



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

PETITION NO. 22 OF 2013

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLE 19, 20, 21, 22, 23, 27, 32, 36 & 50

JACOB MBAU NYAA.....1ST PETITIONER

MONICA MBAU.....2ND PETITIONER

KYALO MALUKI.....3RD PETITIONER

JANET MUTUO KYALO.....4TH PETITIONER

CECILIA DAVID.....5TH PETITIONER

EDWARD MULYUNGI NDULI.....6TH PETITIONER

TABITHA MULYUNGI.....7TH PETITIONER

JONATHAN KIMANZI MBUI.....8TH PETITIONER

VERSUS

THE ANGLICAN CHURCH OF KENYA DIOCESE OF KITUI.....RESPONDENT

AND

THE ARCHBISHOP OF THE ANGLICAN CHURCH OF KENYA.....INTERESTED PARTY

J U D G M E N T

1. The Petitioners herein were members of the **Anglican Church of Kenya (ACK) St. Joseph’s Kyome Parish, Migwani District Eastern Province**. On or about the **15th day of January, 2013**, they received letters from the **Ven. Samwel Mbiri** and the **Rt. Rev. Joseph V. Mule** on behalf of the **ACK Church Kitui Diocese** purporting to ex-communicate them from the church on frivolous grounds.

2. They averred that as a member governed by the ACK Constitution, the **Ven. Samuel Mbiri** had no

authority to purport to ex-communicate any member of the **St. Joseph's Kyome Parish**. If any allegations purported to be levied against them, **Cannon XVI, page 60** of the **Constitution** of the **Anglican Church of Kenya** clearly outlined the disciplinary proceedings to be applied and followed. A tribunal has to be formed pursuant to **Section 3 of Cannon XVI, page 61** of the constitution, a charge should be drawn in writing pursuant to **Section 4 of the Cannon XVI, page 61** and the person accused must be given an opportunity to be heard and subsequently a judgment passed by the tribunal.

3. In the instant case the procedure was not followed by the respondent. According to **Cannon XX** of the sentence section, no sentence can come into effect until the Bishop secures the consent of a commission of the three Bishops of the province sitting together.

4. That the decision was reached without affording the Applicants the right to be heard in defence which was a violation of natural justice. Pursuant to the said ultra vires decision the Respondent has proceeded to sue the Petitioners in **Mwingi PMCC No 15 and 21 of 2013** and obtained Orders barring them (Petitioners) to attend their church and all churches worldwide.

5. It was therefore averred by the Petitioners that the Respondent was in breach of their fundamental constitutional rights and the Interested Party has declined to ensure the Respondent follows the laid down procedures as prescribed by the constitution of the church. Hence their prayer for a declaration that the actions of the Respondents in purporting to ex-communicate the Petitioners from the ACK church was illegal, unconstitutional, null and void.

6. The Respondent filed grounds of opposition stating that; The **Ven. Samuel Mbiri** was the **Vicar in Charge** of the **ACK Church St. Joseph's Kyome Parish, Migwani District, Kitui County**. On or about **21st December, 2012**, the **1st, 3rd and 6th Petitioners** while in a violent mood accosted the **Ven. Samuel Mbiri** at the **Vicarage at St. Josephs Kyome**. They pulled down doors and windows of the Vicarage thereby making the place unsafe and unfit for habitation. They took away an assortment of household goods, books and academic certificates for the **Ven. Samuel Mbiri**.

7. In the cause of the rampage the Petitioners descended upon **Ven. Samuel Mbiri**, the vicar whom they assaulted. The Petitioners conduct was in violation of **Articles 28, 29(c) and 31 (a) (b)** of the constitution and the Respondents are equally entitled to protection. The damage, robbery and assault was reported to the police. The Petitioners were arrested and charged in a Criminal Court. The Petitioners violated the rights and fundamental freedoms of **Ven. Samuel Mbiri** contrary to **Article 29(a) (c) (f), Article 27 (1) and Article 20 (1)** of the **Constitution**.

8. On the **1st January, 2013** a public announcement was made at a burial ceremony by the petitioners of their cessation to be members of the **ACK-Diocese of Kitui**. Subsequently, the Petitioners wrote a letter to the Bishop of ACK Kitui Diocese dated **11th January, 2013** officially giving notice of their voluntary withdrawal from the Diocese. They also renounced canonical responsibility and obedience to the ACK Diocese of Kitui and the Diocesan Bishop respectively. A **notice** to that effect was also sent to the **Arch Bishop of ACK**.

9. The disciplinary procedure set out in the constitution of ACK applies only to consenting bonafide members at the Diocesan level: **(Article XXVI-2 (b))**. Therefore, the Respondent have no power or means by which to bring on trial the Petitioners who had already exercised their freedom of Association in favour of joining the All Saints Cathedral Diocese whose Arch Bishop of ACK is the Bishop.

10. The Constitution of ACK gives no rights of discipline to a Diocese against strangers, or persons who are not consenting members, or persons who have categorically withdrawn themselves ("**delinked**") from the jurisdiction of that Diocese and placed themselves under jurisdiction of another Diocese. Putting the Petitioners on trial, after the **11th day of January, 2013**, under the auspices of the **ACK Diocese of Kitui** would have been in violation of the **ACK constitution**.

11. The letters of ex-communication were prompted by the Petitioners' decision to delink themselves from the **ACK Diocese of Kitui** and were merely a necessary response in the circumstances. The

Respondent having ceased to have canonical authority over the Petitioners could only seek redress in the civil cases (**PMCC No 15 and 21 of 2013**) as the only available mechanism. The Constitution of ACK does not forbid recourse to secular courts. And that the Orders granted in the civil suits were restraining in nature but limited to **ACK St. Lukes Church** and the **Diocese of Kitui** but not “**worldwide**” as alleged in the petition.

12. Also in response was an affidavit sworn by **Ven. Samuel Mbiri**, a priest in the **ACK Diocese Kitui** as well as the Vicar in charge of **Anglican Church of Kenya St. Josephs Kyome Parish (ACK St. Josephs Kyome)**. Who deponed *inter alia* that the petitioners damaged the vicarage, a house in which he lived. They robbed him off his properties and they continue to control use of **ACK St. Lukes Kyome Church** to the detriment of the Respondents.

13. At the hearing the Petitioners called a witness **Jacob Nyaa Mbao, (the 1st Petitioner)** who testified that he has been a member of **ACK** since **1990** when he was confirmed. That in 1990 his father (**Simon Nguli Nyaa**) who also joined the church built a chapel within his land. The church is the current **ACK St. Josephs Kyome**. The church was later allotted land by the then **County Council of Mwingi** in **2009**. Those later internal issues within the church arose particularly on the development project. Members then wrote a letter to the **Arch Bishop** on the issues and as they awaited the response from the Bishop a letter of ex-communication was delivered to them. That the letter had a request of putting the church under oversight until the issues were resolved.

14. The Respondent on the other hand solely relied on the replying affidavit.

15. The petition was canvassed by way of written submissions that I have duly considered.

16. This being a Constitutional Petition it is important to note the requirements set out in **Anaritas Case – v- Amos Kiumo & 19 others v Cabinet Secretary, Ministry of Interior and Co-ordination of National Government & 8 others (2014) Eklr** where **Lesiit, Makau and Bwononga JJ** quoted with approval from **Anarita Karimi Njeru V.A.G (No.1) 1979 KLR 154** where it was held:

“We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

The three Judge bench in the above-mentioned case referred to the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR** in which case the Court of Appeal held:-

“It was the High Court’s observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting. Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under Section 1A and 1B of the Civil Procedure Act (Cap21) and Section 3A and 3B of the Appellate Jurisdiction Act(Cap9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 holds true today: The whole object of pleadings is to bring the parties to an issue, and the meaning of the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of

testimony required on either side at the hearing.”

17. This is a case where the Petitioners argue that their right to worship guaranteed under the Constitution has been infringed by the Respondent an act that is illegal. It is averred that the petitioners have been ex-communicated from worshipping in **ACK Church in Kitui** and **worldwide**.

18. The right to worship is enshrined in the **Constitution of Kenya, 2010**. The relevant provision of law which is **Article 33** provides thus:

“1. Every person has the right to freedom of expression, which includes,

- a. *freedom to seek, receive or impart information or ideas*
- b. *freedom to artistic creativity; and*
- c. *academic freedom and freedom of scientific research*

2. The right to freedom of expression does not extend to-

(a) propaganda for war;

(b) incitement to violence;

(c) hate speech; or

(d) advocacy of hatred that-

- i. *constitutes ethnic incitement, vilification of others or incitement to cause harm; or*
- ii. *is based on any ground of discrimination specified or contemplated in Article 27 (4).*

3. In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.”

19. By a letter dated the **15th day of January, 2013**, the **Ven. Samuel Mbiri** wrote to the **1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th** Petitioners notifying them of their ex-communication from the **Anglican Church Diocese of Kitui** and the Anglican worldwide. The letter stipulates what prompted the author to make the decision to that effect. These included a declaration by the stated Petitioners conduct of recognizing the **9th** Petitioner instead of the priest who was obligated to conduct the funeral service of the **Late Lakeli Nzasu** and the Petitioners’ declaration that they could not be members of **ACK Kyome Parish** where **Ven. Samuel Mbiri** was the **Vicar** and an assault occasioned on the person of the **Vicar**.

20. The **9th** Petitioner and a deacon at the **St. Lukes ACK Church, Kyome** received a letter dated the **15th day of January 2013** ex-communicating him from the **Anglican Church Diocese of Kitui** and **Anglican Worldwide**. The action taken by the Bishop, **ACK Diocese of Kitui** was premised on grounds that the **9th petitioner** was transferred from **ACK Nzeluni Parish** to **ACK Mui in Mutitu Ndooa Parish** with effect from **1st January, 2013** but in disobedience of the Bishop he declined to report to the new station. He publicly disrespected the priest in charge, the **Ven. Samuel Mbiri** by officiating in his presence without his permission hence contravening the **Constitution** of the **Anglican church of Kenya**.

21. The Respondent was prompted to take action following a notice given to its Bishop dated the **11th January, 2013** of de-linkage from it. The petitioners and others from specific churches who purported to constitute **Kyome Parish (St. Joseph’s Kyome, St. Mary’s Kiteru, St. Lukes Kyome East, St Ann’s Kasevi) and Nzeluni Parish (St. Peters Kwa Kyelu, St. Paul’s Ndaluni and St. Stephen’s Mavalani)** stated that they were de-linking from the jurisdiction of the Respondent and were now under the pastoral authority of the primate and Arch Bishop of the **Head of Anglican Church of Kenya (Bishop of all Saints Cathedral Diocese)**.

22. They made a declaration that the **Kitui Diocese** administration were thereby restrained from interfering with their peace. They formally notified **His Grace, the Most Rev. Dr. Eliud Wabukala, Bishop of All Saints Cathedral Diocese** of the de-linkage.

23. The Petitioners now term the ex-communication unconstitutional to the extent of their freedom of worship being curtailed.

24. Parties herein are bound by the **Anglican Church of Kenya Constitution. Article XXVI** provides for discipline in the church. The church is mandated to apply some sanctions when necessary. All office bearers may even be deprived of the office. For the members, the church can ex-communicate them. This means that all their rights and privileges of membership in church are withdrawn. **(See Article XXVI (3) (b) (ii) of the ACK Church Constitution).**

25. The Respondent adopted the sanction pursuant to its discretion as mandated by its Constitution. This was done after the Petitioners acted conscientiously in an endeavor to satisfy their spiritual gratification of delinking themselves from the respondent. The action was taken after the standing committee of the church synod met and endorsed it. The ex-communication was in respect of the ACK Diocese of Kitui but not worldwide. Ex-communicating them from the Respondent was in order but not worldwide. Withdrawing the right and privileges of membership of the Petitioners to other Anglican Churches outside Kenya would be an extreme measure hence unconstitutional.

26. In case of **Rev. Peter Gachara and others V. Attorney General and others, Nairobi Petition No 299 of 2011** (unreported) it was stated thus:

“The (church) is a place of worship for members of the public, but a church, it functions within an organizational structure. In my view, therefore, that organization and the persons who serve in it are subject to internal rules and regulations which they agree to abide by when they agree to join that church. Freedom of worship or religions activity does not operate in a void or vacuum.”

27. In the case of **Mbugua v Festo H. Olang & another, (1979) eKLR Hancox J.** stated thus:

“I fully agree that the last thing the court wishes to do is to arrogate itself powers to decide on matters which are not ordinarily justifiable by the courts and pronounce upon the conclusiveness or otherwise or decisions taken in respect of disciplinary matters affecting the clergy. Indeed in Solomon v Presbyterian Church of East Africa and others, HCCC No.2859 of 1977, I held that a decision to excommunicate the plaintiff was purely a spiritual and therefore a domestic matter for the church, in which the court could not interfere..”

28. With this in mind I find that the Petitioners in exercise of their right to freedom of association delinked themselves from the 1st respondent. Therefore, the action of the Respondent of ex-communicating them from the Anglican church of Kenya diocese of Kitui was lawful. Consequently, the petition fails and is dismissed with costs to the Respondent.

29. It is so ordered.

Dated, Signed and Delivered at Kitui this 14th day of October, 2015.

L.N. MUTENDE

JUDGE