



Momanyi v National Police Service & 4 others (Constitutional Petition 23 (E023) of 2021) [2024] KEHC 1869 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1869 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CONSTITUTIONAL PETITION 23 (E023) OF 2021
PN GICHOHI, J
FEBRUARY 29, 2024**

BETWEEN

REV NEMWEL MOMANYI PETITIONER

AND

NATIONAL POLICE SERVICE 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

CID OFFICER- MASIMBA POLICE STATION 3RD RESPONDENT

**MUSA KHAEMBA THE SUB-COUNTY CRIMINAL INVESTIGATION
OFFICER AT NYAMACHE NYANGUSU POLICE STATION 4TH RESPONDENT**

**THE COUNTY CRIMINAL INVESTIGATING OFFICER KISII
COUNTY 5TH RESPONDENT**

JUDGMENT

1. By Petition dated 19th November, 2021 supported by the affidavit of one Rev. Nemwel Momanyi (Petitioner) sworn on even date, the Petitioner seeks the following reliefs : -
 - a. A declaration that the arrest, detention and threat to life of the Petitioner by the Respondents violated the provisions of article 26, 28, 29 and 49 of *the Constitution*.
 - b. A declaration that the 3rd, 4th and 5th respondents are not fit to serve in the National Police Service and should be relieved of their duties immediately.
 - c. An order compelling the 3rd, 4th and 5th Respondents to compensate the Petitioner for his medical bills in their personal capacities.



- d. The Court to issue any further or other order (s) as it may deem just and expedient for ends of justice.
2. In the affidavit in support of the petition, Petitioner avers as follows:
1. That he had reported a case of threats to his life to the Inspector General of Police.
 2. As a consequence, he received a notice dated 9th November, 2021 requiring him to appear before the SCCIO from one Musa Khaemba
 3. That he presented himself to the SCCIO at Nyamache Nyangusu Police Station and recorded a statement. That while he finished recording his statement the 3rd Respondent emerged and joined him at the 4th Respondent's office and attempted to force him to sign a statement which he had written.
 4. That aggrieved by the Petitioner's refusal to sign the statement, 4th Respondent took Petitioner to a different police station and locked him up in a cell.
 5. That 3rd Respondent continued to further threaten him to sign the statement and pointed a gun at him intending to shoot him while his accomplices were locked at the second police station
 6. That the accomplices had reached out to an advocate who came to his rescue and the 3rd Respondent asked them to deposit a cash bail which he paid but no receipt was issued nor his offence disclosed.
 7. That the Petitioner as an elderly man was subjected to trauma and dignity which resulted to medical complications of high blood pressure and was rushed to Kenyatta National Hospital for treatment.
3. Annexed to the supporting affidavit is a copy of notice dated 09th November, 2021 by which the Petitioner was summoned by 4th Respondent to appear at Nyangusu Police Station on 12th November, 2021 to record a statement concerning a complaint of threats to his life and a piece of paper bearing the words Cash bail Kshs. 20,000/- OB 20/12/11/2021 which Petitioner stated demonstrates that he paid Kshs. 20,000/- instead of Kshs. 30,000/- he paid to 4th Respondent.
4. The Petitioner urged this Court to consider that he has demonstrated that his arrest by the 4th Respondent was unlawful, illegal and subjected him to psychological torture and demeaned his person.
5. By grounds of opposition filed on 16th May, 2022, Respondents opposed the Petition. The grounds are that the Petition is fatally defective both in form and substance, without merit, incompetent, based on assumptions, instituted in bad faith and a mere waste of this Court's judicial time.
6. Additionally, Respondents contend that the supporting affidavit is full of falsehoods, misrepresentation of facts and specifically tailored to mislead the Court in order to advance the Petitioner's selfish interest at the expense of the Respondent's constitutional mandate of dispensing criminal justice.
7. The Respondent also states that Petitioner has miserably failed to sufficiently demonstrate either by facts or evidence how the Respondents have breached or are about to breach his fundamental rights as enshrined in *the Constitution* through the ongoing criminal investigations to warrant the issuance of the orders sought.



8. Further, the Respondents argue that Petitioner has not demonstrated with precision what rights have been violated and how they have been violated by the Respondents through the ongoing investigations. They also contend that there are no specific provision of the law and/or any tangible evidence provided by the Petitioner to demonstrate that indeed the Respondents' action to investigate him was done or is being done contrary to the dictates of our Constitution and the laws of Kenya. They therefore urge that the Petition be dismissed.

Analysis and Determination

9. Having considered the evidence on record and the submissions filed on behalf of the parties and the cited authorities and identified the following issues for determination: -

1. Whether the petition has met the threshold for a constitutional petition.
2. Who is entitled to costs.

Whether the petition has met the threshold for a constitutional petition.

10. In the case of *Hakizimana Abdoul Abdulkarim v Arrow Motors (EA) Ltd & another* [2017] eKLR the court held that:

“A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute...”

11. Further, in the South African case of *Fredericks and Others v MEC for Education and Training Eastern Cape and Others* [2001] ZACC 6, the court held that:

“*The Constitution* provides no definition of “a constitutional matter”. What is a constitutional matter must be gleaned from a reading of *the Constitution* itself constitutional matters must include disputes as to whether any law or conduct is inconsistent with *the Constitution*.”

12. One cannot discuss constitutional petitions without reference to the threshold for a competent constitutional petition established by High Court in *Anarita Karimi Njeru v The Republic* [1979] eKLR when the two Judges 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 a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

13. In *Mumo Matemo v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR case, the Court of Appeal reaffirmed the principle in *Anarita Karimi case* (supra) when the Court at paragraph 87(3) of the judgment stated as follows: -

“It is our finding that the petition before the High Court was not pleaded with precision as required in Constitutional Petitions. Having reviewed the petition and supporting affidavit we have concluded, that they did not provide adequate particulars of the claims relating to the alleged violations of *the constitution* of Kenya and the *Ethics and Anti-Corruption*



Commission Act, 2011, accordingly the petition did not meet the standard enunciated in the Anarita Karimi Njeru case.”

14. From the foregoing, it is not enough for a Petitioner to merely cite constitutional provisions. There has to be some particulars of the alleged infringements to enable the Respondents respond to and/or answer to the allegations or complaints.
15. The Petitioner contends that he was arrested, threatened, moved to various police stations, paid a cash bail of Kshs. 30,000/- and no receipt was issued and was finally released without any charges actions which he says violated his constitutional rights.
16. It is trite law that he who alleges must prove his claim. The claim must be propounded on an evidentiary foundation. Indeed, Mativo J. in the case of Leonard Otieno v Airtel Kenya Limited [2018]eKLR held that:-

“It is fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the proposition he asserts to prove his claim. Decisions on violation of Constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the constitution an inevitable result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.”
17. The Petitioner confirms that he was formally summoned by the 3rd Respondents to record a statement concerning a complaint he had made concerning threats to his life. Other than the averments in his affidavit, he has not placed before the court any material to demonstrate that he was either arrested, threatened, moved to various police stations, paid a cash bail of Kshs. 30,000/- and no receipt was issued and was finally released without any charges.
18. The piece of paper bearing the words Cash bail Kshs. 20,000/- OB 20/12/11/2021 which Petitioner purports to support his claim has no connection either to him or to the 4th Respondent. It is not even clear from which police station it was issued. This Petition is therefore based on unsupported allegations.
19. Concerning the Application dated 19th November, 2021, the National Police Service which is under the command of the Inspector-General of Police who is appointed by the President of the Republic of Kenya with the approval of Parliament is established under Article 244 of the Constitution.
20. The Inspector-General of Police exercises independent command under Article 245 (2) (b) of the Constitution and does not take any directions from any person in the execution of investigation of any particular offense or offenses; and enforcement of the law against any particular person or persons in view of Article 245 (4) (a) and (b) of the Constitution.
21. In the circumstances, it would be a breach of the doctrine of separation of powers if this Court to bar the Respondents from summoning, interrogating, investigating and charging the Petitioner in the event that their investigations disclose a cognizable offence.
22. In addition, the mandate of the National Police Service includes deployment in the service, recruitment, promotions, transfers and discipline of its officers. No material has been placed before the court to warrant the court’s interference with that mandate in so far as the transfers and discipline of the 3rd to 5th Respondents are concerned.



23. In the circumstances herein, this Court makes the following orders:-

1. The Petition and Notice of Motion both dated 19th November, 2021 are unmerited and therefore dismissed.
2. The Costs are awarded to the Respondents.

DATED, SIGNED AND DELIVERED (VIRTUALLY) AT KISII THIS 29TH DAY OF FEBRUARY, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of

The Petitioner

Mr. Mweke holding brief for Mr. Nderitu the Respondents

Saewa/ Aphline, Court Assistant

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