



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

PETITION NO. 20 OF 2019

IN THE MATTER OF SECTION 84 OF THE CONSTITUTION OF KENYA (REPEALED)

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

UNDER SECTION 70 & 71 OF THE CONSTITUTION OF KENYA (AS REVISED IN 2001, REPEALED)

GRACE MAKENA GITUMA (SUING ON BEHALF OF THE ESTATE OF

GERISON MWENDA M'MARETE (DECEASED).....PETITIONER

VERSUS

THE O.C.S. MERU POLICE STATION.....1ST RESPONDENT

THE P.S. MINISTRY OF INTERIOR & CO-ORDINATION OF

NATIONAL GOVERNMENT.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

J U D G M E N T

1. The petitioner herein brought this petition pursuant to Sections 70, 71 and 84 of the constitution of Kenya (2001) now repealed seeking:-

- a) A declaration that the deceased's right to life under Section 70 and 71 of the constitution of Kenya (2001) now repealed was infringed.
- b) An award of damages as compensation to the estate of the deceased wrongful death.
- c) Costs of suit and interest at court rates.

2. The petitioner claimed that the deceased was called by telephone to assist his friend whose vehicle had stalled at Kaaga area on 13th June 2009 when police officers under the command and in the presence of 1st Respondent arrived in the area and just opened fire to innocent law abiding citizens present in panic.

3. The petitioner claimed the deceased's was not armed and his right to life was curtailed as a result of the 1st Respondent's officer's negligence. He contended that the 2nd Respondent was vicariously liable for the acts and/or omissions of the 1st Respondent in the course of his duty. Particulars of negligence on the part of the 1st Respondent and his officers were listed as:-

- i. Firing indiscriminately to innocent members of the public and particularly the deceased.
- ii. Recklessly opened fire on the deceased who was unarmed.
- iii. Failing to exercise cautious, good sense and competence in execution of his duties.

iv. Firing gunshots without warrant and/or need.

v. Failing to satisfy themselves that there was need to shot.

4. That as a result of the negligence on the part of 1st Respondent and his officers the deceased right to life was curtailed and the estate of the deceased suffered loss and damage which they hold Respondents responsible for.

5. The petition was supported by the affidavit of Grace Makena Gituma sworn on 16th December 2019 deponing the issues already stated in the petition. A list of documents dated 16th December 2019 and copies of the said documents i.e Certificate of Death, Limited Grant of Letters of Administration, Post Mortem Report and Notice of Intention to sue where also annexed to the petition and supporting affidavit.

6. The Attorney General representing the Respondents entered appearance and filed grounds of opposition dated 20th February 2020 to the effect:-

i. The petition is incompetent and premised on a fishing expedition.

ii. There is nothing unconstitutional about the petition.

iii. The cause of action is said to have occurred on 13/6/2009.

iv. The petitioners having noted that they are time barred have opted to move the court vide petition for the outlined orders.

v. That the Respondents agents have at no point in time deprived the petition his right to life as alleged.

vi. That individual rights afforded by constitution are not absolute.

vii. That the order sought cannot issue as it is based on misconception and distorted facts.

viii. That the suit being speculative, it lacks merit and ought to be dismissed.

7. The petition was canvassed by way of written submissions. The Respondents filed their submissions on 5th October 2020 and framed issues for determination as follows:-

a) Whether the petitioner is properly before the court.

b) Whether the delay has prejudiced the Respondent

c) Whether there was a violation of the petitioner's rights under Section 70 and 71 of the Constitution of Kenya (2010) by the Respondents.

d) Whether the petitioner is entitled to compensation and quantum thereof.

8. It was the Respondents argument that the claim herein arose 10 years and 6 months and therefore the same is barred under Section 4(2) of Limitation of Action Act which requires that actions founded on tort may not be brought after the end of 3 years from the date on which the cause of action accrued.

9. Ms. Kungú for the Respondents relied in the authority of Peter Kagume and Others vs AG Petition No. 128 of 2006 where Nyamu J held that:

“.....a person whose constitutional rights have been infringed should have same zeal and motivation to enforce his or her rights. In Litigation of any kind, time is essential as evidence may be lost or destroyed and that is possibly the wisdom of time limitation in filing cases”.

10. The *Authority of Trinidad and Tobago in Durity vs AG (2002) UK pc 20* was also relied upon by the Respondents counsel to support her position that the claim was time barred. It was held:

“.....An application made under Section 14 solely for the purpose of avoiding the need to apply in the normal way for the appropriate judicial remedy for unlawful administrative action is an abuse of process”.

11. It was contended by the Respondents that the petitioner is circumventing limitation period by filing a constitutional petition. The Respondents counsel argued that the petition herein depicts a case which has remedies in the law of tort and the same should be struck out for being time barred.

12. The Respondents further contended that from the face of the petition was more of a complaint and paragraph 8 even gives particulars of negligence on the part of the Respondent. In *Anarita Karimi Njeru vs The Republic (1976 -1998) KLR 1272* the threshold in filing

constitutional petitions was set as follows:-

“We would however again, stress that if a person is seeking redress from the High Court as a matter which involves a reference to the constitution it is important 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. It was further argued that the petitioner ought to have commenced cause by way of reference under Section 84(3) of the then constitution of 2001. It was also claimed the petitioner was guilty of laches as held in the case of *Edward Akongo' Oyugi & 2 Others vs AG [2019] eKLR*.

14. The Respondents also contended that the petitioner had not discharged the burden of proof as provided under Section 108 of the Evidence Act and as emphasized by the *Court of Appeal in Jeniffer Nyambura Kamau vs Humphrey Mbaka [2012] eKLR* and *Gathrau Peter Maina vs Dickson Mwendu Kithinji & Others*. It was argued that it was not enough for the petitioner to allude that the Respondents shot the deceased but failed to adduce evidence to support those claims and expect to win courts favour. It was argued that the production of postmortem report indicating the deceased was shot by police while as a gang of robbers in Nkoune in Meru Central District was not sufficient in absence of reports as to damage caused by police bullets.

15. The petitioner in her submissions framed the following issues for determination:-

- a) Whether the delay in filing this petition renders it fatally incompetent.
- b) Whether the deceased right to life was infringed by the Respondents
- c) Whether the petitioner is entitled to compensation and quantum thereof.

16. The petitioner argued in respect to 1st issue that the petition was properly before court. They relied on the authority in *Rael Kendi Mbae vs DCS Nkubu Police Station & 2 Others [2019] eKLR* where Mabeya J held that a delay of 12 years was not unreasonable and that no prejudice would be suffered by the Respondents.

17. The petitioner also relied on the authority in *Peter Mauki Kaijenja & Others vs Chief of Defence Forces & Another [2019] eKLR* in support of his argument that the delay in filing petition was not inordinate.

18. On whether the deceased's right to life was infringed by the Respondents, the Petitioner explained that the deceased was at Kaaga Area assisting a friend whose vehicle had stalled when the police arrived and opened fire on innocent law abiding citizens. She argued that the shooting of the deceased was uncalled for and unlawful. That the shooting led to the death of the deceased thereby infringing on his right to life. The petitioner contended that she had established an infringement of right to life as was provided under Section 70 and 71 of the repealed constitution of Kenya 2001.

19. On whether the petitioner is entitled to compensation and quantum of damages thereof the petitioner relied on the case of *Peter Mauki Kaijenja vs Chief of the Defence Forces & Another [2019]eKLR* in which principles governing award of damages in cases of violation of fundamental rights was spelled out. She proposed an award of Kshs.3,500,000/= as adequate compensation on the circumstances.

20. In consideration of the petition and the affidavit in support thereof as well as grounds of opposition and submissions by respective partners herein the issues for determination as rightly framed by the parties on their submissions are:-

- i. Whether the petition is properly before the court.
- ii. Whether the delay in filing the petition is prejudicial to the Respondent and renders it fatally defective.
- iii. Whether the deceased right to life was violated.
- iv. Whether the petitioner is entitled to compensation and quantum thereof.

21. The cause of action herein occurred on 13th June 2009 under the 2001 repealed constitution which conferred jurisdiction on the High Court in Section 84 to redress violations under Section 70 to 83 of the repealed constitution. Although locus in the then repealed constitution was given on only 2 occasions where contravention is related to the petitioner personally and where detention related to a detained person the petitioner herein the wife to the deceased obtained limited grant of letters of administration to the estate of the deceased and therefore she was entitled to pursue the claim herein.

22. Whether there was a delay in filing the claim as to the death of the deceased. The deceased was shot dead on 13th day of June 2009 and from the copy of post mortem report filed by the petitioner it was at 11.00pm in the night in Nkoune area. The claim had therefore been pending for 9 (nine) years 6(six) months and ten(10) days by the time this petition was filed on 23rd day of December 2019.

23. Being guided by authority in Petition No. 7 of 2017 at Meru High Court- in the matter of *Rael Kendi Mbare vs The OCS Nkubu police station & 2 Others* in which the decision in *Peter Mauki Kaijenja & 9 Others vs Crime of Defence Forces & Another [2019] eKLR* was quoted with approval, I do find that the delay was not unreasonable and no prejudice will be suffered by the Respondents who have not pointed out any such prejudice. In any case, the loss of life which is sacrosanct is such a traumatic event that it would be unjust to expect one

to recollect oneself so soon thereafter to mount a claim immediately. The petition herein is therefore properly before the court for adjudication.

24. On whether the deceased right to life was violated by the Respondents, the petitioner came to court under the now repealed Sections 70, 71 and 80 of the constitution of Kenya 2001. The petitioner in her petition claimed that the deceased was at Kaaga area as he was assisting his friend whose vehicle had stalled when the police under the command and in the presence of the 1st Respondent arrived in the area and just opened fire to innocent law abiding citizens present in panic.

25. She said that the 1st Respondent's officer's without taking any reasonable caution opened fire and executed the deceased who was unarmed & his right to life was curtailed due to 1st Respondents negligence. She held the 2nd Respondent vicariously liable for the acts and/or omissions of the 1st Respondent who acted in the course of his duty. The petitioner gave particulars of the 1st Respondents acts of negligence which she again reiterated at paragraph 10 of the affidavit in support of the petition.

26. In paragraph 4 of the affidavit she avers that on 14th day of June 2009 at about 6.00am she received a call from her brother namely Boniface informing her that her husband had been shot and killed by the police the previous night. That she went to the mortuary and identified the body and postmortem was conducted on 16th June 2009. The pathologist concluded that the deceased died due to head injuries caused by gunshot wounds.

27. The petitioner was not at the scene of the alleged shooting and her brother who informed her of the death did not also swear an affidavit as to the circumstances under which the deceased was shot. There was no evidence rebutting the indication in the post mortem report that the deceased was shot in the course of committing a robbery. There is no evidence of the identity of the deceased friend whose motor vehicle had stalled and the registration number of the vehicle that had stalled. There is no evidence adduced as to what the deceased was doing in Nkuone area at 11.00pm when the shooting incident took place if it is not true that he was committing a crime.

28. In the authority of Rael Kendi Mbae (supra) the petitioner and another witness testified as to the events of the fateful night and the trial Judge concluded and rightly so that the evidence of PW 2 that the shooting was unwarranted was not rebutted by the Respondents.

29. In the case of *Peter Mauki Kaijenja and 9 Others vs The Chief of Defence Forces and Another [2019] eKLR*, the petitioners gave a detailed account of how their fundamental rights to human dignity protections of the law etc was violated. The petitioner here has merely generalized the violations by the mere fact that her husband was shot at by police. Having not been at the scene and there being no eye witness, the particulars of the officers and the fire arms used were not identified.

30. In Petition No. 127 of 2012 between KNCHR & Another vs AG and 3 Others, the petitioners identified the real culprits as the 3rd & 4th Respondents and statements of the witnesses identifying them commit the crime/shooting were recorded. I do find that the petitioner's claims are too generalized to discharge the burden/onus placed on her to prove her case under Sections 107 and 108 of the Evidence Act. The deceased having been shot in the course of committing a robbery and that allegation not having been rebutted, I do find that he was either a threat to the police and the citizens and/or their property.

31. Having found that the petitioner has not proved her case to the required standards, this court cannot award any damages. However had she proved her case to the required standards and being guided by the authorities cited, I would have quantified damages due to the estate of the deceased at Kshs.3,000,000/=.

32. The upshot of the above analysis is that the petition fails and is dismissed with no orders as to costs.

Dated and signed at Mombasa this 30th day of December 2020.

HON. LADY JUSTICE A. ONG'INJO

JUDGE

Delivered at Meru this 28th day of January 2021

HON. LADY JUSTICE CHERERE

JUDGE