



REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

PETITION NO. 1 OF 2014

BETWEEN

PETERLIS OTIENO ONGONDO PETITIONER

AND

OFFICER COMMANDING

**OYUGIS POLICE STATION 1ST
RESPONDENT**

INSPECTOR GENERAL OF NATIONAL POLICE SERVICE 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. The petitioner owns and operates a bar in Oyugis Town, Homa Bay County known as Oasis Bar. He has brought the petition dated 14th March 2014 seeking the following reliefs for the violation of his fundamental rights and freedoms under **Articles 25, 28 and 49(f)** of the Constitution ;
 1. *That the Honourable Court do issue an order that the 1st respondent do withdraw criminal charges against the petitioner and further issue a declaration that the intended prosecution of the petitioner at Oyugis Law Courts before the **Chief Magistrates Court Case No. 115 of 2014** is in violation of the petitioner's constitutional rights.*
 2. *The petitioner also prays for damages for violation of his constitutional rights and the costs of this petition.*
 3. *Any other or such further orders that this Honourable Court may deem fit and just to grant.*
2. The petitioner avers that on 28th February 2014 he was at his establishment when Chief Inspector Moses Wafula Wanyama, at the time the Commanding Officer of Oyugis Police Station ("the OCS"), came in and without introducing himself and without any reason or colour of right accosted and assaulted him. When he tried to find out what was happening, the OCS assaulted, arrested and took him to Oyugis Police Station. The petitioner avers that upon arrest he requested the OCS to release him on a police bond but the same was denied. He therefore had to stay in the police cells the whole night without knowing why he had been assaulted and arrested. He avers that he sustained serious body injuries which required medical attention.
3. The petitioner further complains that after his arrest, he was charged with selling alcoholic drinks without a licence in contravention of **section 7(1)(b)** as read with **section 62** of the *Alcoholic*

Drinks Control Act, 2010 and handling food without valid medical examination certificate contrary to **regulations 15(b)** as read with **section 17(a)** of the **Food Hygiene Regulations**. He avers that the charges against him in **Chief Magistrates Court Case No. 115 of 2014** were fabricated, untrue and unfounded.

4. The 1st and 2nd respondents, represented by the Office of the Director of Public Prosecutions (“the DPP”), refuted the petitioner’s claims. In the reply to the petition dated 24th November 2014, they denied that the petitioner had demonstrated that his rights had been violated. As regards the pending trial, the respondents averred that the orders could not be granted because the Director of Public Prosecutions was not a party to the petition. They further contend that the trial court was better placed to adjudicate on the issues raised by the petitioner.
5. The petitioner’s claim is one for the enforcement of fundamental rights and freedoms brought under **Article 22** of the Constitution. Following the cases of **Anarita Karimi Njeru v Attorney General [1979] KLR 54** and **Matiba v Attorney General [1990] KLR 666** our courts have held that a person who alleges that his rights have been violated is obliged to state his complaint, the provisions of the Constitution he considers have been infringed in relation to him and the manner in which he believes they have been infringed. This principle was restated more recently in the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others NRB Civil Appeal No. 290 of 2012 [2013] eKLR**.
6. The petitioner has claimed that his rights under **Articles 25, 28 and 48(f)** of the Constitution were violated. **Article 25** of the Constitution enumerates the fundamental rights and freedoms which cannot be limited and which are as follows; freedom from torture and cruel, inhuman or degrading treatment or punishment, freedom from slavery or servitude, the right to a fair trial and the right to an order of habeas corpus. **Article 25** does not, of itself, set out a specific fundamental right or freedom capable of being enforced hence it is inapplicable to these proceedings.
7. **Article 28** protects the right to dignity and it states that, “*Every person has inherent dignity and the right to have that dignity respected and protected.*” **Article 49** protects the rights of persons arrested and **Article 49(f)** relied upon by the petitioner provides as follows;
 - (f) *to be brought before a court as soon as reasonably possible, but not later than—*
 - (i) *twenty-four hours after being arrested; or*
 - (ii) *if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;*
8. The issue then is whether the petitioner’s rights as pleaded were violated by the respondents. In support of the petition, the petitioner testified and called two witnesses; Kennedy Ogutu Ojwang’ (PW 2) and Milton Ouma Oginga (PW 3) while the respondent’s Chief Inspector Moses Wafula Wanyama (RW 1) and APC Mary Konyelo (RW 2) and Ishmael Lemiso Papai (RW 3).
9. The evidence emerging from the testimony of the witnesses is that on 28th February 2014 at about 8.30 pm, the OCS, came to Oasis Bar in full uniform in the process of conducting an operation to close down establishment selling alcohol without licences. The OCS, went straight to the counter and asked the attendant whether he had a licence. Since he did not show a licence, the OCS arrested him. He also asked the lady who was near the counter to start filling a crate of beer. At this point, the petitioner and the OCS gave conflicting testimony.
10. The petitioner testified that when he attempted to ask what was going on, the OCS drew his pistol and pushed him causing to fall. He went on his knees and pleaded with the OCS to tell him what had happened. The OCS pulled him by the waist and escorted him to the landcruiser that was waiting outside. Later on the OCS came out with his wife carrying a crate of beer and she too was put into the land cruiser.

11. The OCS denied that he drew his pistol or that he assaulted the petitioner. He testified that the petitioner asked him for a warrant of arrest. He informed him of the purpose of his visit and told him to go to the police station but that the petitioner pushed him and a struggle ensued as the petitioner was resisting arrest. During the struggle, the OCS stated that he was injured.
12. The petitioner stated that he was taken to the police station where he was informed that he would be charged with obstructing a police officer and selling alcohol without a licence. He testified that his request to be released on a police bond was denied and that he spent the night in the police cells. He confirmed that on the next day he was released on a cash bail of Kshs. 5,000/= at about 10.30 am and bonded to appear in court on 3rd March 2014. He sought medical attention and was given a P3 form which was filled and returned. He complained that efforts by his witnesses to record statements by his witnesses were thwarted by the OCS who was the investigating officer.
13. As I stated earlier, the issue is whether the violations as pleaded have been proved. As regards violation of **Article 49(f)** of the Constitution, it is clear from the evidence that the petitioner was arrested and placed in the police cells at about 9.00 pm and released on the next day at 10.30 am with a bond to report to court at 3rd March 2014. The OCS testified that although the petitioner requested to be released on bond, he did not have cash at the time. The petitioner's wife, who had been arrested, was released and she came the next day and facilitated his release by paying the bail.
14. The facts are therefore clear that **Article 49(f)** of the Constitution was not violated as the petitioner was released within 24 hours of his arrest and bonded to appear in court on 3rd March 2014.
15. I now turn to the issue whether I can direct the 1st respondent to withdraw the charges against the petitioner. In this respect it is important to recall that the State's prosecutorial powers are vested in the Director of Public Prosecutions under **Article 157** of the Constitution. The pertinent part thereof provides as follows;

157(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—

- a. *institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.*

14. The decision to institute criminal proceedings by the DPP is discretionary. Such exercise of power is not subject to the direction or control by any authority as **Article 157(10)** stipulates that;

(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

15. The discretionary power vested in the DPP must be exercised reasonably and to promote the policies and objects of the Constitution and the enabling law set forth under **section 4** of the **Office of the Director of Public Prosecutions Act**, which are, the diversity of the people of Kenya, impartiality and gender equity, the rules of natural justice, promotion of public confidence in the integrity of the Office, the need to discharge the functions of the Office on behalf of the people of Kenya, the need to serve the cause of justice, prevent abuse of the legal process and public interest, protection of the sovereignty of the people, secure the observance of democratic values and principles and promotion of constitutionalism
16. As the power of the DPP is impugned, it would have been proper for the petitioner to join the DPP hence the prayer to intervene in the prosecution cannot be granted. Furthermore, there is no evidence that the prosecution lacked any material basis as there is evidence that to support the

charges against the petitioner. There is also no evidence that the petitioner will not receive a fair trial in the subordinate court. I therefore decline to grant prayer 1 of the petition.

16.As regards the issue of assault, the Office of the DPP has expressed the intention to prefer additional charges of obstructing a police officer contrary to **section 59** of the ***Alcoholic Drinks Control Act, 2010*** and assault causing actual bodily harm contrary to **section 251** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. In the circumstances, I decline to enter into an inquiry as to whether there was an assault as I would prejudice and pre-judge any issues that may proceed before the trial court should such charges be preferred against the petitioner. Furthermore, the petitioner has not, in line with the ***Anarita Case***, pleaded what provision of the Constitution has been violated in this respect.

17.I find and hold that the petitioner has not established a violation of **Articles 25** and **49(f)** of the Constitution.

18.The petition is therefore dismissed but with no order as to costs.

DATED and DELIVERED at HOMA BAY this 6th day of July 2015.

D.S. MAJANJA

JUDGE

Petitioner in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Director of Public Prosecutions for the 1st and 2nd respondents.