



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 345 OF 2016

IN THE MATTER OF ARTICLE 2, 10, 19, 20, 21, 22, 23, 27, 50, AND 258 OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)
PRACTICE AND PROCEDURE RULES, 2013**

AND

IN THE MATTER OF SECTION 142 OF THE CRIMINAL PROCEDURE CODE CAP 75 LAWS OF KENYA

AND

IN THE MATTER OF SECTION 55 OF THE NATIONAL POLICE SERVICE ACT, 2011

AND

IN THE MATTER OF SECTION 13 OF THE PRISONS ACT, CAP 90 LAWS OF KENYA

AND

IN THE MATTER OF ARTICLES 2 AND 7 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

AND

**IN THE MATTER OF ARTICLES 2, 10(3), 14(7) AND 26 OF THE INTERNATIONAL COVENANT ON CIVIL AND
POLITICAL RIGHTS**

BETWEEN

BERNARD OUMA OMONDI.....1ST PETITIONER

BERNARD WACHIRA WAHEIRE.....2ND PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

JUDGMENT

PETITION

1. The Petitioners through their Further Amended Petition dated 31st July 2017 pray for the following orders:-

- a) *A declaration be made that Certificates of Good Conduct are illegal and/or unconstitutional instruments in so far as they are used to discriminate against individuals on the basis of past criminal records.*
- b) *The Respondents be directed to formulate a responsive system mechanism and/or law giving guidance on expunging of criminal records after a determinable period of time.*
- c) *That costs of the Petition be provided.*
- d) *That such other order(s) as the Honourable Court shall deem just.*

PETITIONERS' CASE

2. The Petitioners' case as presented in their Further Amended Petition and the Supporting Affidavits of the 1st and 2nd Petitioners dated 31st July 2017 is that the 'Certificate of Good Conduct' regime is manifestly illegal, oppressive and it is being pursued in furtherance of an agenda that is inimical to the rule of double jeopardy.

3. The Petitioners allege that the rule on double jeopardy under *Article 14 (7) of the International Covenant on Civil and Political Rights* has been violated by the denial to issue Certificates to fully reformed or rehabilitated offenders. The Petitioners assert that this amounts to punishing them again for an offence that they have already been punished for.

RESPONDENTS' RESPONSE

4. The Respondents filed Grounds of Opposition dated 31st May 2018 opposing the Petition on grounds that, the Petition discloses no cause of action against the Respondents, and the Amended Petition does not disclose any constitutional violations to warrant the remedies sought.

5. It is further averred that the Petitioners must be treated equally to other Kenyans. Granting their prayers would amount to giving preferential treatment to the Petitioners before the law.

PETITIONERS' SUBMISSIONS

6. The Petitioners filed Written Submission dated 22nd October 2018, in which they submit that Certificates of Good Conduct have the effect of side-lining ex-convicts and persons who may previously have been charged with a crime based on their past criminal records. The Petitioners maintain that this is discriminatory and it offends the provisions of our Constitution and the provisions of International Treaties which, by virtue of *Article 2 (5) and (6) of the Constitution*, are applicable as part of the laws of Kenya.

7. In particular, the Petitioners rely on *Articles 2, 26 and 27 of the International Covenant on Civil and Political Rights*, which recognise the right of every person to equal protection before the law and the right not to be discriminated on any ground. Reliance is further placed in the case of *G.B.M Kariuki v Director of Criminal Investigations & 3 others [2016] eKLR*.

8. The Petitioners highlight the positions of foreign jurisdictions. Reference is made to the Fair Chance Act, which is applicable in New York, United States of America. According to the said Act, all persons are ensured to have a fair chance to compete for a job. They also rely on the guideline in place in the U.K on the expunging of criminal records.

RESPONDENTS' SUBMISSIONS

9. The Respondents did not in spite of having afforded an opportunity to file submissions, file any submissions.

ANALYSIS AND DETERMINATION

10. I have carefully considered the pleadings herein, the Petitioners' submission and authorities relied upon, and from the same the following issues arise for consideration:-

- a) *Whether the Petition meets the legal threshold for a Constitutional Petition.*
- b) *Whether the Petitioners are entitled to reliefs sought.*

A. WHETHER THE PETITION MEETS THE LEGAL THRESHOLD FOR A CONSTITUTIONAL PETITION.

11. Under *Rule 10(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 (otherwise referred to as "The Mutunga Rules)* the form of Petition is clearly described and specifically provided thus:-

"10. (1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary."

12. Further guidance as regard the legal threshold for a Constitutional Petition is clearly enunciated in the case of *Anarita Karimi Njeru v. Republic (1979) eKLR* where the Court addressed itself thus:-

“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. Similarly the same position was reiterated in the case of *Grays Jepkemoi Kiplagat v Zakayo Chepkoga Cheruiyot [2021] eKLR* where the Court stated as follows:-

“9. I have set out, albeit briefly, the facts giving rise to the Petition to contextualize the consideration of the merits or otherwise of the preliminary objection. As to whether or not there is a competent constitutional petition before the Court, it is necessary to consider whether the petition satisfies the threshold of what constitutes a constitutional petition as per the principle established in the case of *Anarita Karimi Njeru -vs- The Republic (1979) eKLR* which principle was later restated by the Court of Appeal in the case of *Mumo Matemo -vs- Trusted Society of Human Rights Alliance & 5 others (2013) eKLR*. The principle established in the *Anarita Karimi Njeru* case (supra) was that a Constitutional petition should set out with a degree of precision the petitioner’s complaint, the provisions infringed and the manner in which they are alleged to be infringed. The *Mumo Matemo* case (supra) reaffirmed the principle in the *Anarita Karimi* case when the Court at paragraph 44 of the judgment stated as follows:-

(44) 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”

10. Further at paragraph 87(3) in the same judgment the Court on its findings 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.”

It is indisputable that a constitutional petition to be sustainable as such must at a minimum satisfy a basic threshold. It must with some reasonable degree of precision identify the constitutional provisions that are alleged to have been violated or threatened to be violated and the manner of the violation and/or threatened violation. I do not suppose it is enough to merely cite constitutional provisions. There has to be some particulars of the alleged infringements to enable the respondents to be able to respond to and/or answer to the allegations or complaints. [Emphasis added]

13. Further in *NM & Others vs Smith and Others (Freedom of Expression Institute as Amicus Curiae) 200 (5) S.A. 250 (CC)* the Court stated thus;

“It is important to recognise that even if a case does raise a constitutional matter, the assessment of whether the case should be heard by this Court rests instead on the additional requirements that access to this court must be in the interests of justice and not every matter will raise a constitutional issue worthy of attention.”

14. Similarly in *Minister of Home Affairs vs Bickle & Others (1985) L.R.C. Cost.755*, Georges CJ held as follows;

“It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be involved at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so (*Wahid Munwar Khan vs. The State AIR (1956) Hyd.22*). The judge went on to add that: “Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights.”

15. The RespondentS through their grounds of opposition contend that the Petition discloses no cause of action against the Respondents; that it lacks clarity and precision in setting out the alleged violations; that it does not disclose any constitutional violations against the Petitioners to warrant remedies sought, that the myriads of Constitutional provisions cited are not supported by any evidence demonstrating that the Respondents have denied and/or refused to issue Petitioners with Certificate of good conduct.

16. It is further asserted by the Respondents, that it is not the mandate of the Inspector General to generate information to update the parties or the Petitioners, as the onus of furnishing such information lies squarely with the any person who holds that information. It is urged that it has not been demonstrated that the inspector General does have access to Court orders; or judgment of individual Kenyans, which such information is held by other stake holders such as the judiciary and Director of Public Prosecutions.

17. The Respondents contend that certificate of Good Conduct is a legal / valid document which is applicable to every Kenyan inclusive of Petitioners and as such it is improper for Petitioners to state that they were discriminated by the Respondents. It is further averred by the Respondents that the Petitioners’ rights are limited by the provisions of **Article 24 of the Constitution** and are thus not absolute but limited.

18. The Respondents further urge the Petitioners must be treated equally as other Kenyans and cannot as such be treated in a preferential manner by the law as by granting them prayers sought would amount to giving preferential treatment to the Petitioners.

19. In determining whether the current Petition meets the legal threshold for a Constitutional Petition, I have to peruse the Petition and consider whether it meets the Constitutional requirements as set out in the above authorities. The Petition herein endeavours to seek redress on a matter that is said to involve a reference to the Constitution, which therefore mandates setting out the Petition with a reasonable degree of precision, that of which they complain of, the provisions said to be infringed and the manner in which they are alleged to be infringed. I find that it is indisputable that a constitutional Petition to be sustainable must at minimum satisfy a basic threshold. It must with reasonable degree of precision identify the Constitutional provisions that the Petitioners allege to have been violated or threatened to be violated and in what manner. I do not agree that it is enough for anyone to make general allegations and merely cite constitutional provisions. It is of paramount input once to give particulars with clarity of the alleged infringements so as to enable the Respondents to be able to respond to and/or answer the allegations or complaints. My view is that litigation by ambush cannot be entertained in Constitutional Petitions as by doing so would be violating the Respondents constitutional rights in regard to fair hearing.

20. The Amended Petition as drawn and filed has in every sense not met the threshold of what constitutes a Constitutional Petition. The Petition is not set out with a reasonable degree of precision of that which the Petitioners complain of, the Constitutional provisions said to be infringed, and the manner in which they are alleged to be infringed are not sufficiently pleaded. The provisions cited have not been shown how they have been infringed.

21. It is now settled law that for Constitutional Petition to be successful it must raise with reasonable precision the constitutional provisions which have been infringed or threatened to be infringed or violated, and the manner in which those provisions were infringed by the Respondents. I find that this is not only necessary for the court to be able to ascertain whether there was a violation of a constitutional right but it is also important for enabling the Respondents to respond to the case and every allegation, putting forwarding a concise case on their defence.

22. Upon considering the authorities cited hereinabove, the Petition as drawn and filed, I find that the Petition before me does not raise any Constitutional provisions which has been violated by the Respondents and further that it does not expound on the actions or omissions which the Respondents have carried out or failed to carry out which infringed on or violated the Petitioners rights. I find that if the Petitioners had sought to pursue the mater through another legal avenue they would have had a better chance of success.

23. In view of the findings that I have come to, I find that this Petition is for dismissal. I accordingly dismiss the Petition as it does not raise constitutional issues for determination by this Court.

24. *The Petition is dismissed, each party to bear its own costs.*

Dated, Signed and Delivered at Nairobi on this 28th day of October, 2021.

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J. A. MAKAU

JUDGE OF THE HIGH COURT OF KENYA