CHUKA.....8TH RESPONDENT

AND

INDEPENDENT POLICING

R U L I N G

1. Before this court is a Notice of Motion dated 16th July 2019 brought by **JACKSON MURITHI AKWALU** (the Petitioner/Applicant herein). He has cited various Articles of the Constitution to wit, 2(1), 3(1), 19, 21(1), 25(a), 28, 29, 35(1b), 48, 49(1a), 16), 50(1), 51(1) and 244. He has also cited Rules **19 and 23** of the **Constitution of Kenya** (Protection of Rights and Fundamental Freedoms) practice and Procedure Rules in seeking the following reliefs namely:-

i. spent

ii. spent

iii. That pending the hearing and determination of the petition this honourable court be pleased to issue an order to the Interested Party to investigate and make a report on the altercation that occurred on 9th August 2018.

iv. spent

v. That pending the hearing and determination of this petition, this honourable court be pleased to issue interim conservatory order stopping proceedings in **Chuka Magistrate's Court Criminal No.852/2018**.

vi. That pending the hearing and determination of the petition filed, this honourable court be pleased to issue an interim conservatory order restraining the Respondents whether by themselves their agents, their employees and/or servants from harassing, arresting, charging, prosecuting or in any manner interfering with the Petitioner.

vii. That this honourable court grants any other relief or order as it may deem just and expedient.

2. This application is based on the following listed ground on the face of the application namely:-

a) That the Applicant at the material time was engaged in lawful business as a barber at Denmark Barbershop and as he was going on in his normal business he was approached by one Micheni Mugambi who had a mobile phone he had collected in his place of business and was trying to trace the owner.

b) That the Petitioner contacted the last dialed number and one Farida Wanja Munene moments later turned up and laid claim over the mobile phone.

c) That the Petitioner then asked the said Farida Wanja for identification documents and ownership documents which she promised to provide them.

d) That shortly thereafter the applicant was surrounded by the 3rd to 7th Respondents who suddenly and without any justifiable cause proceeded to randomly beat up the petitioner with fists, kicks jabs and blows asking him to produce a stolen phone.

e) That in the cause of the commotion, the Petitioner's premises was utterly destroyed with mirrors shattered and chairs broken as the petitioner tried in vain to break free.

f) That the grotesque acts of the 3rd to 7th Respondent attracted genuine curiosity of the general members of the public who gathers to defend the petitioner by hurling stones at the 3rd to 7th Respondents.

g) That in the course of melee the 6th Respondent fired live bullets to disperse the crowd before handcuffing the Applicant and taking him to Chuka Police Station.

h) That on the way to police station, the Applicant was assaulted by the 3rd Respondent.

i) That upon arrival at the police station, the Applicant was descended upon by the 3rd to 7th Respondents, with blows, jabs, kicks, insults and threats to kill which went on until he lost consciousness

j) That the Applicant was then rushed to Chuka General Hospital where he was injected with unknown drugs and tested for Hiv for no apparent reason and after he had regained consciousness, he was rushed back to the police station at Chuka where he was locked up in a dark room with suspected criminals.

k) That the Applicant's ordeal went on for from Thursday, Friday, Saturday and Sunday before being arraigned on 13th August 2018 for the following charges;

i. Stealing contrary to Section 268 as read with Section 275 with alternative charge of handling goods contrary to Section 322(2) of the Penal Code.

ii. Assaulting a police officer in execution of duty contrary to Section 103 (a) of the N.P.S. Act No.11 of 2014.

iii. Resisting Arrest contrary to Section 253(b) of the Penal Code.

(l) That the Applicant was granted bail and he immediately sought for medical services at Chuka Hospital.

(m) That the charges against the Petitioner/Applicant is a roll back on constitutionalism.

(n) That the Petitioner is apprehensive that if this application is not allowed there are chances that he will be dragged into needless criminal process that is oppressive.

(o) That this honourable court is empowered by the Constitution to hear and determine the application for conservatory orders and it is in the interest of justice that the same is allowed.

4. The Applicant has supported and reiterated the above grounds in his affidavit sworn on 16th July 2019.

5. In his oral submissions done through learned counsel Ms Wambui, the Applicant contended that his rights were grossly violated by five police officers who used excessive force in arresting the Applicant who was unarmed. He has also submitted that he was subjected to unfair treatment as he was not taken to court within 24 hours.

6. The Applicant has also pointed that the responses of 3rd to 7th Respondents are a replica of each other which in his view suggests that they are involved in a cover up to hide their excessive use of power. He has also faulted the Office of Director of Public Prosecution for not acting independently.

7. The Respondents have opposed this Application through a Replying Affidavit by P.C Irene Kemboi sworn on 13th September 2019 and grounds of opposition by the 8th Respondent.

8. In her Replying Affidavit the 5th Respondent has deposed that on 9th August 2018 a report of stealing was made at Chuka Police Station involving a theft of a mobile phone valued at Kshs.27,800 by one Farida Wanja Munene vide OB No.16/9/8/2018.

9. The said officer further avers that upon the report being filed, the "**Ward Commander**" instructed the 3rd, 4th, herself, 6th and 7th Respondent to go and arrest the suspect.

10. The officer depones that they proceeded to the Barber Shop in full police uniform whereupon the 3rd Respondent searched the Applicant and recovered the stolen phone in his pocket which phone was positively identified by the complainant.

11. The 5th Respondent alleges that the Applicant became violent, resisted arrest and assaulted the 3rd Respondent after overpowering him forcing the 4th to 7th Respondent to assist in apprehending him. She denies that the Applicant was tortured or subjected to inhuman treatments.

12. The 5th Respondent alleges that the Applicant/Petitioner incited members of the public who turned hostile against them by hurling stones at them forcing the 6th Respondent to fire one round of ammunition in the air to scare them.

13. She avers that the 3rd Respondent collapsed and was forced to be taken for treatment. She alleges that the Applicant faked illness and collapsed also forcing the OCS to order that he be taken to Hospital as well.

14. She further blames the Applicant for becoming violent and resisting arrest. She opines that the criminal trial is before a competent court and that a fair trial should be allowed to proceed as they are witnesses.

15. The 5th Respondent terms the allegations by the Applicant as false, malicious and baseless because according to her he is trying to defeat justice.

16. The 8th Respondent in the grounds of opposition filed has contended that the petition is misconceived, misplaced and an abuse of court process.

17. In its view, the Constitution provides safeguards that the petitioner can fall back if he is prejudiced by the criminal case pending at Chief Magistrate's Court.

18. The 8th Respondent further opines that the Applicant should defend himself at that court because he has a right to do so.

19. In their oral submissions done through learned State Counsel Mr. Momanyi, the Respondents have contended that prayer 3 of the Application does not affect them and doubted whether the 1st Interested Party was served.

20. The Respondents have asserted that the alleged human rights violations have no nexus with criminal charges in the subordinate court. They hold the view that because the Applicant is seeking some remedies in this court the same should not impede his prosecution.
21. The Office of the Director of Public Prosecution insists that the whole issue began with a complaint made at Chuka Police Station that a mobile phone had been stolen and that police officers went with the complainant to the shop where the Applicant operated from and arrested him. The Director of Public Prosecution feels that if there were violations in the process of arrests the same can be addressed later.
22. The Director of Public Prosecution has faulted prayer No. 6 of the application for being too broad and vague and contends that if granted the applicant will be immune to any arrest regardless of any conduct in the society.

23. **Analysis and Determination:**

This court has considered this application and the responses made by all the Respondents. It is true that this court is empowered by **Article 23** of the **Constitution of Kenya 2010** to uphold and enforce the bill of rights.

24. This application no doubt touches on serious breaches of human rights by police officers who have maintained that they were on official duty and that they carried out their duties in effecting arrest lawfully and did not infringe on any of his rights.

25. It is difficult at this stage to make a definite finding on the merits of the Applicant's allegations. In fact it is not desirable to do so until after full trial because this court needs to interrogate all the allegations and the answers provided by the 3rd to 7th Respondents.

26. At this stage this court is required to determine on facts presented if a *prima facie* case has been made out for a conservatory or preservative order to be made pursuant to **Rule 19 and 23** of the **Constitution of Kenya** (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules) which provide for the procedure for approaching the court and the powers of this court to grant the said reliefs.

27. This court has gone through the statements made to the investigating officer and the 3rd, 4th, 5th, 6th and 7th Respondents respectively and it is true that the statements are somewhat almost similar in word on what transpired and the big question is whether or not the statements are similar because the officers were together at the time and therefore gave a similar description of what took place or the statements were carefully choreographed to cover up some misdeeds by uniformed officers gone vogue. Either way it is my considered view that it is premature to make a definite finding at this stage. It however suffices to state this court finds that the allegations made by the Applicant on the face of it appears well grounded. He states that he was not produced in court within 24 hours which is because he was arrested on 9th August 2018, a Thursday. The provisions of **Article 49(1) (6)** states that arrested persons have a right.

"to be brought before a court as soon as reasonably possibly but not later than;

(i) 24 hours after being arrested or

(ii) If the 24 hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day....."

The big question that need answers is whether the police infringed on the Applicant's rights particularly given the allegation by the 5th Respondent that he "*feigned*" sickness. In my considered view the question establishes *prima facie* case against the Respondents and it would be a travesty of justice if prosecution based on elements of unfair trial is allowed to go on. A positive finding to the Applicant's claims in my view can result in a declaration that the trial is a mistrial and to that extent there is basis in the circumstances obtaining here to grant a temporary or conservatory order to preserve the Applicant's right.

28. Secondly, the Applicant's claim that his property was damaged by the same police officers appears not have elicited any response or explanation from the arresting officers.

29. Thirdly and finally I do find that the claims by the Applicant that unreasonably excessive force was used appears to carry some weight because here was an unarmed person within Chuka Town suspected to have stolen a mobile phone. Why would five uniformed armed police in a police motor vehicle go to arrest him? That fact in my view raises questions which require further interrogations and substantive finding because this is a court of law empowered by the constitution to uphold and enforce rights of individuals especially the fundamental rights and I have already observed that the Applicant's allegations touches on his fundamental rights and freedoms. The same are clearly enshrined and protected by the Constitution.

30. I am however not persuaded that prayer 3 and 6 of the application are sustainable in law. In the 1st place, the Applicant has not tendered any proof of service on the 1st Interested Party and this court cannot issue an adverse order against a party unless satisfied that it had been given a fair chance to be heard.

31. Secondly in regard to prayer 6, I agree with the Director of Public Prosecution that the prayer is too vague and general. The same can have undesired effect of granting the Applicant general immunity against any misdeed/crime. That prayer must therefore fail because it is not tenable.

In the end this court for the aforesaid reasons finds merit in this application and the same is allowed only in terms of prayer 4 & 5.

I further direct that the main petition be canvassed without unreasonable delay for the interest of justice. Towards that end, I invite the parties

to take a mention date for directions forthwith. The question of costs will be abide by the finding in the main petition.

Dated, signed and delivered at Chuka this 16th day of October, 2019.

R.K. LIMO

JUDGE

16/10/2019

Ruling signed dated and delivered in the open court in presence of Wambui Gitau for Petitioner and Momanyi for 1st and 2nd Respondent and Interested Party & also holding brief for Mbakiata for 3rd to 8th Respondent.

R.K. LIMO

JUDGE

16/10/2019