



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CONSTITUTIONAL PETITION NO. 6 OF 2019

IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLE 22 (1) OF THE CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 20, 21,33,23,28,29,31,32,33,35,46,258 AND 259 OF THE CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF THE PROVISIONS OF THE KENYA NATIONAL PATIENTS’ RIGHTS CHARTER, 2013

AND

IN THE MATTER OF THE PROVISIONS OF THE HEALTH ACT, 2017

AND

IN THE ALLEGED CONTRAVENTION OF RIGHTS UNDER ARTICLE 7 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

BETWEEN

HARRISON NJUGUNA KIRIKIRU.....PETITIONER

VERSUS

THE INSPECTOR GENERAL

NATIONAL POLICE SERVICE.....1ST RESPONDENT

THE CABINET SECRETARY,

MINISTRY OF HEALTH.....2ND RESPONDENT

THE HONORABLE,

ATTORNEY GENERAL.....3RD RESPONDENT

JUDGEMENT

1. The Petitioner herein moved the Court through the Petition dated 17th August 2019 supported by the Supporting Affidavit sworn by himself on the same date. The Petition was filed against the Respondents for unconstitutional and unlawful interference, infringement and violation of the Petitioner’s privacy, freedom and health. The Petitioner in the instant Petition prayed for the following orders:

- i. A declaration that the Petitioner had and was entitled to enjoy his contravened constitutional fundamental rights and freedoms.***

ii. An injunction restraining further contravention of the Petitioner's constitutional rights and freedoms by the Respondents or any person, agent or proxies acting on behalf or on their authority or any other state organ.

iii. A declaration that he Petitioner's constitutional rights and freedoms as aforesaid in the Petition have been contravened.

iv. Compensation for loss and injuries arising from the effects of the drugs, forced and unlawful medical services.

v. Costs of the Petition.

vi. Any such other order(s) as this honorable court shall deem fit and just.

2. The Petition is based on facts and legal basis set out in paragraphs 1 to 19 of the Petition which may be summarized as follows: -

3. That on 4th July 2016, the Petitioner was apprehended by two police officers in civilian clothes who informed him that they had instructions to arrest and hand him over to Interpol. That they took him to Olkalou Police Station and handed him over to the OCS who informed him that he had instructions to hand him over to the CID Headquarters, Nairobi.

4. That on the way to Nairobi one of the police officers alleged that he had received instructions to take him to a medical clinic in Thika town for a checkup where the doctor asked him routine questions, some of which he answered to the best of his knowledge and thereafter he was escorted by the officers to Mathari National Teaching and Referral Hospital, Nairobi.

5. That a psychiatrist at the aforesaid hospital recommended that the Petitioner be admitted but he objected as he did not have any known psychiatric condition. He was nevertheless admitted and was forced to change into hospital uniform. An injection was administered to him as result of which he lost awareness for a day or two.

6. That for 21 days the Petitioner was confined in the hospital and was given different medication which had severe side effects on his health and whenever he declined to take them, hospital staff/ askaris would threaten to use physical force on him which situation he avoided by taking the drugs. Before discharge from the hospital, the Petitioner was required to continue taking the drugs notwithstanding the side effects.

7. That on a follow up appointment with the doctor sometimes in August 2016, he explained the escalated side effects upon which the doctor discontinued the drugs.

8. The Petitioner contended that his health was adversely, gravely and negatively affected on administration of the drugs when he was not sick and without any justifiable cause or his consent.

9. Further, that he suffered serious side effects from the drugs illegally administered to him including but not limited to severe pain in the lower limbs, blurred vision, insomnia and abdominal discomfort, severe headache, toxification of kidneys which were never examined to establish the level of damage and no objective laboratory test was ever conducted on the Petitioner to determine psychological or biological interference.

10. That the Petitioner required the said hospital to provide him with copies of the documents for treatment that he received and also discharge summary but it declined claiming that they remain confidential information.

11. The Petitioner alleged that their fundamental rights and freedoms enshrined in the Constitution of Kenya, 2010 were violated as follows: -

12. The Petitioner's enjoyment of his fundamental rights and freedoms in the Bill of Rights as contemplated under **Article 20(1) and (2) of the Constitution** were arbitrarily curtailed by the actions of the 1st and 2nd Respondent.

13. That the state failed to observe its fundamental duty under **Article 21 (1) of the Constitution** hence the State or the State Organs handled by the Respondents failed to observe, respect, protect, promote and fulfill the Petitioner's rights and fundamental freedoms in the Bill of Rights.

14. The Petitioner's dignity was neither respected nor protected by the Respondents as contemplated under **Article 28 of the Constitution** in that he was subjected to a medical procedure without his consent.

15. Treatment of the Petitioner without his consent was inhuman and degrading in contravention of **Article 29(f) of the Constitution**.

16. That the 2nd Respondent failed to provide information to the Petitioner by refusing to provide treatment notes and discharge summary and thereby violated the Petitioner's rights under **Article 35 of the Constitution of Kenya 2010**.

17. The Petitioner was deprived of his freedom arbitrarily without just cause, subjected to violence from the institution headed by the Respondents, threatened with physical and psychological torture in contravention of **Article 29 of the Constitution**.

18. When the Petitioner was forcefully taken to hospital and drugs administered to him, his right to freedom of thought and opinion under **Article 32 (1) of the Constitution** was not sought thus contravening his right thereunder.

19. As consume, the Petitioner's right under **Article 46 (1) (c) and (d) of the Constitution** were contravened by the 2nd Respondent in that he consumed drugs when he was not actually sick and he is thus seeking to be compensated for loss or injury arising from effects of the drugs, forced and unlawful medical services.

20. The Petitioner contended that his rights under **Chapter 1 paragraphs 6, 8, 9, 10 and 2 of the Kenya National Patients' Rights Charter, 2013** were denied arbitrarily. That his rights under **Article 7 of the International Covenant on Civil and Political Rights** were contravened as he was subjected to cruel and degrading treatment when he was subjected to forceful medical treatment without his consent.

21. In the Petitioner's written submissions dated 25th June 2020, counsel for the Petitioner submitted that the applicable legal framework supporting the instant Petition include;

22. **Article 2 (5) of the Constitution** which provides that the general rules of international law shall form part of the law of Kenya.

23. **Article 1,5,12 of the Universal Declaration of Human Rights** and **Article 2, 3, 4, 5, 9 of the African Charter on Human and Peoples' Rights** which seek to safeguard human from inhumane treatment.

24. **Article 20 (1) and (2), 28, 19, 28, 29, 49 258, 259 of the Constitution of Kenya.**

25. In particular, the Petitioner contended that he was subjected to physical and psychological suffering, cruel inhuman and degrading treatment contrary to **Article 28 of the Constitution.**

26. On whether the Petitioner's right to dignity, privacy and right not to be subjected to inhuman/degrading treatment were violated. Counsel placed reliance on **Article 10, 24, 25, 28, 49 (1) of the Constitution of Kenya, S v Makwanyane (1995) ZACC 3; 1995 (3) SA 391, Dawood & Others vs Minister of Home Affairs: Shalabi vs Minister of Home Affairs: Thomas vs Minister of Home Affairs (2000) ZACC 8; 2000 9(3) SA 936 (CC), Republic v Kenya National Examinations Council & Another Ex-parte Audrey Mbugua Ithibu (2014) eKLR**

27. **Article 50 (1) and (4) of the National Police Service CAP 84** governing the conduct of police officered while conducting an arrest.

28. **Article 3 of the Universal Declaration of Human Rights** and **Article 9 (1) and (2) of the International Covenant on Civil and Political Rights.**

29. The Petitioner contended that his right was violated on the account of him not being informed of the reason for his arrest. That the said forceful arrest by the 1st Respondent subjected him to psychological torture, embarrassments, public ridicule and humiliation as he was now regarded by the public as an insane.

30. The Petitioner submitted that the provisions of the Mental Health Act were not adhered to and in particular **Section 3, 14 and 16** of the aforementioned Act.

31. The Petitioner believes that he was denied the right to give his consent for the known treatment but he was rather forcefully injected and that lead to him losing his conscious for two days and subsequent serious side effects. On consent reliance was placed on the case of **PBS vs Archdiocese of Nairobi Kenya Registered Trustees & 2 Others (2016) eKLR, Section 10 and 14 of the Mental Health Act and Article 35 of the Constitution of Kenya.**

32. On whether the Petitioner is entitled to the reliefs sought in the Petition, counsel submitted that it was evident from his submissions that his constitutional rights were violated and he is entitled to monetary compensation for inhuman degrading treatments, infringement of his right to privacy, denial of his right to information, forceful and unlawful arrest, loss and injuries arising from the effects of the drugs, forced and unlawful medical service. Reliance was placed on **Article 23, 13 of the Constitution of the Kenya, Edward Akong'o Oyugi & 2 Others vs Ag (2019) eKLR.**

33. It was counsel's submission that the Petitioner is entitled to monetary compensation and that in the totality of the circumstances of this Petition the Petitioner be compensated a sum of Kshs.10,000,000/- for unlawful arrest, degrading inhuman treatments, loss, suffering, post trauma he underwent in the hands of the Respondents.

34. In conclusion the Petitioner averred that he has proved the Petition on a balance of probability, that the court do find and hold that the Petitioner is entitled to the declaration sought in the Petition as his constitutional rights were gravely violated by the Respondents, that the court do award him reasonable global compensation of Kshs.10,000,000/- and that the Petitioner be awarded the costs of this Petition.

ANALYSIS AND DETERMINATION

35. Having carefully considered the Petition, the affidavit in support of the Petition as well as the Petitioner's written submissions; the main issue for determination herein are whether the Petitioner's fundamental rights and freedoms as espoused in the Petition were violated by the Respondents.

36. Before turning to the issue of violation of fundamental rights and freedoms, it is important to note that the instant Petition is unopposed. The Petitioner served upon the Respondents with the Petition, the affidavit in support of the Petition and the Petitioner's list of documents. The 3rd Respondent filed a memorandum of appearance on behalf of all Respondents on 11th December 2020. However, none of the Respondents filed replying affidavits. The Petitioner served the 3rd Respondent with the list of documents on 11th January 2021 and duly filed an affidavit of service.

37. The matter was fixed for directions on 10th March 2021 and further mentioned on 19th May 2021 with the Petitioner having served the 3rd Respondent with mention notices for the said date but there was no appearance in court by the Respondents.

38. In determining the instant Petition, I associate myself with the Court's statements in the case of **Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR:-**

Be that as it may, as a court of Law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the Court will as a matter of course grant the sought orders. It behooves the Court to be satisfied that prima facie, with no objection, the application is meritorious and the prayers may be granted. The Court is under a duty to look at the application and without making any inferences on facts point out any points of law, such as any jurisdictional impediment, which might render the application a non-starter

39. Be it as it may, this court will fully consider the merits of the instant petition and whether the prayers being sought should be granted despite the petition being unopposed. In my view, more was required by the Petitioner in support of his claim of apprehension by the police and subsequent committal to Mathari National Teaching and Referral Hospital in order to support his claims and to afford the court the opportunity to arrive at a just and fair decision.

40. While I do take into account the Petitioner's submission that the Petitioner required the said hospital to provide him with copies of the documents for treatment that he received and also discharge summary but it declined claiming that they remain confidential information as shown in the list of documents presented in court, the Petition should perhaps have been filed together with an application to compel the Respondent institution to produce the relevant information. The gap in evidence has denied the Petitioner the opportunity of demonstrating that his rights as detailed in the Petition were indeed violated.

41. It is often cited that 'he who alleges must prove'. Accordingly, **Section 107 of the Evidence Act** legislates on the burden of proof as follows:-

"107. (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."

42. **Section 108** of the aforesaid Act states that:-

"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

43. Further, **Section 109** legislates on the proof of a particular fact thus:-

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

44. In **Yunes Maniafu Mukowle v Moses Makokha & 3 others (2016) eKLR**, the Judge in dismissing an application for lack of the necessary information to support the claim, relied on the case of **Stephen Wasike Wakho & another v Security Express Limited (2006) eKLR**, where the Court stated as follows:-

"A party seeking justice must place before the court all material facts which considered in light of the law would enable the court to arrive at the decision as to whether the relief sought is available. Hence the legal dictum he who alleges must prove."

45. In the case of **Kiambu County Tenants Welfare Association v Attorney General & another [2017] eKLR** the learned Judge posited that:-

"Courts have over the years established that for a party to prove violation of their rights under the various provisions of the Bill of Rights they must not only state the provisions of the Constitution allegedly infringed in relation to them, but also the manner of infringement and the nature and extent of that infringement and the nature and extent of the injury suffered (if any).".....

"Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in Bristone Pte Ltd vs Smith & Associates Far East Ltd:-

"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him."

46. Moreover, in the case of **Christian Juma Wabwire v Attorney General [2019] eKLR**, the Judge relied on the decision in **Lt. Col Peter Ngari Kagume and 7 others v AG, Constitutional Application No. 128 of 2006** where it was held that:-

"It is incumbent upon the Petitioners to avail tangible evidence of violation of their rights and freedoms. The allegations of

violations could be true but the court is enjoined by law to go by the evidence on record. The Petitioners' allegations ought to have been supported by further tangible evidence such as medical records, witnesses..... the court is deal to speculation and imaginations and must be guided by evidence of probative value. When the court is faced by a scenario where one side alleges and the rival side disputes and denies, the one alleging assumes the burden to prove the allegation... However, mere allegation of incarceration without providing evidence of the same does not at all assist the court. It was incumbent upon the Petitioners to provide evidence of long incarceration beyond the allowed period and not to be presumptuous that the court knows what happened....."

The learned Judge proceeded to hold as follows:-

“I am alive to the fact, that the Petitioner in his Petition alluded to various Constitutional violations, but without having availed tangible evidence of violation of his rights and freedoms, I find the allegation by mere words without any other evidence, the court cannot find that the Petitioner has proved violations of his rights and freedoms. The Petitioner herein ought to have produced documentary evidence such as medical reports and called witnesses to ensure court considers the same. The courts of law are deaf to speculations and irregularities as it must always base its decision on evidence. I therefore find and hold that the Petitioner failed to discharge the burden of proof to the required standard of proof. I find that the Petitioner did not give evidence of probative value to enable this court decide the Petition in his favour and grant the orders sought.”

47. The cited provisions and cases require that a person who desires judgement to be entered in his or her favour needs to produce evidence in support of his or her pleadings and to adduce facts in support of their submissions. The same will guide the court in making its determination. It goes without saying that the standard and burden of proof remains the same even when it comes to constitutional cases. Consequently, the Petitioner should have presented before the court the evidence in support of the allegations set forth in his Petition to aid the court in arriving at a just and fair decision.

48. Although the Petitioner contends that the said hospital to provide him with copies of the documents for treatment that he received and also discharge summary he had the chance to seek a 2nd opinion from another doctor and/or medical facility to support his claim that his health was adversely, gravely and negatively affected on administration of the drugs when he was not sick and without any justifiable cause or his consent and to account for the side effects he alleged to have suffered. I find it hard to determine that the Petitioner's health complications were directly caused by and aggravated by the acts and omissions of the Respondents. Furthermore, the facts behind his arrest and committal were scanty and there has been no evidence adduced to show that he was indeed forcefully arrested by officers of the National Police Service.

49. The Petitioner in this case failed to provide this court with any form of evidence and this court is unable to rely on his word of mouth. It is not enough that the Petitioner submitted that and narrated the sequence of events, documentary evidence was necessary to corroborate his averments. He should have availed documentary evidence in sync his Petition and submissions to support his case. Seemingly, the Petitioner came to the court empty-handed. I completely associate myself with the holding of the court in *Vivo Energy Limited (Initial Party Kenya Shell Limited) v George Karunji [2014] eKLR* the Court held that:-

a. “Pleadings and documents on record are all allegations until they are proved. Oral and documentary evidence should be adduced in a hearing to prove the issue.”

50. On the basis of the same, I am unable to establish the nexus between the Respondents' violation of the Petitioners' rights as alleged and his alleged present medical complications as against his claim for Kshs.10,000,000 as compensation for loss and injuries arising from the effects of the drugs, forced and unlawful medical services. However, the Petitioner did not discharge his burden to prove that he is entitled to monetary compensation for inhuman degrading treatments, infringement of his right to privacy, denial of his right to information, forceful and unlawful arrest, loss and injuries arising from the effects of the drugs, forced and unlawful medical service. Once more, I reiterate that whenever a party approaches the court for a remedy, he does so as an individual and his case will succeed or fail depending on the evidence he places before the court.

51. Having thoroughly considered this Petition, I find it unmerited and dismiss it with no order as to costs.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 30TH DAY OF JULY, 2021.

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CHARLES KARIUKI

JUDGE