



FAB v Director of Public Prosecution & 2 others; Maisha Childrens Home & another (Interested Parties) (Criminal Petition E266 of 2020) [2023] KEHC 26202 (KLR) (Crim) (4 December 2023) (Judgment)

Neutral citation: [2023] KEHC 26202 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL PETITION E266 OF 2020
K KIMONDO, J
DECEMBER 4, 2023**

BETWEEN

FAB APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTION 1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

OFFICER IN CHARGE, DCI TRAINING SCHOOL, SOUTH

C 3RD RESPONDENT

AND

MAISHA CHILDRENS HOME INTERESTED PARTY

THE NATIONAL POLICE SERVICE COMMISSION INTERESTED PARTY

JUDGMENT

1. The petitioner is the mother of MMA [particulars withheld] who she claims was born on 19th August 2001. I must point out at the earliest that the date of birth is contested. According to a copy of a birth certificate produced on behalf of the respondents, MMA was born on 19th August 2003.
2. The petitioner avers that on 16th October 2020, officers from the DCI Children Protection Unit housed at the Police Training School South C Nairobi “took away [her] daughter to unknown place”. Upon further enquiries, she learnt that MMA was first held at Buruburu Children’s Home and ultimately at Maisha Children’s Home (the 1st interested party).



3. The gist of the petition dated 2nd December 2020 is that MMA was an adult on the date of her arrest; and, that the police had no legal basis for their action and in particular to detain her at a children's home.
4. The petitioner contends that the respondents' conduct violates Articles 20 (1) & (2), 24 (1), 25 (a) & (c), 27, 29, 31, 39, 49 (1)(c) & (f), 50 and 51 of the Constitution. She argues that it equally offends sections 4, 63, 73, 113, 114, 118, 120, 121, 128, 128, 132 and 143 of the Children Act 2001 (now amended) as well as Article 9 of the International Covenant on Civil & Political Rights.
5. The petition is primarily founded upon the depositions of the petitioner. She prays for 15 reliefs which can be summarized as follows: Declarations that the respondents have breached the Constitution, specified statutes and international treaties to which Kenya is a party; orders for release of MMA forthwith and to prohibit the 1st to 3rd respondents from arresting, charging or detaining her; an order for her age assessment; and, prayers for damages and costs.
6. The petition is contested by the 1st, 2nd and 3rd respondents through a replying affidavit sworn on 26th October 2021 by Police Constable Susy Wangila. She deposes that on 28th August 2020, they received a complaint from Mehr Abdul Munim, a former husband of the petitioner, who claimed that the petitioner had "married off MMA to Rishad Hamid Ahmed, a politician aged 57 years from Lamu County". Dowry of Kshs 500,000 and a sofa set was paid to the petitioner. A marriage certificate of the Islamic wedding is annexed.
7. She averred that DCI officers from the Child Protection Unit traced MMA to an apartment where she was living with the said Rishad. Upon medical examination at Medicins Sans Frontiers, it transpired that MMA was pregnant. According to the respondents, MMA was a minor as per the birth certificate I referred to earlier; and, it follows that the marriage was illegal.
8. Furthermore, they contend that Rishad remains a suspect for the offence of defilement; and, the only reason he has not been arraigned is that he had contact with someone who had contracted Covid-19. The respondents were also considering charges against the petitioner for child neglect.
9. In a synopsis, the respondents' case is that MMA was a child in need of care and protection; and, that they acted in the best interests of the minor by rescuing and placing her in a children's home. They thus deny all allegations in the petition and pray for dismissal.
10. The two interested parties did not enter an appearance or attend to the hearing.
11. I should also point out that contemporaneously with the petition, the applicant had filed a Notice of Motion seeking some interim reliefs. On 10th December 2020, the court (Lesiit J, as she then was) granted an order for age assessment and issued further directions on the hearing of the main petition. The petitioner was to call 4 witnesses and the respondent 2.
12. But when the parties finally appeared before me on 20th April 2023, 13th July 2023 and 18th October 2023, they elected to canvass the petition by way of written submissions. No explanation for the turn-around on viva voce evidence was forthcoming from any of the disputants.
13. The final submissions of the petitioner are dated 25th March 2022 while the response is dated 8th June 2022. On 18th October 2023, I heard further arguments from learned counsel for the petitioner and the respondents.
14. I take the following view of the matter. A constitutional petition such as this one must be pleaded with precision. The petitioner must specify the provisions of the Constitution that are alleged to have been violated; the particulars of the alleged violation; and, how the respondents have violated her rights. See



generally, *Anarita Karimi Njeru v Republic*, High Court, Nairobi Misc. Crim. Appl. 4 of 1979 [1979] eKLR, *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others*, Court of Appeal, Nairobi, Civil appeal 290 of 2012 [2013] eKLR. I find that the petitioner here has largely met this test.

15. The first key issue in this petition revolves around the actual age of MMA at the time she contracted a marriage on 1st March 2020 or was arrested by the respondents on 16th October 2020 as pleaded by the petitioner. I note that the respondents on their part aver that they first received a complaint on 28th August 2020. The second question is whether the respondents breached the *Constitution*, statutes and international treaties in arresting MMA or holding her in a children's facility.
16. Article 53 of the *Constitution* and section 4 of the *Children Act* decree that the court must always act in the best interest of the child. See generally *G.N. v Chumani Secondary School Board of Management* Mombasa High Court, Civil Suit 95 of 2014 [2014] eKLR.
17. However, the claim that MMA was of majority age as at 1st March 2020 or 16th October 2020 has not been proved by the petitioner. A cardinal precept of the law of evidence encapsulated in sections 107 and 108 of the *Evidence Act* is that (s)he who alleges must prove. To the petitioner, the subject was born on 19th August 2001 and was an adult on the date the respondents arrested her. No sufficient evidence of that fact was placed before me. She is not emphatic about the age of MMA on 1st March 2020 when she contracted a marriage.
18. To be fair to the petitioner, the marriage certificate dated 16th July 2020 before Sheikh Aboud Mohamed indicates that MMA was 18 years. In addition, there is the age assessment by Dr. Alfred Owiti annexed to the respondents' replying affidavit estimating that MMA was above 18 years. It is however not lost on me that the age assessment was carried out far much later on 27th July 2021.
19. I have weighed that evidence against the complaint by the father of MMA, Mehr Munim, that his under-age daughter was married off by the petitioner and his son. It is not contested by the petitioner that the marriage occurred on 1st March 2020 as per the marriage certificate I referred to earlier. In addition, there is the birth certificate annexed to the deposition of PC Wangila mentioned earlier which shows that MMA was born on 19th August 2003. It would mean that on the date MMA was rescued by the police, she was still a minor and pregnant; and, in need of care and protection. It may also point to possible criminal conduct. I say that very carefully and without making a finding. And the less I say about it, the better.
20. I got the distinct impression that both the petitioner and the respondents, whether by design or default, left the court in a blind spot. If both parties had followed the directions made on 10th December 2020; or, called the witnesses that they had each proposed on that date, the question of the age of MMA as at 1st March 2020 (the date of her marriage to Rishad) or 16th October 2020 (the date when she was whisked away by the Child Protection Unit) would have been thrashed out once and for all.
21. The other troubling matter is that to date, the DPP (1st respondent) has not communicated to the court whether it commenced any prosecution against the petitioner or MMA's "husband", Rishad. As far back as 1st November 2021, learned prosecution counsel informed the court that the DPP had made a decision to charge. The DPP has clarified that MMA was never under any criminal investigations. Obviously, by the time of hearing this petition and delivering this judgment, and whichever date of the birth of MMA is true, she is no longer a child as defined in our law.
22. For that reason, I would have been inclined to order for her immediate release. But I note that she was released from the respondents' custody or that of the children's home as far back as 5th December 2020.



That fact has not been seriously contested by the petitioner. The matter has thus been overtaken by events. I am reminded that orders should never issue in vain.

23. In the end, the petitioner has failed to prove that the respondents acted in breach of the Constitution or statute; or specifically acted in excess of the powers granted by Article 245 of the Constitution and section 35 of the National Police Service Act when they commenced the impugned investigations or placed MMA at a children's facility. See generally, Mohamed Feisal & 19 others v Henry Kandie, Chief Inspector of Police et al, High Court Kajiado, Petition 14 of 2017[2018] eKLR.
24. There was also a dearth of evidence of the conditions under which MMA is living or that the respondents have tortured or intend to torture her. On this aspect, I also note that owing to her pregnancy, the respondents released MMA into the custody of her elder sister on 5th December 2020, a fact not contested by the petitioner. It follows that the prayer for her release is now otiose.
25. The petitioner submitted that the rights of MMA to fair administrative action were also violated. Article 47 of the Constitution and section 4 of the Fair Administrative Action Act decree that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. But it is important to keep in mind that the respondents were investigating probable criminal conduct and had a duty to act in the best interests of MMA whom they believed to be a minor. I have already dealt at length with the contested issue of her age.
26. I will finally turn to the prayer to prohibit the respondents from investigating or prosecuting MMA. For starters, the respondents freely concede in their replying affidavit and submissions that MMA was never a suspect or under any criminal investigations. Rather, the respondents claim they were rescuing her in the best interests of the minor. Article 157 of the Constitution grants the office of the DPP the mandate to prosecute criminal matters. I decline the invitation to encroach upon the constitutional independence of the DPP ordained by the grundnorm.
27. For all those reasons, the orders that commend themselves to grant are as follows-
 - a) That the respondents having released MMA from their custody or that of Maisha Children's Home on or about 5th December 2020, the prayers in the petition for the release of MMA, and who is now an adult, are otiose.
 - b) That the prayer for an age assessment of MMA was earlier granted at the interlocutory stage on 10th December 2020 and is equally spent.
 - c) That the remainder of the petition is devoid of merit and is hereby dismissed.
28. Costs follow the event and are at the discretion of the court. In the interests of justice, there shall be no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF DECEMBER 2023.

KANYI KIMONDO

JUDGE

Judgment read virtually on Microsoft Teams in the presence of-

Mr. Amany for the petitioner instructed by Ahmednasir Abdullahi Advocates LLP.

Ms. Oduor for the 1st & 2nd respondents instructed by the Office of the Director of Public Prosecutions.

