



REPUBLIC OF KENYA



KENYA LAW
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Gitau & 11 others v County Commander Kiambu & 3 others (Petition E020 of 2023) [2024] KEHC 1659 (KLR) (23 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1659 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
PETITION E020 OF 2023
A MSHILA, J
FEBRUARY 23, 2024**

IN THE MATTER OF: A PETITION BY NDEIYA TRADITIONAL BREWERS FOR REDRESS ON ACCOUNT OF THE VIOLATION OF THEIR CONSTITUTIONAL RIGHTS

IN THE MATTER OF: ARTICLES 11, 32, 22, 23, 27, 40, 44, 50 AND 260 OF THE CONSTITUTION AND FAIR ADMINISTRATIVE ACTION ACT

IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES

IN THE MATTER OF: THE CONSTITUTION AND LEGAL MANDATE OF THE COURT TO UPHOLD THE CONSTITUTIONAL RIGHTS OF CITIZENS REGARDLESS OF THEIR STANDING

BETWEEN

**ANTHONY NGUMI GITAU 1ST PETITIONER
SAMUEL GITHIEYA MUNGAI 2ND PETITIONER
ALOIS KIHU 3RD PETITIONER
PETER NDUNGU MUNG'ERE 4TH PETITIONER
PAUL KURIA 5TH PETITIONER
CHARLES NGANGA KAGUE 6TH PETITIONER
PAUL NGANGA NJOROGE 7TH PETITIONER
WILSON KIMERIA 8TH PETITIONER
GEORGE KOMU KURIA 9TH PETITIONER
PETER MBURU NJUGUNA 10TH PETITIONER
PETER MUNGA KIRATU 11TH PETITIONER
DANIEL MBUGUA 12TH PETITIONER**



AND

THE COUNTY COMMANDER KIAMBU 1ST RESPONDENT
THE COUNTY COMMISSIONER KIAMBU 2ND RESPONDENT
THE O.C.P.D NDEIYA SUB COUNTY 3RD RESPONDENT
THE DEPUTY COUNTY COMMISSIONER NDEIYA SUB
COUNTY 4TH RESPONDENT

Muratina is not an illicit brew under the Alcoholic Drinks Control Act

The petitioners sought relief for the violation of their rights occasioned by the decision of the respondents to harass and arraign the Kikuyu Council of Elders for preparing traditional brew. The main issues for determination was whether muratina, the traditional brew of the Agikuyu people, was an illicit brew. The High Court held that the respondents were wrong in treating muratina as illicit brew. Actions taken by the respondents against the petitioners for the sole reason that the petitioners were brewing muratina lacked legal basis, the acts were a violation of the cultural rights of the Agikuyu people and unconstitutional.

Reported by Collins Opwora and John Ribia

Constitutional law – cultural rights – Agikuyu cultural rights - traditional brew – use of Agikuyu traditional brew (muratina) in Agikuyu culture – where authorities had raided the homes of muratina brewers and confiscation of their property – whether such actions were a violation of the cultural rights of the Agikuyu people and thus unconstitutional – Constitution of Kenya, articles 11, 32, 22, 23, 27, 40, 44, 50 and 260

Statutes – interpretation of statutes - Alcoholic Drinks Control Act (Cap. 121) – classification of traditional brew under the Alcoholic Drinks Act - whether the use of muratina as a brew had been prohibited by the Alcoholic Drinks Control Act - whether muratina, the traditional brew of the Agikuyu people, was an illicit brew.

Brief facts

The petition was filed and brought by Ndeiya Traditional Brewers for redress on account of the violation of their constitutional rights against the respondents. The petitioners sought relief for the violation of their rights occasioned by the decision of the respondents to harass and arraign the Kikuyu Council of Elders for preparing traditional brew. The respondents were said to be restraining the petitioners from preparing the brew on the grounds that it was illicit.

Issues

- i. Whether *muratina*, the traditional brew of the Agikuyu people, was an illicit brew.
- ii. Whether the use of *muratina* as a brew was prohibited by the Alcoholic Drinks Control Act.
- iii. Whether the raiding of the homes of *muratina* brewers and confiscation of their property by the respondents was a violation of the cultural rights of the Agikuyu people and thus unconstitutional.

Held

1. Article 159 and 259 of the Constitution required courts when considering the constitutionality of any issue before it, to interpret the Constitution in a manner that promoted its purposes, values and principles, advanced the rule of law, human rights and fundamental freedoms in the Bill of Rights, and contributes to good governance.
2. *Muratina* was a kikuyu cultural brew prepared since time immemorial for traditional ceremonies of the Agikuyu people such as dowry ceremony (*ruracio*), circumcision ceremony (*irua*), initiation to council of elders (*Kiama Kia Ma*), reconciliation of family members (*Goima Cia Worobia*), praying for rain (*Kuboya Bura*), blessing of children (*Kurathima ciana citu*) and blessing of land (*Kurathima mugunda*). The importance of muratina in day-to-day functions and celebrations of the Agikuyu



- people could not be over emphasised. It formed the heart of the cultural fabric of the Agikuyu traditions.
3. Article 11 of the Constitution recognised culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation. Article 17(2) of the African Charter on Human and Peoples’ Rights provided that every individual may freely, take part in the cultural life of his community. The right to cultural practices was not absolute and was subject to limitations in line with article 24 of the Constitution. The use of *muratina* as part of the Agikuyu culture had not been prohibited by any law. The Alcoholic Drinks Control Act, (the Act) merely regulated alcoholic drinks including traditional alcoholic drink. The Act did not prohibit traditional drinks, and particularly it does not identify *muratina* as illicit brew.
 4. The respondents were wrong in treating *muratina* as illicit brew. Actions taken by the respondents against the petitioners for the sole reason that the petitioners were brewing *muratina* lacked legal basis and hence unconstitutional. Unless the respondents enforced specific provisions of the Alcoholic Drinks Control Act or any other law, they could not raid homes, confiscate property and prefer unfounded charges against authorized *muratina* brewers. Those actions violated the cultural rights of the Agikuyu people.

Petition allowed.

Orders

- i. *Declaration made that muratina was not an illicit brew and the Agikuyu people were at liberty to prepare and consume it as part of their culture and tradition.*
- ii. *The Kiama Kia Ma with assistance of the local Chiefs were to continue to regulate the preparation and consumption of muratina without prejudice to existing laws.*
- iii. *Each party was to bear their own costs*

Citations

Cases

1. Baadi, Mohamed Ali & others v Attorney General & 11 others (Petition 22 of 2012; [2018] eKLR) — Explained
2. In the Matter of the Interim Independent Electoral Commission (Applicant) (Constitutional Application 2 of 2011; [2011] KESC 1 (KLR); [2011] 2 KLR 32) — Explained
3. Kamau v Attorney General & 2 others; Equality Now & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae) (Constitutional Petition 244 of 2019; [2021] KEHC 450 (KLR)) — Explained
4. Njeru v Republic (Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR); [1979] KLR 154; (1976-80) KLR 1283) — Mentioned
5. Republic v John Ndungu Mbiyu (Criminal Case No 358 of 2018) — Mentioned
6. S v Acheson (1991 (2) SA 805) — Followed

Statutes

1. Alcoholic Drinks Control Act (cap 121) — section 4, 7(1); 27(1)(b); 62 — Interpreted
2. Constitution of Kenya, 2010 — article 11, 24, 44, 159(2)(e); 259 — Interpreted

International Instruments

1. African Charter on Peoples’ and Human Rights (ACPHR), 2014 — article 17(2)

Advocates

Ndungu Kuria for Petitioners



JUDGMENT

1. The Petition herein was filed on 26th June, 2023 and brought by Ndeiya Traditional Brewers for redress on account of the violation of their constitutional rights against the Respondents who are state administrative officers under the Office of the President and the National Police Service.
2. The Petitioners seek relief from the violation of their rights occasioned by the decision of the Respondents to harass and arraign the Kikuyu Council of elders for preparing traditional brew.
3. The Petitioners aver that they are duly authorized by the Kikuyu Cultural Elders (Kiama Kia Ma) to prepare Muratina for traditional ceremonies and not for commercial purposes.
4. The Respondents are said to be restraining the Petitioners from preparing the brew on the grounds that it is illicit and thus does not conform to the *Alcoholic Drink Control Act* No 4 of 2010.
5. The Petitioners impugned the Respondents' decision on the grounds that it classifies Muratina as illicit, it suppresses the traditional celebrations under the Kikuyu Culture as well as discriminating the Kikuyu Culture and also for the unlawful prosecution.
6. The Petitioners aver that Muratina has been around since time immemorial and the same is prepared for purposes of blessing traditional ceremonies with Kiama Kia Ma being the National Gikuyu Cultural Association overseeing matters relating to Kikuyu Culture. It was averred that no traditional ceremony under the Kikuyu Culture can be performed in the absence of Muratina as such the same cannot be governed by the *Alcoholic Drink Control Act* No 4 of 2010. Muratina was said to have no health implications as such it should not be suppressed. The Respondents were said to be in contravention of their obligation to promote cultural celebrations while being discriminatory as other cultures enjoy theirs without interference.
7. The Petitioners sought for orders that;-
 - a. A declaration that Muratina is not illicit brew.
 - b. A declaration that Muratina is not subject to *Alcoholic Drink Control Act* No 4 of 2010.
 - c. A declaration that the regulations of Muratina solely falls on Kiama Kia Ma, the National Gikuyu Cultural Association.
 - d. A declaration that any criminal case instituted on the basis of Muratina is unconstitutional.
8. Alois Kihui one of the Petitioners swore the supporting affidavit on his own behalf and on behalf of the other Petitioners. He deposed that they are members of Kiama Kia Ma and are therefore, authorised under the Kikuyu Culture to prepare Muratina which is fundamental in Kikuyu Traditional Ceremonies. He deposed that Muratina cannot be governed by *Alcoholic Drink Control Act* No 4 of 2010 as it is a traditional brew and that the Respondents should not suppress the rights of the Kikuyu people in celebrating their culture. The same was said to be discriminatory as other cultures were enjoying their rights without interference.
9. Roselyn Mnyolmo the Officer Commanding Police Division (OCPD) Ndeiya Sub-County within Kiambu County deposed that she has been advised by the State Counsel from the Attorney General's office that the National Police Service Officers and the National Government Administration Officers are mandated to maintain law and order. That the officers are mandated by the *Alcoholic Drinks Control Act* to ensure compliance with the *Act*. She deposed that there is need to ensure control and



sale of traditional liquor like Muratina conforms to various standards. That the national statutes on regulation and control of alcohol applies uniformly and precedes all other County legislation. It was contended that the Petitioners' premises were closed for operating contrary to the regulatory framework. She stated that it is an offence to be in possession of Alcoholic drinks which do not conform with the requirements of the Act thus the charges levelled are valid. The Petitioners were asked to approach the relevant authorities for proper licenses for the manufacture and sale of Muratina.

10. The Petition was canvassed by way of written submissions. Hereunder is a summary of the parties rival submissions.

Petitioners' Submissions

11. The Petitioners submit that their cultural celebrations are protected under the Constitution. Muratina was said not to be manufactured but prepared for cultural celebrations. The Petitioners disagree with the need to regulate Muratina as suggested by the Respondents. It was submitted that Kiama Kia Ma is a registered society which regulates Muratina to preserve its cultural significance. Reliance was placed in the case of *Republic v John Ndungu Mbiyu* in Kikuyu Criminal Case No 358 of 2018. The Petitioners submit that the [Alcoholic Drinks Control Act](#) is not in consonance with the Constitution as it contravenes the national values and principles of governance. Reliance was placed in the case of [Mohamed Ali Baadi & others v Attorney General & 11 others](#) (2018) eKLR. The court was urged to grant the prayers sought in the Petition.

Respondents' Submissions

12. The Respondents submit that selling alcoholic drinks without a license is a criminal offence as alcohol manufacture is a highly regulated and controlled activity. It was submitted that there was no licence allowing the Petitioners to manufacture and sell Muratina. The [Alcoholic Drinks Control Act](#) was said to be constitutional as it purposes to protect the public, socially, health wise and economically. The petition was said not to raise any constitutional issue and that it has been brought to advance the Petitioners' commercial interests. The right to culture was said not to be absolute as the same is limited. The police were said to be carrying out their mandate as per the law as such the same is not harassment in any case claims of harassment should be directed to the relevant authority. It was submitted that no *prima facie* evidence has been adduced to the scale of a violation on the bill of rights. The burden of proof was said to vest with the Petitioner. Reliance was placed in the case of [Anarita Karirmi Njeru v R](#) (1979) KLR 154. The issues herein were said to be subject of an appeal as such the court was urged to dismiss the Petition with costs.

Issues For Determination

13. This Petition raised the following issues;-
 - i. Whether the Petitioners' cultural rights are violated or threatened by the Respondents' treating muratina as illicit brew;
 - ii. What reliefs, if any, are the Petitioners are entitled to.



Analysis

Whether the Petitioners' cultural rights are violated or threatened by the Respondents' treating muratina as illicit brew

14. The Petitioners contended that the respondents declared that the kikuyu traditional brew, muratina, is illicit brew and is subject to the [Alcoholic Drinks Control Act](#) No 4 of 2010. The brewers of muratina have been arrested and arraigned in Court on the charges of manufacturing illicit brew. The preparation of muratina has been regulated by the kikuyu cultural elders known as the Kiama kia Ma. The elders regulate the preparation of muratina to preserve the heritage and cultural significance of the brew.
15. The respondents argued that it is an offence under section 4 as read together with section 27 (1) (b) of the [Alcoholic Drinks Control Act](#) to be in possession of alcoholic drinks which do not conform with the requirements of the Act. This justifies the charges leveled against the petitioners. Selling alcoholic drinks without a licence is a criminal offence under sections 7(1) and 62 of the [Alcoholic Drinks Control Act](#). The right to culture is not absolute and subject to limitation in the interest of protecting the health of consumers.
16. Article 259 of the [Constitution](#) provides for the principles on the interpretation of constitutional issues by the Court. It requires that the Court, in considering the constitutionality of any issue before it, interprets the [Constitution](#) in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, and that contributes to good governance. Article 159(2) (e) of the [Constitution](#) requires the Court, in exercising judicial authority, to do so in a manner that protects and promotes the purpose and principles of the [Constitution](#).
17. In [Re The Matter of the Interim Independent Electoral Commission](#) Constitutional Application No 2 of 2011, the Supreme Court of Kenya quoted with approval the words of Mohamed A J in the Namibian case of *S v Acheson*, 1991 (2) SA 805 (at p 813) where he stated that:-

“The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It is a ‘mirror reflecting the national soul’; the identification of ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the Constitution must, therefore, preside and permeate the processes of judicial interpretation and judicial discretion.”
18. The preamble to the [Constitution](#) recognizes the centrality of culture and customs of the Kenyan people. It provides-

“We the Kenyan people are proud of our ethnic, cultural and religious diversity and determined to live in peace and unity.”
19. Muratina is a kikuyu cultural brew prepared since time immemorial for traditional ceremonies of the agikuyu people such as dowry ceremony (ruracio), circumcision ceremony (irua), initiation to council of elders (Kiama Kia Ma), reconciliation of family members (Goima Cia Worohia), praying for rain (Kuhoya Bura), blessing of children (Kurathima ciana citu) and blessing of land (Kurathima mugunda). The importance of muratina in day-to-day functions and celebrations of the agikuyu people cannot be overemphasised. It forms the heart of the cultural fabric of the agikuyu traditions.



20. Article 11 recognises culture as ‘the foundation of the nation and as the cumulative civilization of the Kenyan people and nation’. Article 44 of the *Constitution* provides:-
- “(1) Every person has the right to use the language, and to participate in the cultural life, of the person’s choice.
- (2) A person belonging to a cultural or linguistic community has the right, with other members of that community—
- (a) to enjoy the person’s culture and use the person’s language; or
- (b) to form, join and maintain cultural and linguistic associations and other organs of civil society.”
21. Article 17(2) of the *African Charter on Human and Peoples’ Rights* provides that every individual may freely, take part in the cultural life of his community.
22. In *Tatu Kamau v Attorney General & 2 others; Equality Now & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)* [2021] eKLR the Court observed the following on cultural practice being the foundation of the nation;-
- “In its view, a cultural practice cannot “be deemed to be a national heritage”. We find that statement is not entirely true because article 11 of the *Constitution* posits that culture is the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.”
23. In *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR it was held;-
- “ Article 11 (1) of the *Constitution* recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation. Respect for indigenous culture is found in several international instruments as well...It follows that State actions that erode the cultural uniqueness of indigenous peoples would be contrary to the *Constitution* and international conventions.”
24. The right to cultural practices is not absolute and is subject to limitations in line with Article 24 of the *Constitution*. The use of muratina as part of the agikuyu culture has not been prohibited by any law. The *Alcoholic Drinks Control Act*, 2010, merely regulates alcoholic drinks including traditional alcoholic drink. The Act does not prohibit traditional drinks, and particularly it does not identify muratina as illicit brew.
25. The Respondents were wrong in treating muratina as illicit brew. Actions taken by the Respondents against the Petitioners for the sole reason that the Petitioners are brewing muratina lack legal basis and hence unconstitutional. Unless the Respondents enforce specific provisions of the *Alcoholic Drinks Control Act* or any other law, they cannot raid homes, confiscate property and prefer unfounded charges against authorized muratina brewers. Those actions violate the cultural rights of the agikuyu people.

Findings And Determination

26. Based on the foregoing, the court makes the following findings and determinations;
- a. The Petition is found to have merit and it is hereby allowed.



- b. A declaration be and is hereby made that muratina is not an illicit brew and the agikuyu people are at liberty to prepare and consume it as part of their culture and tradition;
- c. The Kiama Kia Ma with assistance of the local Chiefs to continue to regulate the preparation and consumption of muratina without prejudice to existing laws;
- d. Due to the nature of the matter, each party to bear their own costs.

Orders Accordingly

DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 23RD DAY OF FEBRUARY, 2024.

A. MSHILA

JUDGE

In the presence of;

Mourice – Court Assistant

Ndungu Kuria for the Petitioners

Respondents N/A

