



**Ochieng v Airtel Networks Kenya Limited & 2 others (Constitutional Petition
E003 of 2020) [2025] KEHC 2900 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2900 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CONSTITUTIONAL PETITION E003 OF 2020**

MS SHARIFF, J

FEBRUARY 27, 2025

**IN THE MATTER OF ARTICLES 3,19,20,22,23,28,29,31,35,46,165,243,244
& 245 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF AN APPLICATION BY JUSTUS JAVAN OCHIENG

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010**

AND

**IN THE MATTER OF RULE 3 (1), (4) AND (10) OF THE CONSTITUTION
OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

AND

**IN THE MATTER OF SECTIONS 27A, 27B, 27C AND 27D OF THE KENYA
INFORMATION AND COMMUNICATIONS (AMENDMENT) ACT, 2013**

AND

**IN THE MATTER OF REGULATIONS NUMBERS 5(1), 6(2), 6(3), 7(2) (B)
AND 17 OF THE KENYA INFORMATION AND COMMUNICATION
(REGISTRATION OF SIM-CARDS) REGULATIONS, 2015**

BETWEEN

JUSTUS JAVAN OCHIENG PETITIONER

AND

AIRTEL NETWORKS KENYA LIMITED 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT



JUDGMENT

1. The Petitioner vide his Petition dated 25th April 2025, seeks orders as follows: -
 - a. A declaration that the rights of the Petitioner were violated.
 - b. An order directed to the 1st Respondent to deregister numbers 0751660918,0753755216,0751107635,0739066567,0750423514 and 0751535615.
 - c. An order directed to the 2nd Respondent to stop any further investigations against the Petitioner in relation to the above stated numbers.
 - d. Damages for violation of the rights of the Petitioner to privacy, security, liberty, dignity, economic rights, protection from misleading information and physiological torture.
 - e. Any other relief the Court deems fit.

Petitioner's case

2. The Petitioner outlined his case in his dated 21st October 2020. He avers that sometime on 27th January 2019, he was summoned by Police Offices from the Anti-Terrorism Police Unit, Central Police Station Kisumu on suspicion of engaging in organized criminal activities. While at the station he was informed that there is an Airtel number 0753755216 registered under his name and the same was suspected to be used in the planning of a terror attack at Odeon Area Nairobi sometime in January 2019.
3. He avers that he informed agents of the 2nd Respondent that he only has one registered Airtel number which was 0735306568 registered with his consent. He was ordered to report to the Anti-Terrorism Police Unit headquarters, Nairobi, for further investigations and action and he did the same for 5 weeks without any action from them.
4. He avers that on 31st January 2019, he emailed the 1st Respondent requesting to be supplied with all the numbers registered with his National Identification details and to his surprise he established that the following numbers were registered using his ID card: 0751660918,0753755216,0751107635,0739066567,0750423514 and 0751535615. He deposed that he only consented to the registration of two numbers which are: 0733594301 and 0735306568, and that the former was deregistered under his instruction in favour for the 2nd one.
5. He avers that he did not avail his consent for registration of numbers 0751660918,0753755216,0751107635,0739066567,0750423514 and 0751535615 under his name and identification card. He insisted that he did not personally avail or give details of his personal information to the 1st Respondent for registration of the captured numbers.
6. He avers that the action of the 1st Respondent in registering the numbers under his name without his express consent amounts to violation of his right to privacy and dignity and as a result of the said actions the 2nd Respondent actions and treatment towards him exposed him to psychological torture and curtailed his rights to liberty.
7. He avers that he lives his life in fear after the allegation that he is linked to terrorism activities and was gravely inconvenienced by the calls and summons from the 2nd Respondent's agents. Furthermore, the



illegal actions of the Respondents exposed him to embarrassment, psychological torture and fear for his security.

8. He swore a Further Affidavit in support of his Petition on 30th November 2022, wherein he averred that since his summoning at the Anti-Terrorism Police Unit at Kisumu he started living in fear and that he was expected to report at the Anti-Terrorism Police Unit offices in Nairobi each week yet he resided in Kisumu.
9. He avers that the actions of the 2nd Respondent interfered with his work and had to go 6 months without pay and always being threatened with disciplinary hearings as he was always out of his work station.
10. He avers that despite refuting the 2nd Respondent's claim that he was the owner of the said numbers, the 2nd Respondent did not conduct further investigations thus exposing him to danger and harm.

1st Respondent's case

11. The 1st Respondent raised a Preliminary Objection dated 10th December 2020, and further swore a Replying Affidavit on 20th August 2021 vide Lilian Mugo, Legal Manager, at the 1st Respondent.
12. She avers that the Petitioner's Petition dated 26th October 2020, is scandalous, vexatious, and is an abuse of the Court process.
13. According to her, the 1st Respondent is mandated by law to sell sim cards and/or otherwise provide telecommunication services. She insisted that prior to selling SIM Cards and/or providing the services to any person, the person must provide the 1st Respondent the required specific information and that the same can only be availed by the person seeking to be registered, in this instant Petition, the Petitioner.
14. She emphasized that the SIM Card is registered under a person's name and the same is done only if the person present him/herself before the 1st Respondent or its agents.
15. She avers that the 1st Respondent has not refused to de-register the numbers but the same can only be done if the Petitioner presents himself before the 1st Respondent to effect the same.
16. She avers that the numbers registered under the name of the Petitioner were duly registered as no such registration would have been possible without the Petitioner providing the required details.
17. The 2nd and 3rd Respondents did not tender their response to the Petitioner's Petition.
18. Vide Court directions dated 9th March 2023, the parties were directed to canvass the Petition by way of written submissions. All the parties complied.

Submissions

19. The Petitioner submitted that the registration of the stated 6 other numbers under his name was done procedurally and that the 1st Respondent had a duty to explain when, how, and by who and that the 1st Respondent even advised him to physically visit them for purposes of de-registering the said numbers.
20. He submitted that according to annexure no. JJ03 the Petitioner wrote a letter to confirm which numbers were registered under his name and why he had to physically get the said numbers deregistered.
21. He submitted that under the Kenya Information & Communications (Registration of SIM-Cards) Regulations, 2015 there is a prescribed procedure for registration of a SIM-Card and it provides for a



form to be filled with details, and that an individual has to go physically to an agent of a service provider to register a SIM-Card.

22. He submitted that the burden of proof lies with the 1st Respondent to show who, how and when the said numbers were registered as the said numbers were basis for his summoning at the Anti-Terrorism Police Unit.
23. He submitted that the Petitioner still questions whether the 2nd Respondent's agents visited the 1st Respondent's offices to establish how, where and which of their agents registered these numbers.
24. He submitted that the York of suspicion still hangs on the Petitioner's neck despite him not being charged and this Court ought to grant him damages as prayed.
25. The 1st Respondent submitted that the entire Petition is based on the fact that one of the numbers registered under the Petitioner's name was used in threatened terrorist activities and that the only document provided by the Petitioner showing interaction between him and the Anti-Terrorism Police Unit was the requisition to compel attendance that is issued only by the National Police. He insists that nowhere on the stated document do the police say that particular phone number, 0753755216, is subject of any investigations or the threatened terrorist attack.
26. It was submitted that the link between the alleged terrorist attack and the phone number, 0753755216, is a creation of the Petitioner and that no statement has been produced indicating that the Petitioner made the same with the police.
27. It was submitted that the Petitioner's Petition must fail as that as he failed to prove the substance of his Petition and he has simply made unsubstantiated allegations at paragraph 6 of his Petition. He insisted that no evidence was availed to prove the attendance of the Petitioner at Anti-Terrorism Police Unit Headquarters in Nairobi for the alleged 5 weeks. No evidence of either bus ticket or air ticket was availed to show the Petitioner availed himself in Nairobi as alleged.
28. It was submitted in light of annexure JJ02, that this Court had the same expunged from the Court record thus the allegations at paragraph 8 are unsupported by any evidence.
29. It was submitted that the Petitioner's allegations under paragraphs 14 and 15 are unsubstantiated and as a person of means with his reputation on a brink of tarnish, the Petitioner ought to have availed evidence to support his allegations.
30. It was submitted that the Petitioner has failed to discharge his duty as stipulated under Section 107 and 108 of the *Evidence Act*.
31. It was submitted that under the SIM-Card Registration Regulations, 2015 Regulation 15 enables a person to report any false information regarding registration to the Communication Authority.
32. Counsel referring the Court to Section 102 (F) and Section 3 of the Kenya Communication & Information Act submitted that the Petitioner did not prove that he exhausted the available remedies prior to filing his Petition. The 1st Respondent had invited the Petitioner vide a letter dated 21st February 2019 to present himself for de-registration if aggrieved. It was submitted that the SIM-Card Registration Regulations, 2015 did not set out the procedure for de-registration.
33. Finally, counsel submitted that the Petition and the violations thereto were not proved and that the same ought to be dismissed.
34. The 2nd and 3rd Respondent submitted that the Petitioner was never arrested and the Police did not infringe on his rights as alluded. Furthermore, the Petitioner failed to adduce any evidence to show he



was summoned at the Anti-terrorism Police Unit and subjected to torture and mistreatment. Counsel urged this Court to dismiss the Petition and find the Petitioner not entitled to any damages and compensation as he failed to prove his case on a balance of probabilities.

35. It is my considered opinion that the issues that arise for determination are as follows:
- i. Whether the Petition satisfies the threshold for constitutional Petitions;
 - ii. Whether the Petitioner's rights under *the Constitution* were violated; and
 - iii. Whether the Petitioner is entitled to the reliefs sought.

Whether the Petition satisfies the threshold for constitutional Petitions.

36. An essential requirement for Constitutional Petitions is that they must be drawn with reasonable precision by setting out the Articles of *the Constitution* that were violated and providing sufficient details of how the violation took place. This underscored by the Court in *Husus Mugiri v Music Copy Right Society of Kenya & another* [2018] eKLR where it noted that:

“ 18. In order for a petition to qualify to be a constitutional petition that seeks to enforce or protect fundamental rights and freedoms under the bill of rights, it must meet the test set in *Anarita Karimi Njeru vs. Republic* [1979] eKLR. That is, the applicant must specify which specific provisions of *the Constitution* that declare the rights, the specific rights and freedoms that have been or are threatened to be infringed or violated and the manner in which the respondent has infringed the subject rights. This position has been reiterated time and again.”

37. Likewise, in *Meme v Republic* [2004] eKLR the Court stated as follows:

“Where a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important that he should set out with reasonable degree of precision that of which he complains, the provisions said to have been infringed and the manner in which they are alleged to have been infringed and that the applicant's instant application had not fully complied with the basic test of constitutional references, as it was founded on generalized complaints without any focus on fact, law or Constitution, hence it had nothing to do with the constitutional rights of the appellants”.

38. My reading of this Petition shows that it details the provisions of *the Constitution* that were infringed but the descriptive information on the manner in which the violation occurred is either sketchy or too general. This Petition omits very vital particulars as to how the constitutional provisions were infringed and the manner in which the infringement occurred.
39. The Petitioner alludes to the registration of 6 other number to his name but has failed to demonstrate to the linkage between the alleged registered 6 numbers, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Furthermore, the Petitioner failed to demonstrate in specific details the manner in which the 2nd Respondent agents infringed on his rights. This Petition is pleaded indistinctly and does not meet the threshold required of a Constitutional Petition.

Whether the Petitioner's rights under *the Constitution* were violated

40. For the Petitioner's claim to succeed it must be proved that the Respondents violated provisions of *the Constitution* as alleged in the Petition.



41. The Supreme Court in *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others SC Petition No. 12 of 2019* [2020] eKLR emphasized the need for proof as follows:

“(49) Section 108 of the *Evidence Act* provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and Section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

[50] This Court in *Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013*, restated the basic rule on the shifting of the evidential burden, in these terms:

“...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”

42. Correspondingly, in *Evans Otieno Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR it was held that:

“15. ... As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107(1) of the *Evidence Act* (Chapter 80 of the Laws of Kenya)...

16. Furthermore, the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act as follows:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him...”

43. In the instant Petition, despite the Petitioner stating that the 1st Respondent registered 6 numbers under his name without his consent and/or authorization, there was no evidence availed to prove the existence of the alleged 6 numbers and that he was in communication with the 1st Respondent with regards to the same. On the issue of been summoned by the 2nd Respondent, been required to report at the Anti-terrorism Police Unit headquarters, and the proof of the mental torture exhibited on his, no evidence was availed to that effect. The 2nd Respondent denied ever summoning and/or arresting him as claimed. This Petition is simply hypothetical and is not backed by any facts. The annexures JJ02 as exhibited do not meet the requirements of admissibility of electronic evidence as spelt out under the *Evidence Act* particularly, Section 106 (B) (4).

44. The Petition lacks merit and is hereby dismissed. Considering it was a public interest litigation; each Party will bear its own costs.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF FEBRUARY 2025.

SHARIFF MWANAISHA SAIDA



JUDGE

In the presence of :

..... for Petitioner

..... for 1st Respondent

.....for 2nd and 3rd Respondent

.....Court Assistant

