



**Alridge v Kenyatta Univeristy Teaching Referral and Research Hospital (Petition E235 of 2023)
[2024] KEHC 6126 (KLR) (Constitutional and Human Rights) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6126 (KLR)

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

PETITION E235 OF 2023

LN MUGAMBI, J

MAY 30, 2024

BETWEEN

STEPHEN ANTHONY ALRIDGE PETITIONER

AND

**KENYATTA UNIVERISTY TEACHING REFERRAL AND RESEARCH
HOSPITAL RESPONDENT**

JUDGMENT

1. The Petition is dated 3rd July 2023. The Petitioner asserts that the Respondent violated his constitutional rights as a patient at the Institution. The Petition is supported by the Petitioner's affidavit in support and the Petitioner's witness affidavits of similar date. In addition, the Petitioner's further affidavit dated 12th October 2023 and a replying affidavit dated 27th October 2023.
2. The Petitioner seeks the following reliefs:
 - i. A declaration that the Petitioner's rights enshrined in the Bill of Rights have been grossly violated and/or infringed by the Respondent in the manner set out herein.
 - ii. An Order directing the Respondent to forthwith promptly pay in full just compensation in the sum of KES. 100,000,000/= to the Petitioner for breaching his Constitutionally guaranteed rights.
 - iii. Interest on (2) above at commercial rates from 14/08/2021 until payment in full.
 - iv. Costs of the Petition.



- v. Any other relief that the Court may deem fit to grant in the circumstances of the Petition.

Petitioner's case

3. On 13th August 2021, the Petitioner an elderly man of over 60 years, sought treatment at the Respondent's facility at 3:00 am. He had injured his arm while using a grinding machine. The Petitioner states that he was not issued with any documentation on admission. He had paid a consultation fee of Ksh.900.
4. He depones that he underwent surgery on the same day and was slated for discharge the following day between 9:00 am and 10:00 am. The following day, he asked the Respondent to issue him with the hospital bill, instead the Respondent resorted to harassing him. At that point, the doctor who was to discharge was not available to facilitate his discharge. He avers that he waited from 9:00am to 12:00 without anything happening.
5. The Petitioner in a bid to indicate his readiness to leave, put on his clothes and stepped outside. This caused an altercation with the hospital security personnel who came and directed him to return to his room. The Petitioner nonetheless proceeded to the Respondent's Reception where he requested to be issued with his hospital Bill. He was instead informed that his records were missing hence would have to wait for the person that had admitted him the previous day to provide the information.
6. Irrate, the Petitioner started leaving the premises informing them that they would contact him when the information would be ready. His mission was however not successful as the Respondent's security officers locked the gate and barred his exit. This caused a further altercation between himself and his two associates, Truphena Michoki Osumo and Anne Cherotich Kemboi against the officers during which he alleges he was assaulted. He avers that he got reprieve when the Respondent's manager intervened and instructed the discharge documentation be prepared.
7. He claims that Bill that was issued to him was bogus as it contained items and services that he had not used during his admission. Further, he states that he was not attended to or examined by the doctor in charge. He was charged Kshs. Ksh.92,654/- which he paid even though he felt aggrieved.
8. A promise of a follow up into his allegations and grievance by the Respondent's manager is said to have been in vain. Likewise, he claims that the Respondent has refused to take responsibility for its action despite issuing a demand letter dated 26th May 2022. For these reasons he alleges that the Respondent violated his constitutional rights.
9. The Petitioner went on to challenge the Respondent's replying affidavit on the basis that it failed to comply with Order 19 Rule 3 of the Civil Procedure Rules and averments made therein were not factual. Moreover, the Respondent's further affidavits are incompetent as they were filed without the leave of Court.
10. On their part, Truphena Michoki Osumo and Anne Cherotich Kemboi reiterated and corroborated the Petitioner's account in their affidavits as witnesses for the Petitioner.

Respondent's Case

11. The Respondent *vide* a replying affidavit sworn by its nurse Edith Wanja Kamau on 18th September 2023, states that the Petitioner was brought to the hospital on 13th August 2021 and received at the Accident's and Emergency Section. He thereafter underwent surgery and stayed overnight before he



- was discharged the next day. It is asserted that the Petitioner had accrued a Bill of Ksh.92,653 during his stay.
12. She asserts that as per the Respondent's records, a lady who identified herself as a relative arrived at around 9:30 and sought to discharge the Petitioner. She was informed that the same would occur after the doctor had prepared the discharge summary. The discharge summary and prescribed medication were prepared within the next hour.
 13. In the process, the Petitioner's said relative who is said to have been quite impatient, was directed to go to the Billing Section at around 10:30am. Soon after the relative and the Petitioner attempted to leave the hospital without paying the bill. Attempts by the Respondent's staff to seek the payment is said to have been met by insults and racial slurs. It was at this juncture that the Respondent's security personnel were engaged. The record additionally shows that the Petitioner's discharge medication was picked at 11:10 a.m.
 14. The Respondent contends that the Petition contains falsehoods. To begin with, the Petitioner upon admission was registered and issued with admission number KH00012652. These details were issued to the Petitioner and recorded in the Hospital Information Management System (HIMS). Furthermore, the impugned Bill itemized the services and products offered. It is noted that the Petitioner did not outline the items which were not utilized neither did he seek clarification on the contents of the Bill.
 15. The claim that the Petitioner had stepped out with a canula in his arm is said to be false. Equally it was noted that the Petitioner had not complained of any medical negligence, an indicator that the Respondent had treated him with utmost care, diligence and professionalism as its other patients.
 16. In like manner, it was stated that the Respondent vide a letter dated 17th August 2022 responded to the Petitioner's complaint letter dated 17th August 2022. For these reasons, it is asserted that the Respondent did not violate the Petitioner's constitutional rights neither the Kenya National Patients' Rights Charter, 2013.
 17. The Respondent also went on to file further affidavits by Edith Wanja Kamau and Francis Githae both sworn on 25th September 2023.
 18. Edith Wanja Kamau reiterating the contents her affidavit added that the Respondent was a renowned health provider with a proven track record of upholding public interest. To attain this status, the Respondent ensures routine trainings for its staff on patient care and customer care.
 19. On the other hand, the Respondent's senior security officer, Francis Githae, deponed that he was stationed at the hospital's main gate on 14th August 2021. He states that the Petitioner who was causing a scene at the gate, insisted to be released contrary to the Respondent's discharge policy. Customarily a patient is released at the gate once they produce the hospital discharge form.
 20. He notes that instead of the Petitioner cooperating, he resorted to abusing them and even calling them 'niggas'. On their part, the security personnel, maintained professionalism and did not assault the Petitioner.

Petitioner's Submissions

21. Viona Ochola and Associates Advocates for the Petitioner filed submissions dated 12th October 2023 where the only issue for determination was whether the Respondents' had violated the Petitioner's rights.



22. On a preliminary note however, Counsel challenged the legitimacy of the Respondent's further affidavits. This is since the affidavits were filed without the leave of the Court. A procedure affirmed and emphasized by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 7 Others* (2014) eKLR and the Court of Appeal in *Kiru Tea Factory Company Limited versus Stephen Maina Githiga & 13 Others* (2019) eKLR. As such the Petitioner submitted that they are null and void and so should be expunged from the Court record.
23. Moving on, Counsel submitted that the Respondent violated the Petitioner's right to be treated equally and not be discriminated under Article 27(1) and (2) of the *Constitution*. Further his right to human dignity and right from arbitral deprivation of freedom under Article 28 and Article 29 of the *Constitution*. Equally his right to access information under Article 33 and 35 of the *Constitution*. In like manner his right to access the highest standard of health and service of good quality under Article 43(1) (a) and 46 of the *Constitution*. Similarly, it was noted that the State is bound to ensure that the older members of the society live in dignity and respect as set out under Article 57(c) of the *Constitution*.
24. Counsel relying in the decision in *Stephen Wanjau Karania v The Nairobi Women's Hospital* (2017)eKLR submitted that the Petition had been drafted within the threshold of constitutional petitions. He pointed out that the Petition had been pleaded with precision and specificity demonstrating the violations clearly in the affidavits.
25. In particular Counsel submitted that the ill treatment accorded to the Petitioner was discriminatory as he was the only patient who received such treatment. Counsel relied in the definition of discrimination in *Peter K. Waweru versus Republic* (2006) eKLR. Furthermore, that the Respondent failed to issue him with the sought documents in a timely fashion thus violating Articles 8 and 9 of the Kenya National Patients' Rights Charter, 2013. Equally that assaulting him as an older person whilst with injured also violated Article 10 of the Charter.
26. To this end, Counsel submitted that the Petitioner was entitled to relief as envisaged under Article 23(3) of the *Constitution*. For this violation, Counsel submitted that an award of Ksh.100,000,000 as compensation was justified. In this regard, reliance was placed in the decision in *Mohamed Feisal & 19 Others versus Henry Kandie, Chief Inspector of Police, OCS Ongata Rongai Police Station & 7 Others* Kajiado High Court Constitutional Petition No. 14 of 2017 where it was held that:

“... monetary award for constitutional violations is not confined to the award of compensatory damages in the traditional sense. When exercising this constitutional jurisdiction, the Court is concerned to uphold or vindicate the constitutional right which has been contravened. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award may be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and to deter further breaches ...”

Respondents' Submissions

27. On 25th January 2024, Njoroge Regeru and Company Advocates filed submissions for the Respondent where the key issues for determination were noted as whether the Petition necessitates a constitutional interpretation, whether the burden of proof for constitutional petitions had been met, whether the Petitioner's rights were violated and public interest.
28. Counsel in the first issue answered in the affirmative. According to Counsel, the Petitioner's grievance which revolves around the delay in his discharge from the hospital, does not necessitate an interpretation of the *Constitution*. Therefore, the alleged 2-hour delay cannot be deemed as a



constitutional violation and in fact if it were so, public bodies operations would be impossible to conduct. Reliance was placed in the decision in *Isiolo County Assembly Service Board & another v Principal Secretary (Devolution) Ministry of Devolution and Planning & another* (2016) eKLR, where it was held that:

“The general principle now laid down by the courts is that where it is possible to decide any case or dispute without reading a constitutional issue then that is the recourse to be followed.”

29. Counsel in the second issue stated that the law is clear that he who alleges must prove and this burden of proof lies in the Petitioner. According to Counsel the standard of proof for a constitutional violation is higher than that of a balance of probability. Consequently, Counsel argued that in this case, the Petitioner had failed to prove his case. Relying on the Respondent’s affidavits, Counsel stressed that the Respondent’s conduct had been professional, respectful and lawful throughout. This is despite the Petitioner’s unbecoming conduct toward the Respondent’s staff and security personnel.
30. Considering this, Counsel asserted that the Petitioner is not entitled to the reliefs sought. Moreover, it was noted that in absence of medical evidence, the Petitioner had failed to demonstrate the aspect of quantum and the outrageous compensatory claim of Ksh. 100,000,000.00. In his view, this is an unjust attempt to enrich himself at the expense of the Respondent. This is further opposed as seeks to exploit the Respondent’s scarce resources utilized to serve each patient and is inevitably against public interest.

Analysis and Determination

31. Considering the pleadings and the submissions made by the parties, this Court finds the following to be the issues for determination in this Petition:
 - i. Whether the Petition raises a constitutional questions.
 - ii. Whether the Respondent violated the Petitioner’s rights under Articles 27, 28, 29, 35, 43, 46 and 57 of the Constitution.
 - iii. Whether the Petitioner is entitled to the reliefs sought.

Whether the Petition raises a Constitutional Question

32. Whether or not a Petition raises a constitutional question is an important issue to determine for unless the resolution of a dispute is only through reference to the Constitution, other ways of resolving it must be accorded priority. Consequently, under the doctrine of ‘constitutional avoidance’ courts decline to apply the Constitution when disputes can be resolved by reference to legislation or other authorized means. It is disputes that can only be resolved by reference to the Constitution that should be processed through constitutional petitions.
33. Explaining what constitutes a constitutional question, the Court in *Hakizimana Abdoul Abdulkarim vs Arrow Motors (EA) Ltd & another* (2017) eKLR observed as follows:

“37. A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute... When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values.”



The Court went on to observe as follows:

- “39. When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values. [14] The issues stated above fall mostly in the realm of negligence, contract, breach of implied terms or conditions only to mention but some.
40. The question of what constitutes a constitutional question was ably illuminated in the South African case of *Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others* in which Justice O’Regan recalling the Constitutional Court’s observations in *S vs. Boesak* notes that:-
- “the Constitution provides no definition of “constitutional matter.”
- What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions ofthe Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State....., the interpretation, application and upholding of the Constitution are also constitutional matters. So too,....., is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.”
41. Put simply, the following are examples of constituting constitutional issues; The constitutionality of provisions within an Act of Parliament; the interpretation of legislation, and the application of legislation. At the heart of the cases within each type or classification is an analysis of the same thing – the constitutionally entrenched fundamental rights. Therefore the classifications are not discreet and there are inevitably overlaps, but the classifications are nonetheless useful theoretical tools to organize an analysis of the nature of constitutional matters arising from the cases before the Court.
42. The Petition before me does not raise any constitutional questions at all. This court abhors the practice of parties converting every issue in to a constitutional question and filing suits disguised as constitutional Petitions when in fact they do not fall anywhere close to violation to constitutional Rights.”



34. Correspondingly, in *Munene vs Director of Public Prosecutions & 3 others (Constitutional Petition 5 of 2022)* [2023] KEHC 25900 (KLR) (30 November 2023) (Judgment), the Court held as follows:

“27. The jurisdiction of the High Court in dealing with Constitutional Petitions is properly invoked once a Petition that complies with the constitutional and legal requirements is lodged. The Court must, therefore, decline any invitation by a Petitioner to deal with an alleged Petition which falls short of the laid down parameters on Constitutional Petitions.”

35. Guided by these principles, I must now examine and decide whether the Petition as framed raises constitutional questions. In summary, the Petition raises the following grievances:

- a. That the Petitioner was assaulted when the Respondent’s security attempted to prevent him from leaving the Respondent’s premises on 14.08.2021.
- b. That his discharge from the hospital was delayed by unbothered staff of the Respondent staff who kept him waiting for long despite having been promised it would be completed between 9.00 a.m. to 10.00 a.m. on 14.08.2021
- c. The Hospital Bill levied on him was false in that it included items that the Petitioner did not use.
- d. That he was subjected to discrimination considering that he alone was treated in the manner complained of and not any other patient.

36. The issue of assault is both a common law claim founded on torts as well as a criminal offence. This factual circumstance therefore need not require the *Constitution* to resolve. I would have no hesitation in finding that this particular issue does not raise a constitutional question. The other issue is the complaint that he was made to wait for long hours before being released despite being promised that he would be discharged between 9.00 a.m. to 10.00 a.m. on the morning of 14/08/2021. This in my view is not a dispute that requires the *Constitution* to resolve. A claim founded on breach of contract or even negligence would have sufficed. The other grievance relates to the items included and charged in the medical Bill that the Petitioner says he had not used. A claim of the inflation of the medical Bill is a contractual issue, and the Petitioner could have sued for the difference, to elevate it to a Constitutional issue is an overstatement.

37. This Court considers that the only issue that warrants its attention as a raising a constitutional issue is the alleged discrimination of the Petitioner by the Respondent which however is subject to proof hence the next issue, that is whether there was proof of violation of the Constitutional rights by the Petitioner.

2. Whether there was proof of violation of Constitutional rights

38. A cardinal requirement of the law is that whoever alleges must proof. The *Evidence Act* Cap 80 at Section 107 (1) aptly captures this requirement by providing thus:

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”



39. Reaffirming the obligation on a Petitioner to prove alleged violations, the Supreme Court in *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* (2020) KLR held as follows:

“(49) [49] Section 108 of the *Evidence Act* provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and Section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

[50] This Court in *Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others*, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:

“...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”

(51) In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.”

40. Similarly, in *John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 2 others* (2017) eKLR the Supreme Court reiterated:

“299. As stated in both the Raila 2013 and 2017 decisions, the burden of proof, at all times, lies on a petitioner and generalized claims, without evidence that meets clear threshold, are of no value. The petitioner must supply evidence in support of their claims and this proof must be supplied to the required standard.”

41. This requirement was also upheld by the Court in the cases of *Leonard Otieno v Airtel Kenya Limited* (2018) eKLR and *Evans Otieno Nyakwana vs Cleophas Bwana Ongaro* (2015) eKLR.

42. In the instant case the Petitioner’s Counsel submitted that there was discriminatory treatment of the Petitioner as he was the only patient who was subjected to such treatment.

43. In response, counsel for the Respondent through submissions was that the Petitioner had not tendered evidence to prove the alleged discrimination as there was no evidence of any other patient who had attempted to discharge himself and that was treated differently.

44. The right to equality and freedom from discrimination is provided for under Article 27 of the *Constitution*. It states:

27. Equality and freedom from discrimination

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.



- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
- (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
- (4)) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
- (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
- (6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.
- (7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.
- (8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender

45. The Supreme Court in *Gichuru vs Package Insurance Brokers Ltd (Petition 36 of 2019)* [2021] KESC 12 (KLR) (Civ) (22 October 2021) (Judgment) adopted the meaning of discrimination espoused by the High Court in the case *Peter K Waweru v Republic* [2006] eKLR restating thus:

“...Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions by race, tribe, place of origin or residence or other local conviction, political opinions, colour, creed, or sex, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”

From the above definitions, it is clear that discrimination can be said to have occurred where a person is treated differently from other persons who are in similar positions on the basis of one of the prohibited grounds like race, sex disability etc or due to unfair practice and without any objective and reasonable justification...”

46. Having regard to the above, the duty cast on this Court is to determine if discrimination by the Petitioner was established.
47. The Petitioner cites Article 27 (4) and (5) claiming he was the only patient subjected to that discretionary treatment. However, discrimination from constitutional perspective is treating people differently based on prohibited grounds such as age, sex, religion, status and so on. Further it may also mean the treating people in similar category or class unequally without any reasonable justification for the discriminatory treatment.



48. As was correctly pointed by the Respondent, the Petitioner did not tender evidence of any other patients who were in similar circumstance as him that were treated differently, that, anyone who attempted to leave the Respondent's facility without formal discharge and was not blocked from doing so by the Institution's security. In addition, there is no allegation or evidence of the discrimination having been meted on any of the prohibited grounds specified in the Constitution. The Petitioner did not state any other ground as a manifestation of different treatment meted on him as opposed to any other person who was in similar a situation or category. The claim for discrimination in so far as it is premised on Article 27 (4) and (5) of the Constitution must inevitably flop.
49. There was also allegation made by the Petitioner that he was forcefully restrained and assaulted. As already pointed out, those are tortious claims that he could well pursue under the law of torts. It does require one to invoke the Constitution to determine. Even then, the Petitioner by his own admission said he attempted to leave a medical institution without obtaining a formal discharge after his discharge was delayed. It is evident that he had just undergone a surgical procedure. Under the circumstances, unless the means adopted by the Respondent were excessive, the Respondent was entitled to use reasonable means of restraint. And this is what happened since despite the Petitioner claiming he was assaulted, there was no evidence that he filed a criminal complaint of assault with police for investigation. He equally did not provide any medical evidence to substantiate that as a result, he was hurt in any way. In the circumstances, the Court can only conclude that the means adopted to restrain the Petitioner from discharging for himself from the facilitator were reasonable in the circumstances.
50. It is thus crystal clear that the Petitioner has not proved the allegations pleaded in this Petition against the Respondent.
51. The upshot is that the Petition fails and is hereby dismissed with costs to the Respondent.

Dated, signed and delivered at Nairobi this 30th day of May, 2024.

L N MUGAMBI

JUDGE

