



**Litiema v Masinde Muliro University of Science and Technology & 4 others;
National Police Oversight Authority & another (Interested Parties) (Constitutional
Petition E022 of 2022) [2024] KEHC 1905 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1905 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CONSTITUTIONAL PETITION E022 OF 2022**

PJO OTIENO, J

FEBRUARY 29, 2024

**IN THE MATTER OF ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES
27,29,39,47 AND 49 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE PERSONS DEPRIVED
OF LIBERTY ACT NO. 23 OF 2014 LAWS OF KENYA**

AND

IN THE MATTER OF THE NATIONAL POLICE SERVICE ACT CAP 84 LAWS OF KENYA

AND

**IN THE MATTER OF INDEPENDENT POLICING OVERSIGHT
AUTHORITY ACT NO. 35 OF 2011 LAWS OF KENYA**

AND

IN THE MATTER OF THE CRIMINAL PROCEDURE CODE CAP 75 LAWS OF KENYA

AND

IN THE MATTER OF UNIVERSAL DECLARATION OF HUMAN RIGHTS

AND

IN THE MATTER OF INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

AND

**IN THE MATTER OF UNLAWFUL ARREST, HARRASSMENT, INTIMIDATION,
FRUSTRATION, TORTURE AND INCARCERATION OF THE PETITIONER
ON 10TH/11TH DECEMBER 2021 WITHIN KAKAMEGA COUNTY BY
KNOWN DCIO-KAKAMEGA CENTRAL, MR. DANIEL KIPLANGAT NGETICH**

BETWEEN



JOHNSON SIMIYU LITIEMA.....PETITIONER

VERSUS

MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY.
.....1ST RESPONDENT

DCIO-KAKAMEGA CENTRAL POLICE STATION.....2ND RESPONDENT

OCS-KAKAMEGA CENTRAL POLICE STATION.....3RD RESPONDENT

KAKAMEGA CENTRAL POLICE STATION.....4TH RESPONDENT

ATTORNEY GENERAL-REPUBLIC OF KENYA.....5TH RESPONDENT

NATIONAL POLICE OVERSIGHT AUTHORITY.....1ST INTERESTED PARTY

DIRECTORE OF PUBLIC PROSECUTION.....2ND INTERESTED PARTY

BETWEEN

JOHNSON SIMIYU LITIEMA PETITIONER

AND

MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY 1ST RESPONDENT

DCIO-KAKAMEGA CENTRAL POLICE STATION 2ND RESPONDENT

OCS-KAKAMEGA CENTRAL POLICE STATION 3RD RESPONDENT

KAKAMEGA CENTRAL POLICE STATION 4TH RESPONDENT

ATTORNEY GENERAL-REPUBLIC OF KENYA 5TH RESPONDENT

AND

NATIONAL POLICE OVERSIGHT AUTHORITY INTERESTED PARTY

DIRECTOR OF PUBLIC PROSECUTIONS INTERESTED PARTY

JUDGMENT

The Petitioner’s Case

1. In the amended petition dated 6th February, 2023, the petitioner is described a resident of Kakamega and his claim is against unlawful arrest, harassment, frustration, intimidation, torture, incarceration and loss of employment by confiscation of his two mobile gadgets by the respondents. It is pleaded that on 5/10/2021, the 1st respondent lodged a complaint against him at the Kakamega Central Police Station which was noted under OB No. A2 of 5/10/21. On 10/12/2021 at about 3PM, he was arrested and surrendered to the 2nd respondent and that he spent the night at the cells and was released on 11/12/2021 on a cash bail of Kshs. 10,000/- to appear before the Chief Magistrates Court on 14/12/2021. He claims that according to the cash bail receipt, he was to be charged with the offence of Misuse of Communication Gadgets. He asserts that he was never presented before court to take plea in violation of his constitutional rights under article 47 of the Constitution and that he obtained court



orders for the termination of the investigations and the return of his two mobile phones by the 2nd and 3rd Respondents but the respondents have failed to return thus rendering him jobless since he used the phone to run his taxi business.

2. The petitioner is thus seeking reliefs that: -
 - a. A declaration that the arrest, incarceration and not presenting the petitioner before the court of law was unlawful and unconstitutional.
 - b. An order for payment of a total sum of Kenya Shillings Sixteen Million, Two Hundred Thousand (Kshs. 16,200,000/-).
 - c. Costs of this suit.
 - d. Any other or further remedy this honourable court deems just and expedient to grant.
3. The amended petition is supported by the affidavit of Johnson Simiyu Litiema in which he avers, without more, that the contents of the statement of claim are correct. The court notes that there is no statement of claim but a petition but will regard the petition to be what is termed statement of claim. It is of father note that no document has been exhibited in the affidavit in support of the petition
4. The petition was resisted by all the respondents who appeared and were represented by the Attorney General. The Attorney General filed separate response and Replying Affidavit for the 1st respondent as well as a joint affidavit and response for the 2nd to 6th respondents.
5. In both the response on behalf of the 1st respondent, it is asserted that the petitioner has not illustrated how the 1st respondent violated his fundamental rights and freedoms under the Constitution of Kenya 2010 and that the petition does not meet the threshold for filing a constitutional petition. All the particulars of malice and damages given at paragraph 17 were all denied, petitioner invited to strict proof with a plea that the petition ought to be dismissed with costs.
6. For the 2nd, 3rd, 4th, 5th and 6th respondents, the petition was resisted through the Replying affidavit of No. 74734 Sgt. Jackson Chacha, a police officer attached to the Director of Criminal Investigations, sworn on 31st May, 2023, as well as a Response dated 21.5.2023. The five respondents aver and take the joint position that the 1st respondent reported the commission of an offence against the petitioner vide BO/42/5/10/2021 and that he commenced investigations, summoned the petitioner to come to the station which he refused. They then looked for him and arrested him on 11/12/2021 at 3PM and released him later in the same day on a cash bail of Kshs. 10,000/-. He swears that before they could prefer criminal charges against the petitioner, he obtained injunctive orders stopping any investigations. He further claims that at the time the order for the release of the petitioner's mobile phones was being made, they were with the DCI Nairobi (cyber-crime office) and the petitioner was asked to collect the same from the headquarters but he refused and even after the telephone sets were returned to Kakamega the petitioner has gone to pick same. The deponent then contends that the confiscation of the phones was necessary for purposes of investigation, asserted that the police actions did not violate any rights of the petitioner and denied the accusations that the petitioner had been tortured. The deponent then exhibited two statements recorded with the police, by petitioner and an employee of the 1st respondent as well as the cash bail receipt issued to the petitioner.
7. Upon being served with the responses, the petitioner filed two separate affidavits by way of response to the respondents' positions. As against the 1st respondent the petitioner depones and asserts that the 1st respondent had filed several suits namely CMCC No. 168 of 2018 MMUST v Johnson Simiyu Litiema which was dismissed for want of prosecution and Mumias SRMCC No. E5 of 2021 MMUST



v Johnson SImiyu Litiema & 5 others which is still pending before court and referred to the pleadings in such suits put did not exhibit any copies. The affidavit also alluded to a letter by the 1st to the 2nd respondent but equally failed to annex any copy.

8. As against the 2nd to 6th respondents, the petitioner deponed and asserted that he has never been summoned at the Kakamega Police Station and maintains that he was arrested and booked under OB No. 75/10/12/2021 at 1733hrs on charges of misuse of communication gadgets. He also concedes that the cash bail of Kshs. 10,000/- was refunded to him save for the two mobile phones. Even on this affidavit, reference is made to a letter by the 1st to the 2nd respondent alleged to have instigated the arrest and other documents which are not annexed.
9. The petition has been argued by way of written submissions pursuant to the directions of 18th may 2023.
10. It is the submission by the petitioner that his arrest, incarceration, processing of his fingerprints and not being presented before court on 14/12/2021 amounts to a civil wrong consisting of unlawful restraint of personal freedom of movement. He further submits that the irregular seizure of his phones was illegal and unconstitutional as it violated his rights under articles 29,31 and 47(2) of the Constitution.
11. For the respondents, it is submitted that the subject petition has not met the threshold for filing a constitutional petition as set out by the court of appeal in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & others (2013) eKLR because it did not precisely enumerate and particularized with precision the articles of the constitution he alleges the respondents violated. They argue that the petitioner ought to have filed for a claim for compensation in a civil suit for a tort of malicious and unlawful arrest and place reliance on the case of Benard Murage v Fineserve Africa Ltd & 3 others (2015) eKLR where the court observed that where there exists an alternative remedy through statutory law, then it is desirable that such statutory remedy to be pursued first. It is added that the role the 1st respondent played was to simply lodge a complaint and that the petitioner was never incarcerated beyond the allowed period under the Constitution and that he was even granted police bond. They claim that the reason why the petitioner was not taken to court is because he obtained orders vide Kakamega High Court Criminal Miscellaneous No. E099 of 2021 Johnson Litiema V DCI & others where the respondents were granted 60 days to decide whether to charge the petitioner or not adding that no evidence was tendered by the petitioner to the effect that he slept in the police cells. For the above reasons it is prayed that the petition be dismissed with costs.

Issues, Analysis and Determination

12. The court has looked at the amended petition, the replying affidavits, the response to the replying affidavits and the submissions by the parties herein and this court discerns the following issues to present themselves for determination:
 - a. Whether the amended petition meets the threshold for a constitutional petition?
 - b. Whether the petitioner has proved the violation to be entitled to the reliefs sought?

Whether the amended petition meets the threshold for a constitutional petition?

13. It is now settled law that where a petitioner claims violation of his or her constitutional rights and seeks relief under the Constitution, he must plead with precision the right that he alleges to have been



violated and the manner it has been violated. The position was laid by the court in *Anarita Karimi Njeru v Attorney General* [1979] KLR 154; [1976-80] 1 KLR 1272 where it was held as follows: -

“If a person is seeking redress from the High Court in 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 a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they have been infringed.”

14. Similarly, the Court of Appeal reiterated the same position in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR by observing;

“We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru (supra)*. In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st Respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior Court below to lament that the petition before it was not the “epitome of precise, comprehensive or elegant drafting, without remedy by the 1st Respondent”

15. I have perused the amended petition and the petitioner only makes a mention of article 47 of the *Constitution* in passing and does not explain how the respondents violated his right to fair administrative action. In fact in the entire body of the petition and the short affidavit in support which merely affirms the correctness of the averments in the petition, there is no allegation that the right to fair administrative action had been violated. In law under sections 107 and 108 of the *Evidence Act*, it was at all times the onus of the petitioner as the person laying a claim before the court against another to prove that claim to the requisite standards. In every litigation the rule of the thumb is that whoever desires any court to give judgement as to any legal right or liability, dependent on the existence of fact which he asserts, must prove that those facts exist in the manner alleged. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
16. The amended petition and the supporting affidavit has no annexures to support the claims by the petitioner and for that reason the petitioner’s claim of a violation of his constitutional rights without evidence ought to be regarded as mere allegations.
17. That said, the petitioner’s case may disclose a claim under the tort of false imprisonment, unlawful arrest or trespass to goods. That is conceded by the petitioner in his submissions where he states that his arrest and incarceration amounted to a civil wrong. He ought to have filed a civil suit, simpliciter, without invoking allegations of violation of the *constitution*. In such a suit, his burden would have been to prove that the actions by the police and the complainant were unreasonable and not founded on a reasonable suspicion of a crime having been committed. In a constitutional litigation, however, his burden where there is properly pleaded violation would entail demonstrating that in arresting him, the police went against the demands of the *constitution* in a material and violating manner. Here not only was the pleading insufficient but no material of violation was availed.



18. Where there exists a remedy in civil law, a party should pursue that remedy and not invoke the *constitution*. Lenaola J (as he then was) had this to say in *Uhuru Muigai Kenyatta v Nairobi Star Publications Limited* [2013] eKLR where he held as follows;

“My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in *AG v S.K. Dutambala Cr. Appeal No.37 of 1991* (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions.”

19. With the petitioner failing to demonstrate a violation of his constitutional rights, it then follows that he is not entitled to any of the reliefs sought. The petition is found to lack merit and is therefore dismissed with costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 29TH DAY OF FEBRUARY, 2024.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Petitioner in person

Ms. Ayuko for Were for the Respondents

Ms. Mwangi for IPOA (Interested Party)

Court Assistant: Polycap

