



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CONSTITUTIONAL PETITION NO. 2 OF 2019

IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010

**IN THE MATTER OF PREAMBLE AND ARTICLES: 2, 3, 10, 19, 20, 21, 22, 23, 25, 27, 28, 29, 31, 33, 47, 48, 49, 50, 159 AND 165
OF THE CONSTITUTION OF KENYA, 2010**

IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS

AND

IN THE MATTER OF CONTRAVENTION OF ARTICLES 27, 28, 29, 31, 48, 49, 50 AND 51

IN THE MATTER OF THE PRINCIPLES OF NATURAL JUSTICE, OPENNESS AND FAIRNESS

AND

IN THE MATTER OF THE PREAMBLE AND ARTICLES 7, 9, 10, 16, 17, 23, 24, 25, 26

INTERNATIONAL COVENANT OF CIVIL AND POLITICAL RIGHTS

AND

IN THE MATTER OF THE PREAMBLE, ARTICLE 1, 2, 3, 5, 6, 7, 8, 12, 13, 26 OF THE

UNIVERSAL DECLARATION OF HUMAN RIGHTS

BETWEEN

SAMWEL KIPKIRUI ALIAS NICHOLAS BOI.....PETITIONER

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

CHIEF INSPECTOR ALPHONSE NGUNDO.....4TH RESPONDENT

CORPORAL CYNTHIA BORE.....5TH RESPONDENT

RULING

1. This is a Constitutional Petition dated 4th February 2019 brought under Articles 27, 28, 29, 31, 48, 49, 50 & 51 of the Constitution of Kenya 2010 in, which the petitioner alleges that he was taken to court pre-maturely before investigations were complete and that after 3 prosecution witnesses testified the 2nd respondent made an ex-part application in **Kericho Chief Magistrate's Miscellaneous Criminal Application No.10 of 2019 Republic –vs- Samuel Kipkirui alias Nicholas Boi** seeking that the petitioner be placed in custody of the 4th

respondent with a view to compelling him to provide another saliva sample for the purpose of conducting 2nd DNA test on the alleged ground that the investigating officer had a strong reason to believe that the first analysis was manipulated by the petitioner and his family. The petitioner thus felt that his Constitutional rights had been violated and asked for the following reliefs-

- a) That a declaration be and is hereby issued that the action of the 2nd, 4th and 5th respondent of detaining and subjecting the petitioner to a 2nd DNA test without laying a proper legal and factual basis is a violation of the petitioner's fundamental right to freedom, dignity and privacy, violates his right to fair administrative action and fair hearing and access to access to justice and therefore, unlawful, unconstitutional, invalid and void *ab initio*.
- b) That an order of certiorari be and is hereby issued removing into this court and quashing the decision of the 2nd, 4th and 5th respondents to subject the petitioner to a 2nd DNA test without laying a proper legal and factual basis.
- c) That an order of Certiorari be and is hereby issued removing into this court and quashing the entire proceedings against the petitioner before the Chief Magistrates Court at Kericho Law Courts in Miscellaneous Criminal Application No.10 of 2019 Republic –vs- Samwel Kipkirui *alias* Nicholas Boi.
- d) That an order of mandamus be and is hereby issued compelling the 5th respondent to recall the saliva samples obtained from the petitioner and stopping further analysis of the samples.
- e) That an order of mandamus be and is hereby issued compelling the 5th respondent to substantiate and or prove her allegations that the petitioner and or his family manipulated the first DNA analysis.
- f) That an order for exemplary and punitive damages be and is hereby issued against the 2nd, 4th and 5th 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.
- g) That a declaration be and is hereby issued that Claire Kituyi, Prosecution Counsel, Cynthia Bore the investigation officer and Alphonse Ngundo OCS, Kericho Police Station are incompetent and unfit to hold public office on account of their violations of the Constitution of Kenya, written law and the petitioner's rights.
- h) The 2nd, 4th and 5th respondents be and are hereby directed to bear the costs of this petitioner jointly and severally, in their individual personal and official capacities.
- i) That this honourable court be pleased to grant such further order or orders as may be just and appropriate.

2. None of the respondents filed any response to the petition, though it was said to have been served. On 28/3/2019, Mr. Ayodo of the Director of Public Prosecution's Office held brief for Mr. Langat for the Attorney General and stated that he had been informed by Mr. Langat that there were ongoing discussions on the matter and asked for a mention in three (3) weeks' time. The matter was thus put for mention on 4th June 2019.

3. On 4th June 2019 Mr. Onesmus Langat for the petitioner was present in court but none of the respondents was represented, and on request of Mr. Langat the court ordered that parties file and serve written submissions to the petition. Thereafter, on 7th October 2019, Mr. Langat informed this court that he had filed and served submissions and asked this court to fix a ruling date which was fixed for today.

4. Under section 36 of the Sexual offences Act No.3 of 2006 the court has powers to order that DNA test be conducted. Having seen and perused the originating Magistrate's Court file Kericho Magistrate's Criminal Miscellaneous Application No.10 of 2019, in my view this petition was actually overtaken by events on 4th February 2019, the date it was dated. That was the date the matter was fixed for mention before the Magistrate's Court, and at that mention the magistrate recorded as follows:-

"Matter marked as closed, the accused person may be set at liberty or unless otherwise lawfully held."

5. In my view, It cannot thus be said that from the above date the petitioner would be entitled to any of the orders sought, except may be costs, which are awarded at the discretion of the court though usually they follow the event.

6. I thus mark this petition as overtaken by events, and award the costs of the petition to the petitioner against the Attorney General who is the legal defendant in actions against government officers performing their official duties.

Dated and delivered at Kericho this 11th day of December 2019.

George Dulu

JUDGE