



**Munene v Attorney General & 2 others (Petition 5 of 2020)
[2023] KEHC 21580 (KLR) (19 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21580 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
PETITION 5 OF 2020
SN MUTUKU, J
JULY 19, 2023
(FORMERLY NAIROBI HIGH COURT PETITION NO. 170 OF 2020)**

BETWEEN

DICKSON MWANGI MUNENE PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

COMMISSIONER GENERAL OF PRISONS 2ND RESPONDENT

KITENGELA GK PRISONS NUTRITIONIST 3RD RESPONDENT

JUDGMENT

Background

1. This petition, dated May 12, 2020, was filed in Nairobi on May 21, 2020. It was transferred to Kajiado High Court *vide* an order of the court (Justice J. A Makau) dated May 22, 2020. It did not take off for hearing during the tenure of Justice Mwita. I took over the conduct of the matter on November 18, 2021 upon my taking over duties at the Kajiado High Court. One of the reasons for the delay in the determination of this matter is lack of action by the petitioner to prosecute the petition necessitating this court to issue a notice to show cause why the petition should not be dismissed for want of prosecution. It took us time trying to trace the petitioner whose whereabouts were unknown as it could not be ascertained which prison he was being held. He was traced at Manyani G. K Prison where he had been transferred to.
2. From the papers filed in court, the petitioner was charged with murder in criminal case No 11 of 2009. He was found guilty and sentenced to life imprisonment. His sentence was reduced to 20 years upon his application for re-sentencing. He claims that while he was serving sentence, this cause of action arose upon his transfer to Kitengela G.K Prison.



The Petition

3. The petitioner claims that he was diagnosed with acute hypertension and ulcers while serving sentence for which the doctors recommended that he is placed on a special diet combined with exercises as well as regular check-ups and reviews by doctors. It is his case that upon being transferred to Kitengela G. K. Prison the officer in charge instructed those working under him to ensure that the petitioner is attended by a qualified doctor and nutritionist, but this was not done resulting in breach of the [Constitution](#) and the [Persons Deprived of Liberty Act](#).
4. The petitioner claims that the respondents, or their agents, have violated articles 27(1), 28, 29 (d) (f), 47(1) and 48 of the [Constitution](#) and [Persons Deprived of Liberty Act](#), 2014. He seeks the following reliefs:
 - i. That this court has jurisdiction to hear this petition under articles 159, 160(1) and 162(b) (d) of the [Constitution](#).
 - ii. That the 1st respondent implements the [Persons Deprived of Liberty Act](#) in its totality under the supervision of this honourable court.
 - iii. A declaration that the conduct of the 2nd and 3rd respondents of not taking the petitioner to hospital to allow him access to proper diet arising from his medical condition violated the provisions of the [Constitution](#), [Persons Deprived of Liberty Act](#) and the [Prisons Act](#).
 - iv. A declaration that the 3rd respondent committed tort of negligence and her conduct was contrary to article 75 of the [Constitution](#).
 - v. An order that the petitioner be taken to hospital and access a heart specialist and further be provided with the required diet or in the alternative he be allowed to purchase items which the Prison Authority is not in a position to provide.
 - vi. The orders be implemented under the supervision of the court.
5. The petition is opposed by the respondents. Through a replying affidavit sworn by Mr Joseph Nyamai, Superintendent of Prisons, on September 15, 2020, the 1st and 2nd respondents content that when the petitioner was transferred to Kitengela G.K Prison on October 19, 2019, he was hypertensive and under appropriate treatment and management and that while at Kitengela G. K Prison, the Petitioner has been under appropriate medical observation and care as well as dietary care under the hospital referral system from Kitengela G. K Prison Dispensary to Kitengela sub-county Hospital and Kenyatta National Hospital.
6. The 1st and 2nd respondents have given particulars of instances when the petitioner was attended to as follows:
 - i. On December 2, 2019, the petitioner's dietary needs were reviewed by the 3rd respondent who was based at Kitengela G. K Prison during which time the petitioner demanded that he be given special diet and that he be allowed to buy specific foods and to cook for himself which demands are outside the provisions of section 49(1) of the [Prisons Act](#), cap 90 Laws of Kenya as read with the first schedule.
 - ii. On 17th and December 24, 2019, the petitioner was referred to Kitengela Sub-County Hospital for review by Dr Rashid who recommended UEC, LFT, FGH and Abdominal-Pelvic Ultrasound tests which were done and found to be normal.



- iii. The petitioner's condition remained normal until August 18, 2020 when he was reviewed and found to have blood pressure that was out of control and recommendations made that he should avoid salt, use fortified vegetable oils and take adequate green vegetables and fruits which recommendation was implemented.
 - iv. After the tests were done as recommended by Dr Rashid, the petitioner was referred to Kenyatta National Hospital for review by a cardiologist, which clinics he continued to attend on January 9, 2020, May 6, 2020 and July 1, 2020 with another clinic visit scheduled for January 6, 2021.
7. The 1st and 2nd respondents have stated that it is in bad faith that the petitioner has failed to disclose that he has been attended to in Kenyatta National Hospital while he was in custody.
 8. They further claim that the petition is incompetent, defective and an abuse of the court process for failure to file supporting affidavit as required by the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and that the Petition offends Rules 11(1) and (2) of the above rules and ought to be struck out. The 1st and 2nd Respondents relied on Patrick Ochieno Obachi & 6 others v. Kenya Anti-Corruption Commission (2010) eKLR and Charles Okello Mwanda . EACC & 3 others (2014) eKLR.
 9. They further stated that the Petitioner has never raised any complaints with the Officer in Charge of Kitengela G. K. Prison on both his medical treatment and dietary concerns as required under section 65 and 136 of the [Prisons Act](#).
 10. The 3rd Respondent has also opposed the Petition through her Response to the Petition dated 1st December 2020 and her Replying Affidavit sworn on the same date. She has denied the allegations made by the Petitioner and stated that the Petitioner is guilty of non-disclosure of material information. She has stated that the Petitioner is misleading the court by claiming that he was denied medical treatment while at Kitengela G. K Prison; that since October 2019, the Petitioner has been on continued medical care at the Kitengela G. K Prison Dispensary and Kitengela Sub-County Hospital where he would be referred for examination as well as attending outpatient clinic follow ups at Kenyatta National Hospital.
 11. She has stated that on 2nd December 2019, she reviewed the Petitioner's dietary needs during which time the Petitioner demanded to be given special diet and be allowed to buy specific food items not provided and cook for himself which is contrary to the law; that no dietary reviews were done in the intervening period from 2nd December 2019 to 25th August 2020 because the Petitioner's blood pressure was stable; that on 25th August 2020, she reviewed his dietary needs and recommended that he uses fortified vegetable oil and sufficient green vegetables and fruits. She stated that this Petition is misconceived, lacks merit and ought to be dismissed.
 12. The 3rd Respondent further contends that the Petition has been overtaken by events given that the Petitioner has been transferred to Manyani G.K Prison.
 13. The Petitioner filed Further Affidavit on 1st March 2023. I have noted that this affidavit was filed out of the time allowed by the court and after the Petitioner had filed his submissions. In my view, it would be prejudicial to the Respondents if this court were to consider that Further Affidavit.



Submissions by Petitioner

14. The Petition was canvassed by way of written submissions as directed by the court. I have noted that the Notice of Motion dated 12th May 2020, filed together with the Petition, was withdrawn on 16th September 2020.
15. The Petitioner's submissions are dated 20th September 2021. I note that the Petitioner seeks to abandon prayers (ii) and (iv) of the Petition. He also seems to have amended the remaining reliefs as follows:
 - a. A declaration that the acts of the 2nd and 3rd Respondents in denying the Petitioner access to a proper diet and medical treatment constitutes an unlawful and unreasonable infringement of the Petitioner's right to human dignity, freedom from cruel, inhuman or degrading treatment as set out in Articles 28, 29(f) as read with Article 51 (1) of *the Constitution* of Kenya.
 - b. A declaration that the acts of the 2nd and 3rd Respondents of denying the Petitioner access to health care and a proper diet to manage his hypertension is a violation of his right to health as enshrined in Article 43(1) (e) as read with Article 51(1) of *the Constitution* of Kenya.
 - c. A declaration that the Petitioner is entitled to access to healthcare, including access to a heart specialist and proper diet.
16. The Petitioner has identified four issues for determination and has submitted on those issues as shown below.
 - i. Whether this court has jurisdiction to determine this Petition – to which he has submitted that this court is seized with jurisdiction to determine this Petition as provided under Articles 23 165(3).
 - ii. Whether the Petitioner's right to human dignity was violated – to which he submitted that by denying him access to medical care and necessary nutrition to manage his hypertension is not only degrading to the Petitioner but also dehumanizing as it denies him his worth as a human being. He cited various provisions of *the Constitution* and *Persons Deprived of Liberty Act*, as well as authorities including Republic v. Kenya National Examination Council & another, ex parte Audrey Mbugua Ithibu JR Case No. 147 of 2013, to support his submissions.
 - iii. Whether the Petitioner's right to freedom from cruel, inhuman or degrading treatment or punishment was violated – on this issue he submitted that the denial of medical care and proper nutrition to manage hypertension caused him untold physical and mental suffering and amounts to inhuman treatment. He cited Joseph Mwathi Nyanjui v. Alphonse Mang'eni & another- Petition No. 473 of 2015, among others, to support his submissions on this issue.
 - iv. Whether the denial of access to medical care and proper nutrition by the Respondents violated the Petitioner's right to the highest attainable standard of health as a right accruing to the Petitioner under Article 51(1) of *the Constitution* – he submitted he was entitled to the enjoyment of the right to the highest attainable standard of health which includes the right to healthcare services provided under Article 43(1) of *the Constitution* despite his incarceration.
 - v. Whether the Petition is fatally defective for the reason that it is not accompanied by a Supporting Affidavit – he submitted that by dint of section 11 of *the Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules as that section does not make it mandatory to file an affidavit in support of a petition. He cited Ahmed Mohamed Mwinyihaji v Attorney General & 3 others [2018] eKLR.



Submissions by 1st and 2nd Respondents

17. The 1st and 2nd Respondents' submissions are dated 22nd May 2023. They have submitted on the following issues:
- i. Whether the Respondents have violated the provisions of the *Persons Deprived of Liberty Act* – they submitted that the Petitioner made allegations of violation of the provisions of this Act but failed to disclose that he has been attending clinics both at Kenyatta National Hospital and the Kitengela Sub-County Hospital; that the two rights that feature prominently under the *Persons Deprived of Liberty Act* under sections 13 and 15 are right to nutritional diet and right to healthcare; that while it is not disputed that the Petitioner had health complications while under incarceration and that one of the key ways of managing his health condition was through nutritional and dietary management, the officers under the 2nd Respondent paid attention to the Petitioner's needs at all material times and responded adequately by taking the Petitioner to hospital and adjusting his diet accordingly as directed by the doctor. It was also submitted that the Petitioner has not adduced evidence to prove that any of his rights under the *Persons Deprived of Liberty Act* have been violated.
 - ii. Whether the Respondents have in any way violated the Petitioner's rights – they submitted that from the submissions of the Petitioner, he seems to claim his right to dignity has been violated but he has not specified what he believes to have been a violation to his dignity. They submitted that they took every step to ensure that the Petitioner's dignity was protected by ensuring that he was treated and making referrals when necessary as well as adjusting his diet as recommended by the doctor. It was submitted that the Petitioner has been treated in the most humane way possible and that the Respondents have upheld his right to dignity and humane treatment.
 - iii. Whether the Petitioner is entitled to the reliefs sought – they submitted that the Petitioner has failed to adduce evidence to prove the allegations he is making; that he has been taken to Kenyatta National Hospital to see a cardiologist and therefore the order he seeks to be referred to a heart specialist has not basis; that he has not adduced evidence to confirm lack of compliance with the *Persons Deprived of Liberty Act* for him to seek an order compelling the Respondents to comply with this Act. They submitted that the Petitioner has failed to demonstrate he deserves the orders he is seeking.
18. The 1st and 2nd Respondent submitted that this Petition was brought in bad faith based on material non-disclosure and is therefore unmerited and ought to be dismissed.

Submissions by 3rd Respondent

19. In her submissions dated 15th September 2021, the 3rd Respondent submitted on two issues namely whether the Petitioner has proved the allegations of violation of constitutional rights by the 3rd Respondent and whether the 3rd Respondent should be struck out from this petition. On the first issue, it is submitted that the 3rd Respondent has demonstrated that the Petitioner's dietary needs were always reviewed while he was at Kitengela G. K Prison as shown by annexures marked VNO 3 and 4; that the Petitioner's demands to be allowed to buy food items not provided and be allowed to cook his



own food was outside what is allowed under the law. She cited *SMM & another v. Officer in Charge of Kamiti Maximum Prison & another* (2020) eKLR where the court stated as follows:

“Since the responsibility to provide the medical care falls on the government, the government can only provide services from facilities they own. Unless they receive volunteers to give specialized treatment, as happens with humanitarian groups, such volunteers help should be provided at a government facility, whether in prison or outside prison..... All in all, I find that when a state deprives a person of their liberty it takes on a responsibility to provide adequate health care in accordance to their specific conditions. The responsibility to decide who needs care outside of the prison hospital lies with the prison MOH and in their absence the O/C Prison only if it is in a case of emergency. That discretion should be exercised in a fair and reasonable manner. If the prisoner feels that his right to medical care has been violated, he can make a complaint in the manner provided under the *Prisons Act* and Rules thereunder.”

20. She submitted that she ensured that all the necessary dietary reviews were carried out on the Petitioner and that he was provided with all necessary meals as provided under the law. She submitted that she carried out all her duties as stipulated by the law and never, in any way, violate the Petitioner’s constitutional rights; that the Petitioner was provided with all the necessary medical attention that he required and all the necessary meals were provided for.
21. On the second issue, she submitted that she is a Nutrition Officer based at Kitengela G.K Prison and employed by the County Government of Kajiado; that the Petitioner was transferred from this prison and is currently in Manyani G.K Prison where the 3rd Respondent is not an officer. She submitted that this court has the power to remove her name from this Petition by dint of Order 1 Rule 10 (2) of the Civil Procedure Rules. She submitted that she was wrongly joined to the Petition and that her name should be struck out. She cited *Unilever Tea Kenya Limited v. National Land Commission & 2 others* [2018] eKLR to support her submissions.

Analysis and Determination

22. To my mind, the Petition raises the following issue for determination, namely: Whether the Respondents have violated the Petitioner’s rights under *the Constitution* and the *Persons Deprived of Liberty Act*.
23. Before I determine the two issues, I wish to point out that the Petitioner has, through his submissions, amended his Petition in respect of the reliefs he is seeking. The Petition listed the following original reliefs:
 - i. That this court has jurisdiction to hear this petition under Articles 159, 160(1) and 162(b) (d) of *the Constitution*.
 - ii. That the 1st Respondent implements the *Persons Deprived of Liberty Act* in its totality under the supervision of this honourable court.
 - iii. A declaration that the conduct of the 2nd and 3rd respondents of not taking the Petitioner to hospital to allow him access to proper diet arising from his medical condition violated the provisions of *the Constitution*, *Persons Deprived of Liberty Act* and the *Prisons Act*.
 - iv. A declaration that the 3rd Respondent committed tort of negligence and her conduct was contrary to Article 75 of *the Constitution*.



- v. An order that the Petitioner be taken to hospital and access a heart specialist and further be provided with the required diet or in the alternative he be allowed to purchase items which the Prison Authority is not in a position to provide.
 - vi. The orders be implemented under the supervision of the court.
24. In his submissions, the Petitioner has abandoned prayers (ii) and (iv). But from his submissions, it is clear that the Petitioner now seeks the following three reliefs:
- i. A declaration that the acts of the 2nd and 3rd Respondents in denying the Petitioner access to a proper diet and medical treatment constitutes an unlawful and unreasonable infringement of the Petitioner's right to human dignity, freedom from cruel, inhuman or degrading treatment as set out in Articles 28, 29(f) as read with Article 51 (1) of *the Constitution* of Kenya.
 - ii. A declaration that the acts of the 2nd and 3rd Respondents of denying the Petitioner access to health care and a proper diet to manage his hypertension is a violation of his right to health as enshrined in Article 43(1) (e) as read with Article 51(1) of *the Constitution* of Kenya.
 - iii. A declaration that the Petitioner is entitled to access to healthcare, including access to a heart specialist and proper diet.
25. It is clear to me that the reliefs sought have significantly changed from the original reliefs listed in the Petition filed on 21st May 2020. It is now settled that parties before the court are bound by their pleadings. This legal principle is well captured by the Court of Appeal in *Independent Electoral and Boundaries Commission & Another. vs. Stephen Mutinda Mule & 3 others* (2014) eKLR, where that Court cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002* where it was stated that:
- “.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
- ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”
26. Further, the Supreme Court of Kenya in *Raila Amolo Odinga & Another vs. IEBC & 2 others* (2017) eKLR found and held as follows in respect to the essence of pleadings in an election petition:
- “In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”
27. The Petitioner is in error in amending or attempting to amend the reliefs he is seeking at the stage of his submissions. Pleadings, once filed, can only be amended with leave of the court upon an application to do so being made. It would be prejudicial to the Respondents if the Petitioner were allowed to amend



the reliefs he is seeking at the submissions stage and without leave of the court. This court will therefore not allow the Petitioner to do so. He is bound by the Petition and therefore the reliefs sought are the ones contained in the Petition. This court will therefore confine itself with the Petition as filed and the reliefs sought in the Petition.

28. Having understood the positions taken by the Petitioner and the Respondents and noting that there is no dispute that the Petitioner had a medical condition that required constant medical reviews and recommended diet, it is my view that the Petitioner did not adduce evidence to demonstrate the particulars of the diet he was supposed to be provided with. His pleadings refer to a “condition which was found to be hereditary in nature” and the doctors placing the Petitioner “under medication with regular clinic attendance”. He also refers to “the Petitioner was advised to do physical exercises and use proper diet all in combination” and “as a result the KHN doctors recommended to the Petitioner the kind of diet to take which was effected by doctors at Kamiti Maximum Prison, the Nutritionist of that particular prison and the Officer in Charge of the facility.” The Petitioner did not give particulars of that diet in his pleadings.
29. His main claim is that the officers at Kitengela G.K Prison and the Nutritionist breached his rights under *the Constitution* and the *Persons Deprived of Liberty Act* by denying him medical reviews and recommended diet. My reading of the Response and the Replying Affidavits by the Respondents and the annexed documents show that the Petitioner was regularly taken to hospital for checks and reviews. There is evidence from the attached documents marked VNO1, VNO2, VNO3, VNO4, all annexures to the Replying Affidavit of the 3rd Respondent sworn on the 1st December 2020, that the Petitioner was being attended at the Kitengela G.K Prison Dispensary, the Kitengela Sub-County Hospital and Kenyatta National Hospital.
30. The Petitioner claims that his rights under Articles 27 (1), equality before the law; Article 28, respect and protection of human dignity; Article 29, right to freedom and security; Article 43, right to the highest attainable standard of health; Article 47(1), right to fair administrative action and Article 48, access to justice, were violated by the Respondents. As I have stated above, the Respondents have tendered evidence to show that the Petitioner was treated in accordance with the recommendations of the doctor by taking him to hospital for reviews and treatment and giving him the recommended diet. There is evidence that the Petitioner demanded to be allowed to buy his own food and cook for himself which, according to the Respondents, is not allowed under the law.
31. It is trite that a party who claims violation of constitutional rights must set out with some degree of particularity the specific right and how it has been violated. This is the principle established in the case of Anarita Karimi Njeru v. Republic (No. 1) [1979] I KLR 154 and Mumo Matemu v. Trusted Society of Human Rights Alliance [2013] eKLR.
32. While the Petitioner in this matter has enumerated the rights he claims were violated, he has failed, in my view, to demonstrate how these rights were violated given the evidence by the Respondents that the Petitioner was accorded all the necessary attention as regards his treatment, reviews and dietary requirements. The Petitioner has not controverted this evidence.
33. Section 13 of the *Persons Deprived of Liberty Act* (Cap. 90) provides that:
 - (1) A person deprived of liberty shall be entitled to a nutritional diet approved by competent authorities.
 - (2) A diet under subsection (1) shall take into account the nutritional requirements of children, pregnant women, lactating mothers and any other category of persons whose physical conditions require a prescribed diet.



- (3) For the purposes of this subsection (1), "competent authority" means a qualified medical practitioner or qualified nutritionist.
- (4) A medical officer of health may prescribe a particular diet for a particular person deprived of liberty, depending on the medical condition of the patient.
34. It is the Petitioner's case that he was denied a diet approved by competent authorities. Again, there is evidence to show that this is not the case, and the Petitioner has failed to meet the threshold of proving that he was so denied.
35. After careful consideration of the Petition and the Responses, it is my view that the Petitioner is in error in changing his pleadings at the stage of submissions by amending, without leave, of the orders he is seeking. This court could only consider the Petition as filed and consider whether the Petitioner has met the threshold for grant of the orders he is seeking in the Petition.
36. After careful consideration of the evidence before me and the law, I am satisfied that the Petitioner has failed to prove his case against the Respondents. I am satisfied that at the time the Petitioner was held at Kitiengela G.K Prison, he was according all the necessary treatment and respect befitting of a prisoner in respect to his medical treatment, medical reviews, and dietary requirements. The law required him to tender evidence to prove his case which he has failed to do to the requirements of the law.
37. The outcome of my determination is that this Petition fails. Consequently, the Petition dated 12th May 2020 is hereby dismissed. I order each party to bear its own costs for this Petition.
38. Orders shall be issued accordingly.

DATED, SIGNED AND DELIVERED THIS 19TH DAY OF JULY 2023.

S. N. MUTUKU

JUDGE

