



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

PETITION NO. 54 OF 2015

(ARTICLES 19(1), 20(1) & (2), 22(1), 27(1), 28, 29(f), 32(1), 49(1) (f) & (2) AND 50(4) OF THE CONSTITUTION, 2010)

AND

IN THE MATTER OF VIOLATION OF THE CONSTITUTION, 2010

AND

IN THE MATTER OF INFRINGEMENT OF FUNDAMENTAL AND CONSTITUTIONAL RIGHTS

AND

IN THE MATTER OF SECTIONS 43, 44 & 164 OF THE PUBLIC HEALTH ACT, CHAPTER 242, LAWS OF KENYA

AND

IN THE MATTER OF THE FREEDOM OF SEX WORKERS

AND

IN THE MATTER OF UNLAWFUL DETENTION AND FORCEFUL MEDICAL EXAMINATION

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS & FUNDAMENTAL FREEDOM) PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

TERESIA KWAMBOKA & 27 OTHERS.....PETITIONERS

-VERSUS-

THE OFFICER COMMANDING POLICE STATION, (OCS)

KISII POLICE STATION & 5 OTHERS.....RESPONDENTS

RULING

1. The first to the twenty-sixth (1st to 26th) petitioners are adult female residents of Kisii town while the twenty seventh (27th) and the twenty eighth (28th) petitioners are duly registered Non-Governmental Organizations (NGO's) charged with the responsibility of propagating the protection and enjoyment of the fundamental and constitutional rights by and/or on behalf of the less fortunate and marginalized groups and/or persons including but not limited to the first to the twenty-sixth petitioners described herein as "sex-workers".

2. All the petitioners bring this petition dated 27th November 2015, against the six (6) respondents viz:-

The Officer Commanding Kisii Police Station (O.C.S), The Officer Commanding Police Division (O.C.P.D) Kisii Central. The Inspector General of Police, The Director Public Prosecution (DPP), The Chief Magistrate's Court, Kisii and the Attorney General.

The prayers sought are declaratory orders to the effect that:-

- a. The petitioners are entitled to full and equal protection under the Constitution of Kenya, 2010.
- b. The actions, omissions and/or conduct of the respondents against the first to the twenty-sixth petitioners, constitute and/or amount to infringement of their rights and fundamental freedoms under Article 20(1) and 27(1) of the Constitution.
- c. The arrest and body search of the 1st to 26th petitioners by male police officers, their detention for period of 91 hours and the forceful medical examination carried out on them on 20th November 2015, constituted and/or amounted to violation of their constitutional rights.
- d. The medical examination reports and/or evidence arising from the forceful medical examination and undertaken at the instance of the first, second and third respondents are unconstitutional and incapable of being used and/or relied upon towards the prosecution and in prosecution of the 1st to 26th petitioners.
- e. The forceful subjection of the 1st to 26th petitioners to forceful medical examination without their consent and permission amounted to violation of Articles 28 and 29(f) of the Constitution.

3. The petitioners also seek judicial review orders of certiorari and prohibition to the effect that the charge sheets in Kisii CMCC Nos 3116 to 3141 of 2015 and orders made on 23rd November, 2015, by the fifth respondent against the 1st to 26th petitioners be quashed and that the first, second and third respondents be prohibited from enforcing, implementing and/or executing the said orders directing that a forceful medical examination be carried out on the 1st to 26th petitioners. Further, that the fourth and fifth respondents be prohibited from carrying out, undertaking and/or entertaining the criminal proceedings in the said Kisii CMCC Nos 3116 to 3141 of 2015.

It is the petitioners' further prayer that general and exemplary damages be awarded to the 1st to 26th petitioners on account of breach, violation and/or infringement of their constitutional rights. They also pray for the costs of this petition which was filed contemporaneously with a Notice of Motion dated 27th November 2015 seeking conservatory orders by way of staying the criminal proceedings in Kisii CMCC Nos 3116 to 3141 of 2015 pending the hearing and determination of the petition and prohibiting the first, second and third respondents from enforcing, implementing and/or executing the order of the fifth respondent made on the 23rd November 2015, pending the hearing and determination of this petition.

4. The Notice of Motion is based on the grounds contained in its body as fortified by the averments in a supporting affidavit dated 27th November 2015, deposited by the first petitioner, **Teresia Kwamboka**, on her own behalf and that of the second to the twenty-sixth petitioners.

The motion is opposed by the respondents on the basis of the averments contained in a replying affidavit

dated 13th January 2016, deposed by **Zamdan Mkondo**, the Deputy Officer Commanding Police Station, Kisii.

As directed by the court on the 21st March 2016, the motion was argued by way of written submissions and in that regard submissions were filed by **Messrs Ogutu Mboya & Co. Advocates**, on behalf of the petitioners and by the Senior Principal Litigation Counsel, **Mr. M.O. Eredi**, on behalf of the respondents.

5. This ruling is in respect of the prayers sought in the notice of motion pending the hearing and determination of the petition (i.e prayers 4 and 5).

The basic issue for determination is whether the petitioners have satisfied this court for a grant of conservatory orders against the respondents. Put in another way, the question is whether the application is proper before the court and if so, whether the applicants/petitioners have demonstrated that their case against the respondents is eminently arguable for exercise of the court's discretion in their favour.

An arguable case is not necessarily one that must ultimately succeed but must raise credible issues worth the consideration of the court.

6. As for this petition, Article 22 of the Constitution provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.

Under Article 23, the High Court has jurisdiction in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights and in doing so, may grant appropriate relief including a declaration of right, an order of judicial review and a conservatory order "inter-alia".

Herein, the conservatory order sought by the petitioners is mainly for stay of criminal proceedings in the cases referred to in the appropriate notice of motion. Such grant of stay would invariably result in a prohibition of any action, intended to be taken against the first to the twenty sixth petitioners in compliance with the order of the Magistrate's Court made on the 23rd November 2015.

7. Suffice therefore to say that this application is proper before the court although it would have been more appropriate for the petitioners to have moved the court by way of judicial review under the Law Reform Act and the Civil Procedure Rules, 2010, at least for the remedies of certiorari and prohibition.

In the case of **Minister of Home Affairs Vs. Bickie & Others (1985) LRC 755**, it was stated that:-

"It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be involved at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so Court will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provisions or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition a breach of the declaration of rights."

8. Be that as it may and with regard to conservatory orders, the Supreme Court of Kenya in the case **Gatirau Peter Munya Vs. Dickson Mwenda Kithinji & Others Petition No. 2 of 2014**, gave the necessary guidelines for issue of the same in matters of public law and/or constitutional matters.

The Court thus held that:-

"Conservatory orders bear a decided public law commutation for these are orders to facilitate ordered functioning within public agencies as well as to uphold the adjudicatory authority of the courts, in the public interest. Conservatory orders therefore are not unlike interlocutory injunctions linked to such private party issues as the prospects of irreparable harm occurring"

during the pendency of case or high probability of success in the applicant's case for orders of stay.

Conservatory orders consequently should be granted on the inherent merit of a cause bearing in mind the public interest, the constitutional values and the proportionate magnitudes and priority levels attributable to the relevant cases."

9. These guidelines are to be applied by courts while bearing in mind that constitutional functions undertaken by state organs such as the respondents herein are intended to serve the public interest so that the due discharge of any public interest tasks merit special protection over the perceived private right of one individual or a few individuals.

It would therefore not be in the public interest nor would it be consistent with constitutional principle for the courts to readily issue conservatory orders as would have the effect of staying due motions of core constitutional function or other functions for the facilitation of primary constitutional functions.

10. And talking about public interest which appears to be one of the key elements in deciding whether or not to grant a conservatory order, there are many areas of national and community activities which may be subject to the public interest. These must be distinguished between "what is in the public interest" and "what is of interest to the public." As there are many categories of public interest the main task is to ascertain amongst others the public interest to be served.

In the case of **D Vs. National Society for the Prevention of Cruelty to Children (1978) AC 171**, it was stated that the categories of public interest are not closed and that matters of public interest that would affect fundamental rights and freedoms would include for example, public health, national security, defence, international obligations, proper and due administration of criminal justice, independence of the judiciary, observance of the rule of law, the welfare of children, a clean environment among others.

This instant case would fall under the public interest categories related to public health, due administration of criminal justice and perhaps the independence of the judiciary and observance of the rule of law.

11. In the case of **Loveness Mudzuru & Another Vs. Minister of Justice, Legal & Parliamentary Affairs and Others Constitutional Application No. 79 of 2014**, the Constitutional Court of Zimbabwe held that:-

"Public interest is a term embracing matters among others, of standards of human conduct tacitly accepted and acknowledged to be for the good order of society and for the well being of its members. The paramount test should be whether the alleged infringement of a fundamental right or freedom has the effect of prejudicially affecting on potentially the community at large or a significant section or segment of the community. The test covers cases of marginalized or underprivileged persons in society who because of sufficient reasons such as poverty, disability, socially and economical disadvantaged positions are unable to approach a court to vindicate their rights."

12. The significant point coming from the holding is that the interest being protected is the interest of the public as distinct from the interest of an individual or individuals.

In this case as may be deciphered from the petitioners' supporting affidavit, the interest sought to be protected is that of a group of individuals carrying themselves out as "sex - workers" or "commercial sex - workers", a term which is neither defined in our statutes nor bears any legal significance.

13. This court may however, take judicial notice that the term is a creation of the media to reflect a "politically correct" description of a person engaged in prostitution which is itself defined as the act or practice of engaging in sexual activity for money or its equivalent or commercialized sex (see, **Black's Law Dictionary – 8th Edition**)

In this country unlike few others mostly in the Western World, such a venture is illegal or unlawful to the extent of constituting criminal offences under the penal code and often leads to offences under the Public Health Act.

Indeed, the petitioners admit that they were arrested while in the course of conducting their illegal business and were subjected to medical examination before being arraigned in court under the Public Health Act.

The legality or otherwise of the arrest, the medical examination and the arraignment of the petitioners are factors which may be addressed in the pending trial at the Magistrate's Court and of course at the hearing of the petition.

14. If the respondents are found to have acted unlawfully or contrary to constitutional principles and values and in violation of the petitioners' rights and fundamental freedoms while enforcing the law, then there is available remedy under Article 23 of the Constitution including a declaration of rights and an order for compensation "inter-alia".

Indeed the petitioners in their petition also pray for payment of general and exemplary damages on account of breach, violation and/or infringement of the constitutional rights and fundamental freedoms of the first to the twenty sixth petitioners. These rights and freedoms are essentially those enshrined under Articles 27, 28, 29, 32, 49 and 50 of the Constitution and whether or not they were breached, infringed or violated may only be determined at the hearing of the petition.

15. In the meantime, it would be in the public interest for the petition and indeed the proceedings in the Magistrate's Court to continue without any hinderance or obstacle by way of a conservatory order. It cannot be gainsaid that the activity for which the first to the twenty sixth petitioners were arrested poses great risk and danger to the health of the public within the County of Kisii such that it behoves upon the relevant state organs to contain it as by law established if only for public good and interest. It is without doubt that in the present circumstances the interest of the public far outweighs the interest of the so-called "sex workers" or commercial sex-workers".

In the upshot, conservatory orders are not for granting where the effect is to stay the due discharge of clear statutory and constitutional functions bestowed upon the respondents.

The application by the petitioners is therefore dismissed with costs to the respondent to be borne by the twenty-seventh (27th) and twenty eighth (28th) petitioners only.

J.R. KARANJAH

JUDGE

Read and signed this 12th day of May 2016.