



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**PETITION NO. 12 OF 2016**

**MOSES LUKALE SANDE.....1<sup>ST</sup> PETITIONER**

**NABII NABWERA.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**THE HONOURABLE ATTORNEY GENERAL.....RESPONDENT**

**RULING**

1. The petition, dated 17<sup>th</sup> May 2016, was brought at the instance of Moses Lukale Sande and Nabii Nabwera, to be known hereafter as the petitioners, citing several constitutional violations of their constitutional rights. They have brought the suit against the Attorney General, as the legal advisor to the national government, sued on behalf of the Kenya Police Service. The 1<sup>st</sup> petitioner is an Advocate of the High Court of Kenya, and at the material time served as County Attorney within the County Government of Kakamega. The 2<sup>nd</sup> petitioner was also, at the material time, an employee of the County Government of Kakamega, serving as Chief of Staff and member of cabinet within the County Government of Kakamega.

2. The factual background to the petition is that on 3<sup>rd</sup> April 2016, the 2<sup>nd</sup> petitioner had been arrested and held at the Kakamega Police Station, following events at a political rally at Muliro Gardens within Kakamega township. The 1<sup>st</sup> petitioner went to the police station, in his capacity as a co-worker of the 2<sup>nd</sup> petitioner, to understand why the said petitioner, had been arrested and detained at the police station, and possibly secure his release. He was also wearing the hat of an advocate, and intended to provide legal advice to the 2<sup>nd</sup> petitioner. He introduced himself to the officers at the police station as the County Attorney, but to his shock he was denied access to the 2<sup>nd</sup> petitioner, denied audience, was forcibly manhandled, arrested, physically assaulted, verbally insulted and placed in the cells. The 1<sup>st</sup> petitioner was subsequently charged with obstruction of justice, which charges were summarily dismissed by the magistrate.

3. The petitioners contend that the police at Kakamega Police Station, in liaison with the Deputy Public Prosecutor, acted maliciously. They have particularized the acts of malice to include: physically assaulting the petitioners, refusal to issue the petitioners with P3 Forms, verbally insulting the 1<sup>st</sup> petitioner and ridiculing his profession, refusing to grant the 1<sup>st</sup> petitioner bail, bringing trumped up charges against the 1<sup>st</sup> petitioner founded on a defective affidavit, humiliating the 1<sup>st</sup> petitioner in public and getting the charges preferred dismissed summarily. The petitioners argue that as a result of the conduct of the police officers at the Kakamega Police Station, his constitutionally protected rights were violated, specifically the rights to dignity, freedom of assembly and rights of an arrested person, provided in Articles 28 and 36 of the Constitution of Kenya, 2010.

4. The Petitioner seeks the following reliefs:

- (1) a declaration that the police acted unconstitutionally;
- (2) general damages;
- (3) exemplary and punitive damages;
- (4) issuance of a P3 Form; and
- (5) Costs.

5. The two petitioners have sworn and filed separate five paragraph verifying affidavits, where they basically affirm that they had read the averments in the petition, had instructed Ombito & Co. Advocates to pursue the matter on their behalf and that there was no other suit pending between the same parties.

6. The Attorney General filed a memorandum of appearance, dated 6<sup>th</sup> March 2018, on 12<sup>th</sup> March 2018. I have carefully ploughed through the file of papers before me, and I have not come across a response to the petition by the Attorney General. I shall take it that the petition is not opposed.
7. Directions were taken on 30<sup>th</sup> July 2018, that the petition, dated 17<sup>th</sup> May 2018, be heard orally, and 14<sup>th</sup> November 2018 was appointed as the date for the taking of oral evidence. The hearing scheduled for 14<sup>th</sup> November 2018 did not happen, as the Attorney General had not been served. The matter was then allocated the 5<sup>th</sup> March 2019 for hearing, on which date it was stood over generally, for reasons that are not recorded. The oral hearing never happened. The matter was subsequently, given a date for mention on 16<sup>th</sup> July 2020, for further directions. On that date the parties stated that they had filed written submissions, and that they did not wish to highlight them, and invited me to give them a date for judgement.
8. The petitioners' written submissions are dated 26<sup>th</sup> September 2019, and were filed in court, simultaneously with a witness statement signed by the 1<sup>st</sup> petitioner, a demand notice, copy of a charge sheet, copies of medical reports on the two petitioners, assorted practicing certificates issued to the 1<sup>st</sup> petitioner, a letter of appointment of the 1<sup>st</sup> petitioner as County Attorney and a bundle of authorities to support their case. The written submissions for the Attorney General are dated 14<sup>th</sup> July 2020, and were filed herein on 15<sup>th</sup> July 2020.
9. I find it curious that the parties proceeded to file written submissions to dispose of the matter without the benefit of an oral hearing, and before obtaining directions of the court to that effect. The only directions given by the court are those of 30<sup>th</sup> July 2018. No directions were given thereafter to revise those of 30<sup>th</sup> July 2018, to substitute disposal of the petition orally with written submissions. The parties acted on their own devices, and did not even seek the concurrence of the court to endorse the course of action that they had privately embarked on without involving the court. Yet, case management is the obligation of the court, and parties and their advocates are obligated to always act at the direction of the court. It is the court which directs the management of any matter. It should never be up to the parties to decide on the course of any matter pending in court without the concurrence of the court. Such a course action can only be foolhardy as shall come out very clearly hereafter.
10. The verifying affidavits that were sworn by the petitioners herein, in purported support of their petition, do not carry any evidence. The petitioners did not make any statements on oath that were of any evidential value. They did not refer to or annex any documents to their affidavits. Having taken that course of action, they needed to lead oral evidence to support the averments made in their petition, in much the same way with a suit commenced by way of plaint. They needed to formally prove their case as set out in the petition, where they would then make statements on oath, and avail themselves for cross-examination by the Attorney General. It was with that background in mind that the court had directed that the petition be disposed of by way of oral evidence. The petitioners aver in the petition that they were arrested, assaulted and charged in court. They have not sworn any affidavits to support those narratives. The court can only act on sworn evidence, which should take the form of an affidavit or sworn oral testimony in open court.
11. The scenario would have been different had the petitioners supported their petition with affidavits which detailed the events that led up to the filing of the petition, supported by relevant documents. Such affidavits would have amounted to sworn statements, upon which the court could act without the necessity of the petitioners giving oral evidence. That would have been so, so long as the Attorney General had been properly served, and, therefore, given an opportunity to respond to the averments made in such affidavits, by way of replying affidavits. It would have been permissible then for the parties to make legal arguments by way of written submissions based on the affidavits and annexures.
12. I note that the 1<sup>st</sup> petitioner filed a witness statement. Well, an unsworn witness statement is not the equivalent of an affidavit. It is not sworn evidence. It is not something that a court should act upon, until life has been breathed into it by way of the maker of the statement taking to the witness stand to verify the statement after being sworn. I note too that various documents were introduced into the record as evidence to support the petitioners case. These documents were not introduced through an affidavit, they were simply filed in court, without leave of court, and, therefore, there cannot be any basis for the court to consider them since they are not introduced by a sworn witness. Inviting the court to determine a matter based on unsworn evidence is unacceptable. Yet, that is precisely what I am being invited to do in this case.
13. I believe the device of written submissions is being abused. It can never take the place of sworn evidence. Courts decide matters on the basis of sworn evidence, whether oral or in writing. The taking of an oath by a witness is intended to authenticate the narrative given by the witness. The courts have repeatedly said that unsworn evidence is worthless. It counts for nothing. It is only in a few exceptions, such as in cases involving witnesses of tender years, that some weight is given to unsworn evidence, subject to corroboration. Written submissions are not the answer to every litigation. Parties ought to be careful, when they rush to file written submissions, to be sure that the cases they have are amenable to disposal through that mode.
14. It may be argued that Article 159 of the Constitution allows the court to overlook technicalities of procedure. The issue herein is not about procedure, but evidence. A court should act only on the basis of evidence, that is given on oath. This is not a technical issue of procedure. It goes to the core of due process. It is a basic standard, that even Article 159 of the Constitution cannot override.
15. I need not say more. The petitioners herein have merely filed papers, where they demand compensation from the state, which would involve expenditure of public funds. They have an obligation to formally prove their case. They have not done so, either by way of presenting oral evidence or affidavit evidence. They have simply filed documents and thrown them into the face of the court, without making an effort to explain themselves and the documents filed. In simple terms, the case placed before me has not been verified through sworn testimonies. The material placed before me, in the manner that it has, cannot, therefore, form a basis for making the orders sought. Let me say, with respect, the petitioners have not approached this matter with the seriousness that it deserves.
16. In the end, I decline to determine the matter on the basis of the written submissions filed. Let the petitioners avail themselves in court to testify orally, so as to breathe life to their pleadings; for, if I am to determine the matter purely on the basis of the written submissions, I will have no option but to dismiss the petition, for the reasons given above. Dates for the oral hearing of the petition to be given at the delivery of

this ruling, or at the registry, should the parties fail to turn up for delivery of the ruling.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 18<sup>th</sup> DAY OF September, 2020**

**W MUSYOKA**

**JUDGE**