



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kariithi & another v Attorney General & another (Constitutional Petition  
30 of 2013) [2021] KEHC 308 (KLR) (23 November 2021) (Judgment)**

Neutral citation: [2021] KEHC 308 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CONSTITUTIONAL PETITION 30 OF 2013**

**JM MATIVO, J**

**NOVEMBER 23, 2021**

**(FORMERLY NAIROBI CONSTITUTIONAL PETITION NO. 121 OF 2012)**

**BETWEEN**

**ALEXANDER KARIUKI KARIITHI ..... 1<sup>ST</sup> PETITIONER**

**JOHN MUTHUI KENEGENI T/A TURKEY BAYSE RESTAURANT .... 2<sup>ND</sup>  
PETITIONER**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**PERMANENT SECRETARY, OFFICE OF THE PRESIDENT,  
MINISTER OF INTERNAL SECURITY AND PROVINCIAL  
ADMINISTRATION ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. This Petition has been pending in court since 4<sup>th</sup> April 2012, a long period by any standards which should prick the conscience of all those who care about the need for speedy resolution of court disputes, a constitutional edict under Article 159 (2) (b) of the *Constitution*. It was initially filed in Nairobi, but on 3<sup>rd</sup> May 2013, Majanja J ordered that the file be transferred to Mombasa High Court for hearing and determination because the subject property is in Mombasa and the cause of action arose in Mombasa.
2. In their amended Petition dated 19<sup>th</sup> March 2020, the Petitioners aver that they were until 30<sup>th</sup> December 2007, residents of Mombasa occupying L.R. Nos. MN/11/7362, 7363 and 7364, Hillside/ Kiembeni Estate. They aver that they developed the said premises where they were operating a business in the name and style of Turkey Bayse Restaurant. They aver that at all material times, the Respondent owed them a constitutional duty to protect them and their property. Further, that on or about 30<sup>th</sup> December 2007 owing to the Respondent's laxity, neglect and or breach of duty, their aforesaid



premised were invaded, vandalized and or set on fire by an organized group of youth on account of the Petitioners' ethnic background.

3. They aver that they had a right to have their properties protected by the Respondents, and, that their properties were approximately 500 metres from Kiembeni Police Post. They claim that as a result of the Respondents' failure to protect them and their property, they suffered extensive loss and damage as follows: -

- a. Loss of investments on Parcel No MN/11/7362, 7363, 7364 worth Kshs. 5,000,000/=.
- b. Dislodged liquors.....Kshs. 533,576/=
- c. Food.....Kshs. 188,158/=
- d. Kitchen equipment.....Kshs. 226,490/=
- e. Furnishing, electronics.....Kshs. 809,200/=
- Total.....Kshs. 6,687,424/=**

4. They claim that their business was an ongoing concern with an annual profit of Kshs. 176,425/= which was expected to operate profitably in the foreseeable future but owing to the said destruction, they were forced to sell the land and move out, Accordingly, they claim loss of profit at the rate of Kshs. 176,425/= a year for 5 years being the period which the business stood idle before it was sold. Also, they aver that they suffered agonizing moments of fear, pain and anguish as they waited for the law enforcers to arrive in vain and watching their business being looted and burnt to the ground.

5. They aver that the 2<sup>nd</sup> Respondent who was under direct advice of the 1<sup>st</sup> Respondent failed, refused, neglected and or ignored to protect and provide security to them and or their properties thus exposing them to a blatant violation of their fundamental right to security and or the right to reside and or to own property in any part of the Republic as provided for under chapter 1V of the Constitution. As a consequence, the Petitioners pray for: -

- a. A declaration that the Petitioners' fundamental rights and freedoms were violated.
- b. Special damages.
- c. Loss of profits.
- d. Exemplary Damages.
- e. A declaration that the Petitioners are entitled to compensation for all loss arising from breach of their fundamental rights and freedom.
- f. A declaration that the Petitioners are entitled to general damages.
- g. The costs of this Petition
- h. Any other relief this court may deem fit to grant.

#### **The Respondent's grounds of opposition**

6. The Hon .Attorney General filed grounds of opposition dated 31<sup>st</sup> March 2017 stating:- the Petition does not disclose violation of the Petitioner's fundamental rights and freedoms; that the Petition does



not raise constitutional issues; that the 2007/2008 post-election violence was spontaneous and the police did everything they could to control the situation; no receipts have been availed to justify their claim; that the Petition is totally incompetent, incurably defective, bad in law and it ought to be dismissed with costs.

#### **The Petitioners' advocates submissions**

7. The Petitioners' counsel submitted that the Respondents failure to protect their properties violated their constitutional right under section 70 of the repealed Constitution now guaranteed under Article 40 of the Constitution. Counsel submitted that the state, through the Police is responsible of maintaining law, order, preservation of life and property and prevention and detection of crime including apprehending offenders. He cited *Charles Murigu Muriithi & 2 others v Attorney General*<sup>1</sup> which held that "the state's duty to protect those rights would only be activated if it's demonstrated that the police or other state agencies had prior information that a section of the members of the public were in danger of being subjected to acts of violence against their person or property."

#### **The Respondent's submissions**

8. The Respondent argued that the instant Petition does not meet the threshold set out in *Anarita Karimi Njeru v Republic* that a person seeking redress for violation of the Constitution should set out with reasonable degree of precision that which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.
9. Further, the Respondent submitted that the Petitioners have not substantiated their claim citing *Douglas Odhiambo Apel & another v Telkom Kenya Ltd* which held that a Plaintiff has a duty to present evidence to prove his claim. It argued that no receipts were produced to prove the loss. Further, it submitted that the Petitioner is not entitled to damages citing *Maharaj v Attorney General of Trinidad and Tobago (No. 2)*<sup>2</sup> which set out the tests for awarding damages for breach of constitutional rights.

#### **Determination**

10. In any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case, the onus is obviously not as heavy as it is in a criminal case. Nevertheless, where the onus rests on the Plaintiff, or where there are two mutually destructive stories, the Plaintiff can only succeed if he satisfies the court on a preponderance of probabilities that his version is true, accurate, and therefore acceptable, and the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding, whether that evidence is true or not, the court will weigh up and test the Plaintiff's allegations against the general probabilities.
11. The Petitioners case is anchored on alleged failure by the Police to protect them and their property against attacks from marauding gangs who allegedly attacked and destroyed their property. The nub of their argument is that the state through the police have a duty to protect them and their property, that the have a duty to detect and deter crime and also that they have a duty to apprehend criminals. This duty is not disputed. But as was held in *Charles Murigu Muriithi & 2 others v Attorney General*<sup>3</sup> relied upon by the Petitioners "the state's duty to protect those rights would only be activated if it's demonstrated that the police or other state agencies had prior information that a section of the

<sup>1</sup> {2015} e KLR.

<sup>2</sup> {1979} AC 385.

<sup>3</sup> {2015} e KLR.



members of the public were in danger of being subjected to acts of violence against their person or property.”

12. As was held in the above case, the test lies in the question whether the Police had prior information of the attack and failed to act. Here lies the missing link in the Petitioners’ case upon which it will stand or fall. Other than claiming that their premises were located about 500 metres from a police post, (which allegation was not proved), the Petitioners never demonstrated that prior to the attack the police were aware of the impending attack, that despite having prior knowledge they failed to take necessary steps to deter the crime. There is no iota of evidence to show that the Police had prior knowledge of the attack. It was contended by the defendants that the post-election violence was spontaneous. This ground was not discounted. In fact, I find no evidence to show that prior to the attack the police knew or were notified of the planning of the office. Further, no evidence was tendered to show that immediately before the attack or during the attack, the police were called and failed to respond. There is no evidence that a report was made to the police alerting them of the impending attack. Even during the attack, there is no evidence to show that the Petitioners or persons acting on their behalf reported to the police either physically or through a telephone call and the police failed to respond.
13. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court before a fact can be said to exist or not exist.
14. Whoever desires any court to give judgement as to any legal right or liability, dependant on the existence of fact which he asserts, must prove that those facts exist. 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. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities. In *Miller v Minister of Pensions*,<sup>4</sup> Lord Denning said the following about the standard of proof in civil cases: -

“The ...{standard of proof}...is well settled. It must carry a reasonable degree of probability.....if the evidence is such that the tribunal can say: ‘
15. Clearly, the Petitioners have failed to discharge the burden of prove to the required standard. All cases are decided on the legal burden of proof being discharged (or not). Lord Brandon in *Rhesa Shipping Co SA vs Edmunds*<sup>5</sup> remarked: -

“No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take.”

<sup>4</sup> {1947} 2ALL ER 372

<sup>5</sup> {1955} 1 WLR 948 at 955



16. 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 was pithily put forth by Rajah JA in *Bristone Pte Ltd v Smith & Associates Far East Ltd*<sup>6</sup> :-

“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.”

17. The Petitioners have not demonstrated that the Respondents failed to act or were negligent in the performance of their duty. As was held in *Blyth v The Company of Proprietors of the Birmingham Waterworks*:<sup>7</sup>

“Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do...”

18. I find that the Petitioners have not placed any material before me upon which I can hold the Respondents liable.

19. The Petitioners claim special and general damages. They claim that they suffered extensive loss and damage including Loss of investments on Parcel No MN/11/7362, 7363, 7364 worth Kshs. 5,000,000/=; Dislodged liquors- Kshs. 533,576/=; Food-Kshs. 188,158/=; Kitchen equipment- Kshs. 226,490/=; Furnishing, electronics- .Kshs. 809,200/= all totalling to Kshs. 6,687,424/. They claim loss of profit at the rate of Kshs. 176,425/= for year for 5 years being the period they claim the business stood idle before it was sold.

20. The above figures are appealing. But that is how far it can go. As the law stands, special damages must be specifically be pleaded and strictly proved. This position has been explicated in numerous decisions. The Court of Appeal in *Hahn v Singh*<sup>8</sup> held that: -

“Special damages must not only be specifically claimed (pleaded) but also strictly proved....for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

21. Decisional law is quite clear that one consequence of the above principle is that a party claiming special damages must demonstrate that they actually made the payments or suffered the specific injury or loss before compensation is permitted. A natural corollary of this has been that the courts have insisted that a party must present actual receipts of payments made or documents in support of the loss incurred to substantiate loss or economic injury. (See *Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited*;<sup>9</sup> *Zacharia Waweru Thumbi v Samuel Njoroge Thuku*.<sup>10</sup>). Our case law is quite clear that a party must produce actual receipts/relevant documents or books of accounts in order to

<sup>6</sup> {2007} 4 SLR (R) 855 at 59

<sup>7</sup> {1856} 11 Ex 781 , (E.R. Vol. CLV1 1047), A PAGE 1049

<sup>8</sup> Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721, Kneller, Nyarangi JJA, and Chesoni Ag. J.A.

<sup>9</sup> {2015} eKLR

<sup>10</sup> {2006} eKLR



meet the test of specifically proving special damages. For the alleged loss of profits, books of accounts were necessary to prove the claim.

22. The other hurdle the Petitioners failed to surmount is the manner in which they elected to proceed with this case. It is not clear how they expected to prove their claim without providing oral evidence. It is not even clear how the Petitioners expected to discharge the burden of prove in a constitutional Petition which is determined by way of affidavits without offering oral evidence. This was a fatal mistake on the part of the Petitioners. They assumed the claim will be uncontested.
23. Similarly, the Petitioners are claiming damages for breach of constitutional rights. True, it is well settled that award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under the constitution. I accept in principle that constitutional damages as a relief separate and distinct from remedies available under private law is competent because a violation of a constitutional right must of necessity find a remedy in one form or another, including a remedy in the form of compensation in monetary terms. However, a Petitioner must demonstrate the breach of rights to qualify for an award of damages for violation of rights.
24. As was held in *Anarita Karimi Njeru v Republic*, a person who alleges breach of fundamental rights must prove the violation. He must demonstrate the provisions of the Constitution which were alleged violated and the rights. The onus on the Petitioners to establish violation of alleged rights is not a mere formality; it is important. Differently put, this includes sufficient facts to justify a finding that their rights were violated.
25. Constitutional analysis under the Bill of Rights takes place in three stages. First, the Petitioner is required to demonstrate that his fundamental rights have been infringed. If the court finds that the law, measure, conduct or omission in question infringes the exercise of the fundamental right or a right guaranteed in the Bill of Rights, the analysis may move to its second stage. In this second stage, the party looking to uphold the restriction or conduct will be required to demonstrate that the infringement or conduct is justifiable in a modern democratic State and satisfies the Article 24 analysis test.<sup>11</sup> Third, if the infringement cannot pass an article 24 analysis test, then the court may consider an appropriate relief including damages.
26. In the instant case, the analysis cannot pass the first test. The Petitioner has failed to demonstrate breach of rights.
27. Flowing from my analysis of the facts and the law, the conclusion becomes irresistible that the Petitioners amended Petition dated 19<sup>th</sup> March 2020 is fit for dismissal. I dismiss the said Petition with no orders as to costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23<sup>RD</sup> DAY OF NOVEMBER 2021**

**JOHN M. MATIVO**

**JUDGE**

<sup>11</sup> Stuart Woolman in *M. Chaskalson et al Constitutional Law of South Africa 12-2*:

