



**Amuguni v Registered Trustees of the Sisters of Mercy (Kenya) t/a ‘The Mater
Misericordiae Hospital (Petition E213 of 2024) [2025] KEHC 7118 (KLR)
(Constitutional and Human Rights) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7118 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E213 OF 2024

LN MUGAMBI, J

MAY 29, 2025

BETWEEN

NAOMI KEMUNTO AMUGUNI PETITIONER

AND

**THE REGISTERED TRUSTEES OF THE SISTERS OF MERCY (KENYA) T/A
‘THE MATER MISERICORDIAE HOSPITAL RESPONDENT**

JUDGMENT

1. The Petition dated the 15th day of April 2024 is supported by the Petitioner’s verifying affidavit dated 4th April 2024 and a further affidavit dated 15th January 2024.
2. The Petitioner states that on 6th December 2022, she was deported from the USA. Prior to that she had been detained for three days. She stated her ordeal is traceable to the alleged entry into the USA with a COVID-19 Certificate that was labelled a forgery by the USA Immigration officers. The Petitioner accuses the Respondent of issuing her with an inaccurate version of the COVID-19 Certificate which sparked of the violations of Articles, Article 10(2)(b), 25(a), 28, 29(d) and 43(1)(a) of *the Constitution*.
3. As such, the Petitioner seeks the following orders:
 - a. A declaration that the Respondent’s issuance of a defective COVID-19 certificate to the Petitioner was in contravention of Articles 10(2)(b), 25(a), 29(d), 28, and 43(1)(a).
 - b. A declaration that the Respondent’s reluctance to accord the Petitioner an internal administrative process that was expeditious, efficient, lawful, reasonable, and procedurally fair was in violation of the Petitioner’s rights under Article 47.



- c. An order for compensation in the sum of 20,000,000/= be and is hereby issued to the Petitioner.
- d. Costs of the petition.
- e. An order for interest be and is hereby issued on (f) and (g) above.
- f. Such other order(s) as this Honourable Court shall deem just.

Petitioner's Case

4. The Petitioner avers that she is a former employee of the Respondent. On 30th November 2021, she was granted her an unpaid sabbatical leave of six months by the Respondent to facilitate her to travel to the USA.
5. On 1st December 2021, she went to the Respondent's facility for COVID-19 test in compliance with the US travel requirements and was issued a negative for COVID-19 Certificate which she proceeded to upload to the US Embassy's traveller's portal.
6. On 2nd December 2021, at the Jomo Kenyatta International Airport (JKIA) where she was to depart to USA, she was informed at check-in point by the immigration officers that her COVID -19 Certificate had an error and thus could not make the journey.
7. The Petitioner contacted the Respondent's Hospital, which confirmed that the issued COVID-19 certificate had an error and promptly sent an amended version of the Certificate but was unable to upload the amended version onto the US Embassy travellers' portal even though she was allowed to travel.
8. Upon arrival at Los Angeles International Airport (LAX), in the USA, the immigration officials stopped her and inquired why the COVID 19 Certificate on the portal and one she presented had different dates, time stamps, and test codes. She tried to explain the discrepancy but was pulled aside for questioning.
9. She was subsequently detained in a room for 8 hours after which an immigration officer informed her that she was getting deported for attempted entry into USA with missing COVID-19 test results, lying to border officials and forgery. She was detained for 3 more days and was provided a packet of cookies and crisps and was not being allowed to shower.
10. The Petitioner depones that on 6th December 2021, she was deported to the USA from Kenya via Amsterdam. While she was on the plane from Amsterdam to Nairobi, she opened her passport and discovered that her US visa had been revoked. Further upon arrival in Kenya, she discovered she had a criminal record when an immigration officer in Kenya asked her what crime she had committed in the USA.
11. The Petitioner posits that the Respondent's act of supplying her with a defective COVID-19 certificate ignited the sequence of unfortunate events that caused her eventual deportation and revocation of her US Visa. In addition, the Respondent maliciously terminated her employment.
12. The Petitioner avers that she has been living with her sister since being deported into Kenya as she was mentally and emotionally affected, is financially strained and unable to support herself, all because of the Respondent's negligent act.



Respondent's case

13. The Respondent through its Counsel, Evelyn N. Maina opposed the Petition through its Replying Affidavit sworn on 12th July 2024.
14. The Respondent averred that the Petitioner had a duty to exercise due diligence by counter-checking the details of COVID-19 certificate before uploading the same on the portal.
15. It was asserted that the Respondent on 2nd December 2021, forwarded the corrected soft copy of the COVID -19 Certificate to the Petitioner upon request.
16. The Respondent contended that the Petitioner assumed the risk of any prejudicial consequences by undertaking the journey while fully aware she was unable to upload the correct COVID 19 Certificate on the USA travellers portal.
17. The Respondent further states that the causal link of any negligent error on its part with respect to the entry in the COVID-19 Certificate was extinguished after its officers issued a corrected soft copy of the Certificate as requested by the Petitioner.
18. To this end, she stresses that the Respondent cannot be held liable for the violation of the Petitioner's rights that happened outside Kenya and in the hands of the US Immigration Department which is a separate sovereign entity.

Petitioner's Submissions

19. The Petitioner, through S.B Otieno & Company Advocates, filed submissions dated 6th January 2025, where the following issues were highlighted for determination: whether the Respondent violated the Petitioner's right under Article 43(1)(a) and Article 29(d) of *the Constitution*, whether Petitioner ought to exhaust alternative remedies, and whether the Petitioner is entitled to damages.
20. On the first issue, Counsel, averred that the negligence of the Respondent in issuing the erroneous COVID-19 certificate was the trigger that set in motion the events that resulted in the cited constitutional violations. In violation of Article 43(1)(a) of *the Constitution*, Counsel turned to Article 45(2)(c) of the WHO International Health Regulations 2005 and the Ministry of Health's Standard Opening Procedures for COVID-19, which stipulate that health documents for international travel must be accurate.
21. Accordingly, by issuing erroneous certificates without a supporting explanation for the discrepancies, Counsel contended that the Respondent had breached this provision of the WHO International Health Regulation 2005, and the Ministry of Health's Standard Operating Procedures for COVID-19 and as such violated Article 43(1)(a) of *the Constitution*.
22. With reference to Article 29(d) of *the Constitution*, Counsel averred that the Respondent's negligence in issuing an erroneous COVID-19 Certificate resulted in the adverse action taken against the Petitioner by the US immigration department. To further assert this, Counsel placed reliance on *Elijah Ole Kool v George Ikonya Thuo* [2001] eKLR where it was held that:

“When will an act or omission be said to be the cause of the Plaintiff's injuries? A defendant will only be held liable for negligence if his act or omission is either the sole effective cause of the Plaintiff's injury or the act or omission is so connected with it as to be a cause materially contributing to it. The first case will rarely raise contentions.”



23. On the second issue, the Counsel relied in *Christabel Akinyi Onyango v Kenya Airports Authority* [2014] eKLR to support the assertion that they ought not to have pursued a civil suit as the case is not purely civil and that the Petition specifically sets out the Petitioner's rights which were violated by the Respondent. Additionally, Counsel highlighted that the Respondent did not indicate any alternative remedies through which the Petitioner could seek redress against the Respondent.
24. Counsel was certain in the third issue that the Petitioner is indeed entitled to the sought reliefs. Reliance was placed in *Wachira Weieire V Attorney-General* [2010] eKLR where the petitioner having suffered psychological torture, detention and questioning in the hands of authorities, the Court awarded Kshs. 2.5 million. Counsel argued that considering the inflation in the last 15 year since this matter was determined, and that the present petition alleges more violations, an award of Ksh. 20,000,000 plus costs and interest will be sufficient to compensate the petitioner.

Respondent's submission

25. The Respondent, through Chiuri Kirui & Rugo Advocates, filed submissions on 16th December 2024. The Respondent underscored the issues for determination as: whether the basic relevant antecedent facts, giving rise to the Petition, disclose a civil cause or grievance under the tort of negligence, whether the alleged breach of rights and freedoms establish any constitutionally -actionable harm attributable to the Respondent, and whether the Petitioner is entitled to the reliefs prayed for.
26. Counsel on the first issue, submitted that while the Respondent's officers had indeed made a negligent error, the same would have been resolved by due diligence on the Petitioner's part even before the Immigration officers at JKIA pointed it out. That said, Counsel submitted that the facts giving rise to this case are civil in nature as the claim revolves around an act of negligence. Reliance was placed in *Communications Commission of Kenya & 5 others v Royal Media Services & 5 others* [2014] KESC 53 (KLR) where it was observed that:

“The 1st, 2nd and 3rd respondents' claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright-infringement claim and it was not properly laid before that Court as a constitutional issue”.
27. In view of this, Counsel submitted in the second issue, that there was no link between the violation of the Petitioner's constitutional rights and the jurisdiction of this Court. This is because the acts that violated the Petitioner's rights took place in a different jurisdiction. Furthermore, Counsel submitted that the Petition in sum invokes the doctrine of constitutional avoidance.
28. On this premise, Counsel in the third issue, submitted that the Petitioner was not entitled to the relief sought. In addition, Counsel stated that the claim for compensation for special damages was not particularised.

Analysis and Determination

29. There three issues for determination in this Petition, namely:
 - i. Whether the Petition offends the doctrine of constitutional avoidance.
 - ii. Whether the Respondent's actions violated the Petitioner's rights under Articles 10(2)(b), 25(a), 28, 29(d) and 43(1)(a) of *the Constitution*.
 - iii. Where the Petitioner is entitled to the reliefs sought.



30. The doctrine of Constitutional avoidance is a jurisdictional principle which holds that *the Constitution* should not be resorted to in resolving ordinary disputes where remedies are available under either common law, in statutes or on the basis of other established legal principles. Black's Law Dictionary Tenth Edition defines 'Constitutional avoidance rule' as follows:

“The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion”

31. In *Ibrahim Wakhanyanga & 2 others v Chief Magistrate's Court Kakamega & 2 others; Attorney General for Land Registrar Kakamega (Interested party)* [2022] eKLR when it stated thus:

“17. One of the instances in which a constitutional court loses jurisdiction is through the doctrine of constitutional avoidance. Thus, where there exist ample statutory avenues for resolution of a dispute, the constitutional court will defer to the statutory options and decline to entertain such a dispute. A party seeking relief in a matter that can be addressed through interpretation of statutes and rules made thereunder must seek relief through an ordinary suit as opposed to a constitutional petition. In that regard, the Court of Appeal stated in *Sumayya Athmani Hassan v Paul Masinde Simidi & another* [2019] eKLR as follows:

... where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on *the Constitution* without challenging the legislation in question. That principle has been reinforced by the Supreme Court in *Communications Commission* case (*supra*).

(17) In conclusion, we find that the alleged unlawful interdiction and termination of a contract of employment was not a constitutional issue and thus the petition did not disclose a cause of action anchored on *the Constitution*. Accordingly, the petition being incompetent, the court acted in excess of jurisdiction and erred in law in determining the petition.

18. Similarly, the same court stated in *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another* [2016] eKLR thus:

Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation....

A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done.”



32. Correspondingly, in *Council of County Governors v Attorney General & 12 others* [2018] eKLR the Court expressed itself as follows:

“ 59. The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved. In that regard, the Supreme Court stated in *Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others* (supra) (at para 256) that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis.

60. In the South African case of *S v Mhlungu*, [1995] (3) SA 867 (CC), Kentridge AJ, stated in the dissenting opinion respecting the principle of avoidance (at paragraph 59), that he would lay down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed. And in *Ashwander v Tennessee Valley Authority*, 297 U.S. 288, 347 [1936], the U.S. Supreme Court held that it would not decide a constitutional question which was properly before it if there was also some other basis upon which the case could have been disposed of.”

33. A close reading of the facts forming the foundation of this Petition clearly shows a cause of action that for all purposes lie in the tort of negligence.

34. The Petition is based on unintentional issuance of an erroneous Covid 19 Certificate. A valid Covid 19 Certificate was required for one to be allowed entry in the USA. The Petitioner was alerted about the erroneous Certificate while at JKIA and she contacted the Respondent who promptly amended and sent the correct one.

35. Nevertheless, the Petitioner went ahead and undertook the journey even though she acknowledges she was unable to upload the new/amended Covid 19 on the USA Travellers Portal as was required.

36. In my view, this is a tortious liability claim governed by principles of the law of negligence where the Court would be determining if there was duty of care, breach of duty and damages including the issue of foreseeability of harm, particularly in regard to what is said to have occurred in USA, the question that the Court would be grappling with will be the causation principle. As was held in *C O D & another v Nairobi City Water & Sewerage Co. Ltd* [2015] eKLR

“ 11. Similarly, in *Papinder Kaur Atwal v Manjit Singh Amrit Nairobi* Petition No. 236 of 2011 where after considering several authorities on the issue, Justice Lenaola remarked as follows:

“All the authorities above would point to the fact that *the constitution* is a solemn document, and should not be a substitute for remedying emotional personal questions... I must add the following; Our Bill of Rights is robust. It has been hailed as one of the best in any Constitution in the World. Our Courts must interpret it [with] all the liberalism they can marshal. However, not every pain can be addressed through the Bill of Rights and alleged violation thereof.”



12. The Supreme Court of India has also held that ordinary remedies available under common law and statutes must be pursued in the ordinary manner or as provided under statute. For instance, in *Re Application by Bahadur*[1986] LRC (Const) the Court expressed itself as follows at page 307:

“The Courts have said time and again that where infringements of rights are alleged which can be founded in a claim under substantive law, the proper course is to bring the claim under such law and not under *the Constitution*. This case highlights the un-wisdom of ignoring that advice...”

37. I have set out the above principles to demonstrate that this Petition does not raise Constitutional questions, this is a matter that ought to be have been resolved under the ordinary civil law instead of trivialising *the Constitution* by camouflaging it as Constitutional litigation. The Petition offends the doctrine of Constitutional avoidance.

38. This Court thus declines to adjudicate the same as a Constitutional Petition and orders that the same be struck out. I shall not consider any other issue.

39. The Petitioner should seek the remedy using other appropriate legal mechanisms.

40. I make no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29TH DAY OF MAY, 2025.

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L N MUGAMBI

JUDGE

