



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NUMBER 187 OF 2012

IN THE MATTER OF ARTICLES 28, 33 AND 22 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OR INFRINGEMENT AND VIOLATION OF RIGHTS

AND FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 28 AND 33 OF THE CONSTITUTION OF KENYA

BETWEEN

HON. UHURU MUIGAI KENYATTA.....PETITIONER

VERSUS

THE NAIROBI STAR PUBLICATIONS LIMITED.....RESPONDENT

RULING ON A PRELIMINARY OBJECTION

Introduction

1. The Petition is dated the 7th May 2012 and in it the Petitioner alleges violation or infringement of his fundamental rights under **Articles 28** and **33** of the **Constitution**. He seeks the following Prayers and reliefs;

“a) A declaration that the publication by the Respondent in fabricating and publishing falsehoods and abuses (sic) that the Petitioner is involved in a plot to murder one Maina Njenga, and/or is linked to a gunman and/or wants to murder anyone in his quest for the Presidency of Kenya, and/or is a thug whose exploits are worse than the most vile Mafia operative, and/or if the Petitioner became the President of Kenya, he would be the most depraved president the country would ever know. That the Respondent's actions are therefore a gross abuse of the freedom of expression or the freedom of the medial and is a violation or infringement of the Petitioner's rights or fundamental freedom in the Bill of Rights under the Constitution of Kenya and a contravention of the Constitution of Kenya.

b) A permanent injunction restraining the Respondent whether by itself, its agents or servants or howsoever from fabricating or publishing the said words or any other hate speech of and concerning the Petitioner.

c) An order that the Respondent pays compensation to the Petitioner for the gross violations of the Constitution of Kenya and the Petitioner's rights and fundamental freedoms in the Bill of Rights under the said Constitution of Kenya.

d) That the Respondent do pay the costs of this Petition.

e) Such other reliefs that this Honourable Court may deem just to grant against the Respondent for the gross violations of the Constitution and the Law aforesaid.”

2. Before the Petition could be heard, the Respondent filed a Notice of Preliminary Objection dated the 10th of May 2012 based on the following grounds;

a) Fundamental Rights and Freedoms set out in the Bill of Rights in the Constitution of Kenya 2010 can be enforced by a private individual by way of a Constitutional Petition only as against the State and State organs and not by a private individual as against another private individual as sought by the Petitioner.

b) The Petitioner's Claim, if any, is a claim in the tort of defamation and the same can only be remedied in a civil suit and not through a Constitutional Petition.

c) The Petitioner's complaint if any, for hate speech is a matter for determination by the National Cohesion and Integration Commission under the National Cohesion and Integration Act No. 12 of 2008 and no such complaint has been lodged to date.

d) The entire Petition is an abuse of the process of court and is intended to censor the Respondent's Freedom of Media.

Facts of the case according to the Petitioner

3. The facts as set out in the Petition are that on or about the 24th of April 2012, the Respondent published a story in a local daily newspaper, “*The Nairobi Star*”, in which there was a cover photo with the headline, “*Uhuru denies links to Njenga Gunman.*” A summary of the story is as follows;

a) A Nairobi businessman by the name Joseph Njoroge Thuo (“Thuo”) allegedly caused commotion at the Hope International Church which is headed by alleged Former “Mungiki” Leader, Maina Njenga.

b) Some alleged supporters of the said Maina Njenga claimed that Thuo had accompanied Uhuru Kenyatta to the International Criminal Court at the Hague in the year 2011.

c) Uhuru Kenyatta's Director of Communications, a Mr. Munyori Buku, denied that Thuo had accompanied Uhuru Kenyatta to the Hague stating that Thuo could not have been a body guard of Uhuru Kenyatta because Uhuru Kenyatta's bodyguards are all police officers.

d) Buku stated that the drama caused by Thuo at the Hope International Church may have been stage-managed by Maina Njenga to discredit Uhuru Kenyatta.

e) A photo of Uhuru Kenyatta at the Hague shows a man standing behind him who resembled Thuo.

f) Njenga claimed that Thuo had told him that he was privy to a plot to assassinate Njenga but Thuo later reportedly told the police that he believed that he had been set up by Njenga.

g) On the previous Sunday, Njenga had claimed that prominent politicians from Central Kenya were behind the plot and that 18 GSU officers had been tasked to trail and execute him.

The Petition was then filed to challenge the above facts and to seek the reliefs set out above.

Issues for determination in the preliminary Objection

4. i) *Does the Objection fit the test for a Preliminary Objection?*

ii) *Can a Constitutional Petition be lodged between two private persons?*

iii) *Is the Petitioner's Claim a tort in defamation?*

iv) *Is the Petitioner's Complaint, if any, a matter for determination by processes known to the NCIC Act No.12 of 2008?*

Does the Application fit the test for a Preliminary Objection?

5. In **Mukisa Biscuit Manufacturing Co. Limited vs. West End Distributors Limited [1969] EA 696**, Newbold, V.P, observed as follows;

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of Law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase cost and, on occasion, confuse issues. This improper practice should stop.”

Applying the above test, the matters raised by the Respondents in their preliminary question and which are set out above are clearly pure points of law that must be considered by this Court and as such I shall proceed to determine them.

Whether a Constitutional Petition can be lodged between two private persons

6. On the first issue, the Respondent in written submissions dated the 4th day of June, 2012 relies on the decision in **Kenya Bus Service Ltd & 2 Others vs. The Attorney General & 2 Others (2005) eKLR** where it was held that fundamental rights and freedom set out in the Bill of Rights are enforceable by a private individual by way of a constitutional reference only as against the State and State Organs and not by a private individual as against another private individual and that if any party had a claim against another then the parties should pursue such action under private law. The Respondents also rely on **Article 21** of the **Constitution** which provides that it is the fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.

7. The Petitioner in reply to the issue above relies on **Civil Appeal No.110 of 2001, Rashid Odhiambo Aloggoh & 245 Others vs Haco Industries Ltd (unreported)** where it was held that availability of other lawful causes of action is no bar to a party who alleges a contravention of his rights under the Constitution. The Petitioner also relies on the Constitution of Kenya (Supervisory Jurisdiction And Protection Of Fundamental Rights And Freedoms Of the Individual) **High Court Practice And Procedure Rules, 2006 Part III** which provides for the Enforcement jurisdiction of the Court and specifically **Rule 15** which states that;

“The Petition shall, in a criminal case, be served on the Attorney-General and in a Civil Case, on the Respondent, within seven (7) days of filing.” The Petitioner's in that regard submit that in the circumstances where the contravention emanates from a Government-cum-Governed relationship then the Attorney General is the apt party to sue but in situations where the alleged contravention is between private individuals (persons) as defined in **Article 260** of the **Constitution**, then such private party is the right party to sue.

8. The point being made is that individuals can sue each other for enforcement of fundamental rights.

9. The Law on this subject is in my view quite clear. As Nyamu J. stated in **Kenya Bus** (supra).

“... fundamental right are contained in the Constitution and are principally against the State because the Constitution's function is to define what constitutes Government and it regulates the relationship between the Government and the governed On the other hand the rights of individual interests are taken care of in the province of private Law and are invariably addressed as such.”

10. More succinctly, Maxwell C.J. In Teitiwinnang and Ariong & Others [1987] L.R.C. Const. 517 at page 599 stated as follows;

“Dealing now with the question can a private individual maintain an action for declaration against another private individual on individual or individuals for breach of the fundamental rights provisions of the Constitution. The rights and duties of individuals and between individuals are regulated by private law.

The Constitution on the other hand is an instrument of Government. It contains rules about the Government of the country. It is my view therefore that the duties imposed by the Constitution under the fundamental rights provisions are owed by the Government of the day to the governed. I am of the opinion that an individual or a group of individuals as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual so as to give rise to an action against the individual or a group of individuals since no duty can be owed by an individual or group of individuals to another individual or group of individuals so as to give rise to an action against the fundamental rights provisions of the Constitution, no action for a declaration that there has been a breach of duty under the provision can be or be maintained in the case before me, and I so hold.”

11. Similarly, in Re Application by Bahadur [1986] L.R.C (Cost.) 297 at 298, the Court in Trinidad and Tobago held as follows;

“The Constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can found a claim under substantive law, the proper course is to bring the claim under that law and not under the Constitution”.

12. I am in agreement with the above findings and looking at **Article 21** of the **Constitution**, it is the State and every State Organ that is required to “*observe, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.*” No such obligation is imposed on an individual (including a company) and so I am in agreement with the Respondent arguments in that regard – see also Chomondely vs Republic (2008) eKLR.

Is the Petitioner's claim a tort in defamation?

13. Turning now to the second issue, it is obvious that principally, the Petitioner's complaint is that he was defamed by the publication whose facts are summarized above. If so, then the remedy for his pain, if at all, lies in Civil Law and not a reference under the Constitution.

14. In NM & Others vs Smith and Others (Freedom of Expression Institute as Amicus Curiae) 200 (5) S.A. 250 (CC) the Court stated thus;

“It is important to recognise that even if a case does raise a constitutional matter, the assessment of whether the case should be heard by this Court rests instead on the additional requirements that access to this court must be in the interests of justice and not every matter will raise a constitutional issue worthy of attention.”

15. Similarly in Minister of Home Affairs vs Bickle & Others (1985) L.R.C. Cost.755, Georges CJ held as follows;

“It is an established practice that where a matter can be disposed off 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 (Wahid Munwar Khan vs. The State AIR (1956) Hyd.22). The judge went on to add that: "Courts 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 provision 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."

16. I need say no more. Where there is a remedy in Civil Law, a party should pursue that remedy and I say so well aware of the decision in Haco Industries (supra) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in AG vs S.K. Dutambala Cr. Appeal No.37 of 1991 (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions.

The complaint in this case is not so serious as to attract Constitutional sanction.

Is the Petitioner's complaint a matter for determination under the NCIC Act, No.12 of 2008?

17. The **National Cohesion and Integration Act (NCI Act) No.12 of 2008** is an **Act of Parliament** to encourage national cohesion and integration by outlawing discrimination on ethnic grounds, to provide for the establishment, powers and functions of the National Cohesion and Integration Commission and for connected purposes. Under **Section 13** of the **NCI Act**, thereof;

A person who ... (b) Publishes or distributes written material which is threatening, abusive or insulting or involves the use of threatening, abusive or insulting words or behaviour commits an offence if such person intends thereby to stir up ethnic hatred, or having regard to all the circumstances, ethnic hatred is likely to be stirred up is guilty of hate speech" Further, Section 13(3) of the same Act states that "Ethnic hatred means hatred against a group of persons defined by reference to colour, race, nationality including citizenship or ethnic or national origins."

18. The **Constitution** of Kenya, **2010**, guarantees the right to freedom of expression but the same has limitations and does not extend to propaganda for war, incitement to violence, hate speech or advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm; or is based on any ground of discrimination specified or contemplated under **Article 24** of the **Constitution**. The **NCI Act** criminalizes hate speech and provides for a penalty payable in the event one is found guilty of the offence. As was held by Majanja J. in Chirau Ali Mwakwere vs Robert M. Maberu and 4 Others (2012) eKLR.

"Hate speech, incitement to violence and other forms of expression are excluded from the ambit of protection of Article 33(2) and are not defined by the Constitution. Because of the deleterious effects of propaganda for war, incitement to violence, hate speech and advocacy for hatred, which I have referred to at paragraph 33, sanctions are imposed on such conduct through criminal law. Sections 13 and 62 of the NCI Act give effect to the State objective to promote ethnic harmony and national cohesion by prohibiting hate speech. This objective is consistent with the national values and principles of the Constitution particularly human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized."

19. Further that: *"Coming back to our own legislation, reading and applying the plain meaning interpretation of Section 13, I do not find that this provisions simply 'criminalize' the voicing of historical injustices as contended by the Petitioner. Section 13 only curtails such freedom of a person who intends to stir up ethnic hatred or having regard to all circumstances, ethnic hatred is likely to be stirred. It is thus not merely a question about the falsity, truth, popularity or otherwise of particular information or expression. It appears to me that the statute lays more emphasis on the likely effect of the objectionable information and intention of the person delivering it rather than on the content of the objectionable expression."*

It is obvious to me that the facts as pleaded do not fit the definition of hate speech as set out above and I

so find.

20. The finding above cannot conclude the matter because the Respondents in their submissions also state that the Petitioner should file his complaint before the Council created under the **Media Act Cap 411(B)** for resolution. **Section 4** of the **Media Act** states that;

“The functions of the Council are;

(a) mediate or arbitrate in disputes between the government and the media, between the public and the media and intramedia;”

Section 26 of the **Act** also states that;

“1) Any person aggrieved by;

(a) any publication, or any conduct of a journalist media enterprise or the Council; or

(b) anything done against a journalist or media enterprise that limits or interferes with the Constitutional freedom of expression of such journalist or media enterprise; may make a written complaint to the Council setting out the grounds for the complaint, nature of the injury or damage suffered and the remedy sought”

21. My reading of the above provisions of the Law would lead me to the conclusion that looking at the facts raised in the Petition, it is not the National Cohesion and Integration Commission that should be seized of the issues in contest but the Media Council and/or the Civil Courts and it is obvious why.

22. Having held as I have, it is obvious that the Preliminary Objection has merit on all grounds with the consequence that the Petition before me is ordered to be struck off and the Petitioner is granted leave to either pursue his claim under the tort of defamation in the Civil Court or file a complaint before the Media Council of Kenya for an appropriate relief.

23. As to costs, it is obvious to me that the dispute is not fully settled and may be pursued in the right forum. In the event, let each party bear its own costs.

24. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 5TH DAY OF APRIL, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court Clerk

Mr. Toiywa holding brief for Mr. Havi for Respondent

No appearance for Petitioner

Order

Ruling duly delivered.

ISAAC LENAOLA

JUDGE

5/4/2013