



**Okonya v Attorney General & 4 others (Petition E012 of 2023)
[2024] KEHC 2603 (KLR) (15 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2603 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
PETITION E012 OF 2023
WM MUSYOKA, J
MARCH 15, 2024**

BETWEEN

CARLBENZ OKONYA PETITIONER

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

THE JUDICIAL SERVICE COMMISSION 2ND RESPONDENT

THE INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

**THE OFFICE OF DIRECTOR OF PUBLIC PROSECUTIONS 4TH
RESPONDENT**

**EDNA NYALOTI, CHIEF MAGISTRATE BUSIA LAW
COURTS 5TH RESPONDENT**

JUDGMENT

1. This constitutional cause was initiated by the petitioner herein, Carlbenz Okonya, to be known hereafter as the petitioner, vide a petition, dated 12th October 2023, seeking various orders. The cause relates to a criminal prosecution that was being mounted at the Busia law courts, hence the petition names the various agencies in the criminal justice sector as respondents. The petitioner has brought the cause against the Attorney General, as the legal advisor to the national government, given that most of the other respondents are agencies within the Executive arm of the national government.
2. His case is that he was arrested by the police, on 22nd September 2023, but was let out on police bond, and he later presented himself in court, where he was charged with defilement. He pleaded not guilty to that charge. His principal complaint is around how the court handled the matter of his admission to bond. The prosecution was not opposed to his admission to bond, but was concerned about witness interference, hence it sought to have him detained for 14 days to allow for arrangements



- to have witnesses placed under protection. The court allowed that plea, and ordered that the petitioner be detained for 9 days, but he was admitted to a bond of Kshs. 2,000,000.00, with 1 surety of like amount, effective from 9th October 2023. He complains that he was detained for a period longer than the 9 days pronounced by the court, for his detention was for a total of 13 days.
3. The petitioner sets out the constitutional and legal foundations for his petition. He cites the commitment for observance of the values of human rights, equality, freedom, democracy, social justice and the rule of law. He cites Article 2 of the Constitution, to assert the supremacy of the Constitution, and the fact that it binds all persons and State agencies. He also cites Article 10, on national values and principles, relating to the rule of law, democracy and participation of the people. He argues that judicial authority is derived, according to the Constitution, from the people, and ought to be exercised in accordance with the Constitution, in a manner which respects and upholds the rule of law. He cites Articles 20 and 21, on all State organs being bound to observe, respect, protect, promote and fulfil the rights and fundamental freedoms listed in the Bill of Rights.
 4. The petitioner complains that he was unlawfully detained, for 4 days, in excess of the 9 days ordered by the court, which amounted to a violation of his constitutional right to freedom of movement as enshrined under Article 39 of the Constitution. It is further argued that the unlawful detention, meant that he could not meet and interact with members of his family friends and associates, and his right to freedom of association, as enshrined in Article 36, was curtailed. He also argues that Article 50 was violated, for he was denied a fair hearing under Article 50 of the Constitution. He further argues that he was treated in a discriminatory manner, in contravention of Article 27, to the extent that he spent more time in detention than ordered by the court.
 5. The petitioner seeks the following reliefs:
 1. a declaration that his detention in police cells from 27th September 2023 to 5th October 2023 was lawful detention;
 2. a declaration that his detention at the police cells from 6th September 2023 to 9th September 2023 was unlawful and illegal;
 3. a declaration that the detention from 6th September 2023 to 9th September 2023 violated his constitutional rights to freedom of movement, freedom of association, fair hearing and freedom from discrimination;
 4. compensation for the said wrongs, to the tune of Kshs. 20,000,000.00; and
 5. Costs.
 6. The affidavit, sworn by the petitioner in support of his petition, is more or less, a replica of the petition, for it is a mere regurgitation of the contents of the petition. What is of importance are the annexures attached to it. The first annexure is the ruling on bond that was delivered on 27th September 2023 by the 5th respondent. The second annexure comprises of medical treatment notes. The third annexure is a letter from the Advocates for the petitioner, addressed to the court, on the matter of bond, seeking clarification on the issue of the 9-day detention and the bond being effective from 9th October 2023. The last annexure is another letter by the Advocates, indicating that their documents to support release on bond were ready.
 7. The response by the respondent is by way of grounds of opposition, dated 5th February 2024. They raise 4 principal grounds: that no case was disclosed against the 1st, 2nd and 4th respondents; that the petition was unsustainable in law, as judicial officers had judicial immunity, and the petition offended section 6 of the Judicature Act and Article 160(5) of the Constitution; that the decision complained



of was judicial, and the 5th respondent had acted in good faith and within jurisdiction; and that the petitioner had failed to exhaust the available remedies before filing the petition.

8. Directions on the disposal of the petition were given on 25th January 2024, for canvassing by way of written submissions. Both sides complied. The petitioner's written submissions are dated 15th February 2024. Those by the respondents are dated 5th February 2024. I have read through both, and noted the arguments made in them.

9. The complaint arises from the order that the court made in its ruling of 27th September 2023, on the admission of the petitioner to bond. The relevant paragraphs are 2, being 25 and 27, where the court stated:

“ 25. The accused person be detained for nine days to enable Witness Protection Agency carry out risk assessment and make logistical arrangements to secure protective accommodation for the victim and witnesses.

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27. The accused will be admitted to a conditional bond of Kshs. two million/2.000.000.00 with one surety of a similar amount on the 9th October 2023.”

10. The issue lies with how the petitioner interpreted that order. My understanding of his interpretation is that he was being detained for 9 days, which period was to run from 27th September 2023 to 5th October 2023. He has no problem with that period. His complaint is that he was not released upon expiry of the 9 days, on 5th October 2023, and, therefore, his detention beyond that period and that date was unlawful, and amounted to a violation of his constitutional rights. The respondents, in their written submissions, have not addressed that aspect of the dispute.

11. The question then is, what should be the proper interpretation of the orders comprised in paragraphs 25 and 27 of the ruling of 27th September 2023? My understanding of it is that the court was denying the petitioner bond for a while, to allow for arrangements to secure and protect witnesses, and that the release on bond was to be delayed. The order in paragraph 25 states the detention period to be 9 days; while that at paragraph 27 states that the date for admission of the petitioner to bond was 9th October 2023. There was an element of lack of neatness in the framing of the 2 orders. The 2 should have been aligned, so that the expiry of the period of detention coincided with the date when the admission to bond was to be effective. The period between 27th September 2023 and 9th October 2023 was not 9 days, it was more than that. However, that did not make the orders unlawful. The court had jurisdiction and discretion to make the orders, and the detention of the petitioner was made within jurisdiction. The fact that the 2 orders were not properly aligned, did not render the detention of the petitioner unlawful.

12. It is a cardinal rule of interpretation or construction, of documents, which should include rulings and orders, that the entire document should be read as a whole, so that the meaning of the document is to be gathered or collected from the entire or whole document. No clause or paragraph of the document ought to be read in isolation of the rest. So, paragraph 25 has to be read together with paragraph 27. The determination of the entire period of the detention of the petitioner was to be calculated based on the combined meaning of the 2 paragraphs. The petitioner was being detained in remand custody, from 27th September 2023 till 9th October 2023, when he was to be admitted to bond, and that was the effective date when he could be released upon his bond being processed. According to paragraph 27, he could not come out of remand, on bond, prior to 9th October 2023, for his bond was effective from 9th October 2023. His detention beyond the 9 days was not unlawful, in view of the limb of the



order referring to admission to bond on 9th October 2023, and it did not amount to violation of the constitutional rights alleged in the Constitution, and, consequently, the petitioner is not entitled to the compensation that he claims.

13. The respondents have raised some pertinent issues that I should address shortly. One of them is cardinal, and that is about cases being brought against judicial officers with respect to discharge of their judicial duties. It is trite that judicial officers enjoy judicial immunities, in the sense that no proceedings can be brought against them with respect to how they have conducted matters that have been placed before them. There are 3 ways of going about being aggrieved about how a judicial officer has handled a matter. One, is to seek a review of the order or directions given. Two, is by moving to a higher court, either by way of review, revision or appeal, so as to get the opinion of the second court. Three, where the matter goes into integrity of the judicial officer, then the aggrieved party should pursue administrative remedies, by way of filing a complaint, about the conduct of the judicial officer, either with the judiciary ombudsman or with the 2nd respondent. Suing a judicial officer, with respect to an order they have made or because of the manner they have handled a case, is not available to a party to any litigation. See Bellevue Development Company Ltd vs. Francis Gikonyo & 3 others [2020] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala & Lenaola, SCJJ).
14. Curiously, the petitioner appears to be well aware of that, going by the way he has pleaded in paragraph 5 of his petition. In view of that paragraph, I wonder why he still retained Edna Nyaloti, Chief Magistrate, as a party to the petition. This is how he has pleaded:

“The Court before whom your Petitioner appeared was the Chief Magistrate Busia Law Courts in Busia Chief Magistrate’s Court Criminal SOA Case No. E117 of 2023 and pursuant to the Judicature Act Chapter 8, the officer presiding over the said Court cannot be enjoined in this proceedings.”
15. Of course, it is permissible to name a court as a party in judicial review and constitutional causes, but a distinction must be made between the court and the judicial officer. The court is the institution or the office. It would be quite proper to name the Chief Justice, or the Chief Magistrate, or the Registrar of whichever court, as a party to such causes. However, the individual judicial officer sitting in that court or occupying that position cannot be made a party to the suit, on account of judicial immunity. The naming of Edna Nyaloti, as a party to these constitutional proceedings, was, therefore, wrongful.
16. Related to what I have discussed above is the question of what the respondents have raised about exhaustion of alternative reliefs and remedies. That a party ought not to run to the High Court with a constitutional petition, when he has other remedies and reliefs available, which he has not exhausted. See Geoffrey Muthinja & another v Samuel Muguria Henry & 1756 others [2015] eKLR (Waki, Nambuye & Kiage, JJA) and Jeremiah Memba Ocharo v Evangeline Njoka & 3 others [2022] eKLR (Mrima, J). This doctrine is also related to that of constitutional avoidance, that the High Court should avoid dealing with a petition, even where a constitutional issue arises, so long as the issue raised could also be addressed in ordinary proceedings. See Uhuru Muigai Kenyatta v Nairobi Star Publications Limited [2013] eKLR (Lenaola, J), Mike Rubia & another v Moses Mwangi & 2 others [2014] eKLR (Lenaola, J), Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another [2015] eKLR (Makhandia, Ouko & M’Inoti, JJA), Council of Governors v Attorney General & 12 others [2018] eKLR (Mwita, J), KKB vs. SCM & 5 others [2022] KEHC 289 (KLR)(Mativo, J) and Edarus Salim Hussein & 8 others vs. Shariffia Binti Salim & 3 others [2022] eKLR (Odeny, J).
17. In my view the principle to apply here should be constitutional avoidance rather than the exhaustion of remedies principle. The exhaustion of remedies principle is more about quasi-judicial bodies, so that a person entitled to a remedy or relief before a quasi-judicial body, should exhaust that mechanism



of dispute resolution first, and should approach the High Court, by a constitutional petition, as a last resort. The Chief Magistrate's Court is not a quasi-judicial body. The issue of exhausting remedies, with regard to what the petitioner is complaining about, does not arise. His case is about false imprisonment, and he seeks compensation for that, and he can quite properly pursue damages for the tort of false imprisonment, either before the Chief Magistrate's Court, or before the High Court. This court should avoid entertaining the claim for compensation for false imprisonment, clothed as a violation of fundamental rights and freedoms, as there is a remedy available for that civil wrong or tort in ordinary civil proceedings.

18. Overall, there is no merit in the case presented by the petitioner, for the reasons given above. I shall dismiss the petition, as I hereby do. Each party shall bear its own costs. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUSIA THIS 15TH MARCH 2024

W. MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant

Advocates

Mr. Makokha, instructed by JP Makokha & Company, Advocates for the petitioner.

Mr. Simiyu, instructed by the Attorney-General, for the respondents.

