



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.372 OF 2019

IN THE MATTER OF: ARTICLES 1, 2, 3(i), 10, 19, 20, 21, 23, 24, 25, 29, 30, 31, 32, 33, 36, 39 and 43 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: 4, 10, 11, 13 SNF 20 OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES.

MASHACK SAMI NGUTU.....PETITIONER/APPLICANT

VERSUS

MICAH KYAMA SILA1ST RESPONDENT

ZIPPORAH K. SILA.....2ND RESPONDENT

JUDGMENT

1. Mashack Sami Ngutu the petitioner filed this petition dated 19th August, 2019 on behalf of his adult daughters, Sharleen Wamuu Sami, Ruth Kavenge Sami, Teresia Wairimu Sami and Mercy Wambui Sami citing Articles 22(1) and (2), Articles 23, 159, 160(1) and 165 among many other Articles of the Constitution. The petition is supported by his sworn affidavit.

2. He claims that the 1st and 2nd respondents who are pastors in the church known as Kingdom and Life Embassy Church have indoctrinated his four (4) daughters to join the said church and abandon their studies. He states that Sharlene Wamuu Sami was made to abandon her Masters degree in project management at JKUAT University in December 2018. This breached the girls' rights to education under Article 43(1)(f) of the Constitution.

3. He further states that his daughter Ruth Kavenge Sami. Was also made to join the said church and abandoned a Diploma she was pursuing in music at Kenyatta University. This was in December 2016. The next victim is his daughter Teresia Wairimu Sami who joined the respondents church and abandoned a degree course she was pursuing in Mass Communication at JKUAT University in January 2018.

4. The next victim was Mercy Wambui Sami who he claims was made by the respondents to join their church and abandoned her

studies. She was to join college to pursue a degree in Tourism and Hospitality, in January 2018. It is therefore his case that as a result of the respondents action his daughters rights to education under Article 43(1) (f) of the Constitution were violated.

5. He also claimed that all his four (4) daughters pose as models in an enterprise known as “House of Zippy” which is associated with the respondents and this is a contravention of Article 30(1) and (2) of the Constitution. He further states that the respondents actions are meant to destroy his family unit contrary to Article 45(1) of the Constitution.

6. In his supporting affidavit he has averred that the respondents have instigated his daughters to be witnesses in a criminal case against him. He annexed the statement by his two daughters (MSNI); He further averred that his daughters Sharlene Wamuu Sami and Ruth Kavenge Sami were instigated by Counsel John Mundia to do a letter dated 28th May 2019 instigating his arrest (MSN2).

7. As a result of the above, the Petitioner seeks the following prayers:

(a) A declaration that the rights and or fundamental freedoms in the Bill of right the petitioner's children Sharleen Wamuu Sami, Ruth Kavenge Sami, Teresia Wairimu Sami and Mercy Wambui Sami as per the constitution of Kenya 2010 has been denied, violated and infringed by the respondents.

(b) A declaration that the Petitioner's children Sharleen Wamuu Sami, Ruth Kavenge Sami, Teresia Wairimu Sami and Mercy Wambui Sami are entitled to damages and compensation for the violations and contraventions of their fundamental rights and freedoms under the aforementioned provisions of constitution.

(c) A perpetual mandatory injunction to issue directing the respondents to release the petitioner's children forthwith and further restraining the respondents either by themselves or through their agents and or servants from detaining and or holding the petitioner's children and or interfering with their fundamental rights and freedoms provided in the Constitution.

8. The respondents filed the following grounds of opposition dated 11th October, 2019:

i. The Petition is a misapprehension of the law as the children mentioned are adults who cannot be forced by the court to make personal decisions regarding their religion, education, residence and livelihood.

ii. This Petition does not reveal any violation of constitutional rights and freedoms and does not therefore reveal a viable cause of action.

iii. The orders sought are incapable of being granted as granting them would in itself amount to a violation of constitutional rights and freedoms.

iv. This Petition is frivolous and an abuse of the court process.

9. They also filed a replying affidavit sworn by the 1st respondent on 11th October, 2019. He averred that he is the Apostolic Leader in Kingdom and Life Embassy a Ministry under the Living Word Churches, a society registered under the Societies Act Cap 108 of the Laws of Kenya. He has stated and categorically denied that him and his wife (2nd respondent) have forced/coerced/influenced any of the petitioner’s children to become members of their church. They denied ever housing any of the petitioner’s children who have always lived on their own.

10. They have also denied influencing or advising the said children to leave school, or pose as models or work for any of their enterprises as claimed. They have denied ever interfering with the petitioner’s family.

11. He averred that somewhere in February 2019 the petitioner called him on phone insulting him and threatened to come to his church and assault him. He made good his threat when on 28th March 2019 he stormed the church and dragged out his daughters Sharlene Wamuu Sami and Ruth Kavenge Sami who were there to pray. He also threatened and insulted the pastors present and tried to incite the crowd outside to torch the church. The incident was reported by the church caretaker at Ruiru Police Station vide O.B. No.66/28/03/2019. After investigations the Petitioner was arrested and charged on 30th August, 2019 vide Cr. Case No.959 of

2019 (M.K.S.1) at Ruiru Magistrate's court.

12. Further that on 12th April, 2019, a group of drunkards stormed the church and attacked the church caretaker claiming to have been sent by the Petitioner, who said the church was cultic. The matter was reported and one of the culprits called James Mwangi was arrested and charged at Ruiru Law Courts with assaulting the caretaker. He deponed that the Petitioners children are adults who have rights to make independent decisions regarding their religion, education and livelihood.

13. Filed together with the replying affidavit was the further affidavit by Sharlene Wamuu Sami sworn on 14th October, 2019. She deponed that she is aged 30 years old, Ruth Kavenge Sami is 26 years old, Teresia Wairimu Sami, is 22 years old while Mercy Wambui Sami is 20 years old. Further that they moved out of the petitioner's house in Matuu upon attaining the age of majority and have led independent lives ever since. She confirms them having voluntarily joined the respondents' church at different times.

14. She has deponed that their relationship with their father even prior to their joining the respondents church was rocky due to his violent and controlling nature. She further deponed that the petitioner in February, 2019 stormed into the Permanent Presidential Music Commission (PPMC) where Teresia Wairimu Sami was working and caused a commotion and this led to her departure. She has set out at paragraph 11 of the replying affidavit her education background plus that of her sisters. She referred to the incident of 28th March, 2019 as stated by the 1st respondent in his affidavit.

15. She deponed that an interference with the investigations prompted them to go to the Independent Oversight Authority, International Affairs Unit and the office of the Director of Public Prosecutions through the advocates [annexture S.W.S 1] (a) (b) (c) and (d). This led to the arraignment of the petitioner in court on 30th August, 2019 in Ruiru Cr. Case No.959 of 2019. She denied that any of them had posed as a model from House of Zippy Enterprise arguing that the petitioner was the one interfering with their right of worship and liberty.

16. The petitioner in his supplementary affidavit deponed that Sharlene Wamuu Sami, had no authority to swear an affidavit on behalf of her three sisters, as that offended the mandatory provisions of Order 1 Rule 13(1) and (2) Civil Procedure Rules. He averred that his daughters stayed in the church and he was present when they collected their belongings on 29th March, 2019. He denied attacking the daughters or anybody else at the church. He further denied Sharlene Wamuu Sami's averment on their current education status.

17. He also denied having a rocky relationship with his daughters and that he stormed into the PPMC offices. He deponed that the respondents have been using his daughters for financial gain and that Sharlene Wamuu Sami had acknowledged their posing as models for House of Zippy Enterprise.

18. The petitioners filed their submissions dated 15th January, 2021 by their counsel M.M. Uvyu and Co. Advocates. Learned Counsel referred to the petition and the affidavits filed. He submitted that the petitioner had been charged as a result of an instigation of his daughters by the respondents. That the charge was to cover up the respondents' actions of indoctrinating his children to abandon their constitutional right to education. Counsel contends that the Petitioner was at the church on 29th March, 2019, to pick his children who were held in servitude and were staying in deplorable conditions within the church compound.

19. It has further been submitted by counsel that the evidence confirms that the petitioner's daughters were indoctrinated by the respondents as a result of which they abandoned college. That they were also posing as models at the House of Zippy Enterprise at no pay and without their permission. In all this, there was a violation of Articles 30(1) and (2) of the Constitution. He argues that the respondents had turned the petitioner's children against him in contravention of Article 45(1) of the Constitution. He therefore prays for damages and compensation for all these violations as provided for under Article 23(1) (3) of the Constitution.

20. To buttress this argument he relied on the case of **MWK V. Attorney General and 3 others [2017] eKLR** where the Judge held that compensation is an appropriate remedy in instances such as the case at hand. Counsel also referred to the case of **HOO (a child suing through his father and next friend) POO V. Board of Management N. School and 2 others [2018] eKLR** where the court stressed the need for a petitioner to set out with precision his/her claim and the provisions of the Constitution alleged to have been violated. Counsel submitted that the petition herein has done so. He urged the court to award the petitioner KShs.3000,000/- plus costs of the petition, as compensation.

21. The respondents filed submissions dated 6th July, 2020 through their counsel Mr. John Mundia. Learned Counsel submitted by giving brief facts and the evidence by all the parties. He argued that the petitioner clearly misunderstood the provisions of Article 22(2) of the Constitution which allows court proceedings by a person acting on behalf of another person who cannot act in their own name. He submitted that the petitioners are adults and educated with a thorough understanding of the legal process.

22. He further argues that the daughters who know their rights were never named by their father as Interested Parties. That the petitioner did not explain to the court why the children cannot act in their own name. It is his submission that the burden of proof in this case lay on the petitioner. On this he referred to the following cases:

i. Paul Ng'ang'a Nyaga & 2 others V. Attorney General and 3 others [2013] eKLR.

ii. Kiambu County Tenants Welfare Association V. Attorney General and Another [2017] eKLR.

23. Counsel has submitted that no evidence was led by the petitioner to show any violation of Constitutional rights. That the witness statements by his daughters and the letter annexed to his supporting affidavit are not original documents and cannot be relied on by the court. Secondly, the witness statements only show that the deponents are witnesses in an ongoing investigation or court case. Further, that the petitioner's accusation of "unlawful indoctrination" is not backed by any evidence. That the petitioner has not shown how the respondents' activities are unlawful. He defined the term "indoctrination" as "...the process of teaching a person or groups to accept a set of beliefs..." He therefore argues that there is nothing wrong with indoctrination.

24. Moreover, he adds that indoctrination is a right protected by the laws under Article 32 of the Constitution which states:

"32. (1) Every person has the right to freedom of conscience, religion, thought, belief and opinion.

(2) Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship."

He therefore submitted that the respondents did nothing wrong in pastoring and impacting religious instruction to the petitioner's adult children.

25. On the accusation that the respondents have advised the petitioners' children not to continue with their education counsel submitted that no evidence has been laid before court to confirm that the children have dropped out of school. Further that no evidence has been led to show the existence of the House of Zippy Enterprise let alone the children going there for modelling.

26. Counsel contends that the claim by the Petitioner that the respondents had turned the children against him and their mother was not substantiated and more so Sharlene Wamuu Sami deponed that their relationship with the petitioner has never been good from the start. Relying on the case of Kiambu County Tenants Welfare Association V. Attorney and another [2017] eKLR he submitted that this case was an abuse of the court process. In the said case the court stated that abuse of the court process can arise *"...where there is no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action."*

27. Counsel finds no other possible motivation behind this suit other than malice and character assassination. He submits that the prayers sought are frivolous, vexatious, illegal and should not be issued by the court for the reason that the court cannot stop the children from going to church, nor participating as witnesses in Cr. Case No.959 of 2019. That the two daughters are victims and are protected under Article 50(9) of the Constitution and the Victims Protection Act.

28. The respondents filed supplementary submissions dated 30th March, 2021 in response to the petitioner's submissions dated 15th January, 2021. On the submission by the petitioner that Sharlene Wamuu Sami's further affidavit offends Order 1 Rule 13 of the Civil Procedure Rules counsel submits that the law is that an affidavit should only contain matters of fact and not law. That the said rule only applies to either a plaint or a defence where there is more than one plaintiff/defendant. The rule cannot therefore be extended to constitutional matters. Further that if the rule were to apply as suggested by the Petitioner, then the petitioner ought to have obtained written consent from his children before filing this case on their behalf.

29. The rest of the submissions touch on matters already submitted on and the affidavits before court. Counsel argues that the damages sought in the sum of KShs.3,000,000/- is not explained. He wondered who would benefit from the damages were the court to grant them. He urged the court to dismiss the petition with costs.

30. Mr. Mundia for the respondents highlighted his submissions stressing on the following issues.

(i) Article 22 of the Constitution having been misapplied (ii) lack of *locus standi* by the petitioner (iii) The reason behind the petition. (iv) Failure to discharge the burden of proof as there is no evidence to support the petitioner's allegations against the respondents. (v) The issue of the children not being parties in the suit. The arguments behind all these issues have been covered in the written submissions and I will not reproduce them here.

Analysis and Determination

31. I have duly considered the petition, affidavits, submissions and authorities cited by both counsel. The issues I find arising for determination are:

i. Whether the petitioner had the *locus standi* to file the suit.

ii. Whether the further affidavit by Sharlene Wamuu Sami offends the provisions of Order 1 Rule 13 of the Civil Procedure rules.

iii. Whether the petitioner discharged his burden of proof against the respondents.

iv. Whether he is entitled to compensation of KShs.3,000,000/- plus costs.

32. The respondents contend that the petitioner lacks *locus standi* to bring the suit herein because the daughters he is complaining about are adults. Further that there is no special reason why he filed the suit on their behalf. This is an issue that has been raised at paragraphs 8, 9, 10 and 20 of the 1st respondent's replying affidavit and the first ground of opposition by the respondents.

33. The petitioner has not responded to this issue at all whether in the supplementary affidavit or in the submissions. The evidence on record from the affidavits shows that as at the time of filing of the petition the petitioner's children were university and post university material. I therefore conclude that the silence by the petitioner on this noble issue means the claim by the respondents on the age of the children is true. I therefore find that as at 20th September, 2019 the four daughters of the petitioner were each aged above 18 years.

34. The next issue to determine is whether the petitioner could file a suit claiming damages on their behalf. This is what the petitioner states at paragraph 4,5 and 6 of the petition:

"4. Under Article 22(1) of the Constitution of Kenya every person has the right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of rights has been denied, violated or infringed or is threatened. The Petitioner being the biological father of Sharleen Wamuu Sami, Ruth Kavenge Sami, Teresia Wairimu Sami and Mercy Wambui Sami who are entitled to the enjoyment of the fundamental rights and freedoms of the individual in Chapter Four of the Constitution of Kenya has a right to institute these proceedings in the interests of his children stated hereabove.

5. Under Article 22(2) of the Constitution of Kenya court proceedings under Clause (1) above may be instituted by a person acting on behalf of another person who cannot act in their own name."

6. Under Article 23, 159, 160(1) and 165 of the Constitution of Kenya this Honourable Court has jurisdiction to hear any question regarding the violation of rights and the interoperation of the Constitution including questions of contradiction between any Law and the Constitution and whether anything said to be done under the authority of the Constitution or any Law is inconsistent with or in contravention of the Constitution."

To buttress this he has cited several provisions of the Constitution which he sums up and states that this court has jurisdiction to hear any question regarding the violation of rights and anything in contravention of the Constitution.

35. There is no dispute on the jurisdiction of this court to hear and determine matters on violation of rights under the Constitution. This is found in Article 165(3) (b) of the Constitution which provides:

Subject to clause (5) the High Court shall have-

“(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.”

36. The issue is whether the petitioner had the right standing to institute proceedings on behalf of his adult daughter. Article 22(1) and (2) of the Constitution which the petitioner has relied on provides that:

“22. (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.”

37. It is not denied that the petitioner is the father of the children on whose behalf he has filed the petition. It is not also disputed that the children are adults and no consent was obtained from them prior to filing the petition. There is no indication that any of the children is incapable of filing a suit in their own name for Article 22(2) (a) to apply. Article 22(2) (b), (c) (d) of the Constitution are inapplicable, in this case.

Issue No. ii. Whether the further affidavit by Sharlene Wamuu Sami offends the provisions of Order 1 Rule 13 of the Civil Procedure rules.

38. The petitioner in his supplementary affidavit raised issue with the further affidavit by Sharlene Wamuu Sami dated 14 October, 2019 saying she had no authority to swear the affidavit on behalf of the sisters. He referred to Order 1 Rule 13(1) and (2) of the Civil Procedure Rules which provides as follows:

“13. (1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case.”

39. The affidavit of Sharlene Wamuu Sami, is not sworn on behalf of her sisters. The deponent has in the affidavit simply told the court what she knows about the case. She is the eldest of the four (4) girls and so knows the matter well. Secondly she is not a party to the proceedings though mentioned by the petitioner in the petition. She cannot therefore be said to have offended the provisions of Order 1 Rule 13(1) and (2) Civil Procedure Rules.

Issue No.(iii) Whether the petitioner discharged his burden of proof against the respondents.

40. The issues raised by the petitioner emanate from alleged violation of the right to education and freedom of worship. The petitioner claims that the respondents have indoctrinated his children into their church and deceived them into discontinuing their education to join modelling for the respondents benefit.

Article 30 of the Constitution provides:

“30. (1) A person shall not be held in slavery or servitude.

2. A person shall not be required to perform forced labour.

Article 32 of the Constitution provides:

“32. (1) Every person has the right to freedom of conscience, religion, thought, belief and opinion.

(2) Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship.

(3) A person may not be denied access to any institution, employment or facility, or the enjoyment of any right, because of the person’s belief or religion.

(4) A person shall not be compelled to act, or engage in any act, that is contrary to the person’s belief or religion.”

Article 43 (1) (f) of the Constitution provides:

“43. (1) Every person has the right-

(f) to education.”

41. The petitioner who claims to be a very responsible father cites the dates of the occurrences of the abandonment of education and indoctrination as December 2016, January 2018 and December 2018. As the responsible father he claims to be he only found it fit to file this suit on 20th September, 2019. What was he doing since December 2016 when he allegedly learnt of what was allegedly happening to his daughters”

Sharlene Wamuu Sami in her further affidavit has averred that the petitioner’s violent and controlling nature made them (daughters) move out of his home in Mature upon attainment of majority age and have been leading independent lives.

42. At paragraph 11 of the further affidavit Sharlene Wamuu Sami has set out their educational progress as follows:

“11. THAT none of us has abandoned/dropped out of school as the Petitioner alleges. Our current educational progress is as follows:

a) That I am in the process of winding up my Thesis in MSc Project Management at Jomo Kenyatta University.

b) That Ruth Sami finished her Diploma in Music at Kenyatta University in 2017 and is now self employed as a music tutor.

c) That Teresia Sami opted out of her Journalism course because it was not her passion and decided to pursue Civil Engineering.

d) That Mercy Sami completed her Computer Studies at Digix Computer College and is awaiting to enroll for a Hospitality and Tourism course at Kenyatta University.

she has also deponed that she works for Innovations for Poverty Action (IPA) as a Field Officer.”

43. The petitioner still insists that the girls discontinued their education and that Sharlene Wamuu Sami should have exhibited her letter of employment with IPA. Section 107 of the Evidence Act Cap 80 Laws of Kenya provides that:

“107. Burden of proof:

(1) 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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

44. The petitioner pleaded that his children had been indoctrinated and induced into leaving school. It was his duty to prove to this court that indeed his children had left school at the instance of the respondents. He knows the institutions they were attending. What was so difficult in him getting letters from those institutions to confirm they had abandoned their education" Instead, he wants Sharlene Wamuu Sami to produce documents to show where she is working.

45. Article 32 of the Constitution is clear. One has a right to choose a religion and even a place of worship. The children in this matter are adults and have a right to exercise their rights in accordance with the said Article. If they have elected to go to Kingdom and Life Embassy Church they cannot be forced out of it at the petitioner's whims. They may only leave at their own pleasure. These children are well educated. There is no evidence of them having been forced into any form of labour.

46. The petitioner has been charged with a criminal offence Cr. Case No.959/19 at Ruiru Law Courts. The offence is alleged to have been committed on 26th day of March, 2019, at the church. It is after his appearance in court on 30th August, 2019 that he filed this petition on 20th September, 2019. He has not explained all these coincidences. Why had he to wait for all this time to file the petition" There is so much revealed in the pleadings, affidavits and annexures placed before this court, which shows that the petitioner filed this petition with very ulterior motives.

47. There are reasons why all his daughters from the oldest to the youngest left home and have no intention of going back there. There is a deep family issue which he as the family head must tackle without antagonizing the already wounded children. The children being adults have made choices and are not complaining about them. He cannot impose terms and conditions on them even if he is the father.

48. The law does not allow him to go behind the decision by the children for him to start making claims for compensation using the children's names. I find that the petitioner has failed to prove any wrong doing against the respondents and/or his children. That being the case he is not entitled to any compensation.

49. The upshot is that the petition is lacking in merits and is dismissed with costs. Orders accordingly.

DELIVERED ONLINE, SIGNED AND DATED THIS 11TH DAY OF NOVEMBER, 2021 IN OPEN COURT AT MILIMANI NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT



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