



RA (Acting on Her Own Behalf and on Behalf of SOO) & another v Holy Ghost Coptic Church of Africa & 6 others; National Council for Persons With Disabilities & another (Interested Parties) (Petition 23 of 2018) [2020] KEHC 9230 (KLR) (22 October 2020) (Judgment)

RA (acting on her own behalf and on behalf of S.O.O). & another v Holy Ghost Coptic Church of Africa & 6 others; National Gender and Equality Commission & another (Interested Parties) [2020] eKLR

Neutral citation: [2020] KEHC 9230 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
PETITION 23 OF 2018
TW CHERERE, J
OCTOBER 22, 2020
IN THE MATTER OF ARTICLES 22(2)(A) AND (C), 23
(1) AND (3), 165 (3) (B),
258 AND 260 OF THE CONSTITUTION
AND
IN THE MATTER OF ALLEGED CONTRAVENTION OF
ARTICLES 2(1), 2(5), 2(6), 10(1), AND (2)(B),
19(1), 920, 3(A), 20(1) AND (2), 21 (1) TO (4), 25
(A), 26(1), 28, 29(A) (C), (D) AND (F), 43 (1) (A)
AND (F) AND 54 (1)(A) OF THE CONSTITUTION
AND
IN THE MATTER OF SECTIONS 2, 3(A), (B) AND (D),
4 (A), (C) AND (D), 5 (1) AND
(2), 15(1) (A), (C), (F), (P) AND (Q), 2, 20 (A) (B),(D)
(G) (M) AND (N), 22 AND 73 OF
THE MENTAL HEALTH ACT CAP 248 LAWS OF
KENYA
AND
IN THE MATTER OF AN ALLEGED CONTRAVENTION
OF ARTICLES 2(1) A**



BETWEEN

RA (ACTING ON HER OWN BEHALF AND ON BEHALF OF SOO) 1ST PETITIONER

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS 2ND PETITIONER

AND

HOLY GHOST COPTIC CHURCH OF AFRICA 1ST RESPONDENT

FATHER JOHN PESA 2ND RESPONDENT

WILLY OJWANG 3RD RESPONDENT

THE COUNTY GOVERNMENT OF KISUMU 4TH RESPONDENT

KISUMU COUNTY EXECUTIVE COMMITTEE MEMBER FOR HEALTH & SANITATION 5TH RESPONDENT

THE CABINET SECRETARY MINISTRY OF HEALTH 6TH RESPONDENT

THE ATTORNEY GENERAL 7TH RESPONDENT

AND

NATIONAL GENDER AND EQUALITY COMMISSION .. INTERESTED PARTY

NATIONAL COUNCIL FOR PERSONS WITH DISABILITIES INTERESTED PARTY

JUDGMENT

Petitioner's case

1. SOO the son of RA (Petitioner) and WO (3rd Respondent) was born on 03.09.1999. As at July, 2017, he was in form 4 at [particulars withheld] Mixed Secondary School.
2. In July, 2017, the school after noticing that SOO had reduced concentration advised his parents to take him for medical treatment.
3. The 3rd Respondent took SOO to the 1st Respondent's church for faith healing.
The 1st Petitioner alleges that upon visiting SOO, he found him cuffed in heavy chains and together with the 2nd Petitioner sought his release which was denied by the 2nd and 3rd Respondents.
4. It is the 1st Petitioner's case that the continued detention of SOO in the 1st Respondent's church denies him freedom of movement and liberty and is a violation of his rights to health, education and freedom from torture, cruel, inhuman and degrading treatment.
5. The 4th to 6th Respondents were faulted for failing to reprimand the 1st and 2nd Respondents and for failing to put in place appropriate measures to address the plight of persons suffering from mental illness and/or disability.
6. Petitioners seeks various orders against the Respondents as stated in the Petition.



1st and 2nd Respondents' case

7. The 1st and 2nd Respondents concede that SOO was taken to the 1st Respondent by the 3rd Respondent for spiritual prayers on 02.07.2017 and was in their custody until May, 2019 when he was released to the 3rd Respondent. They assert that there was no medical evidence to prove torture of SOO.

6th and 7th Respondents' case

8. It is the 6th and 7th Respondents' case that the 1st Petitioner has misapprehended the role of the 6th Respondent with regard to health functions for the reason that Part 2(2) Page 3 of 11 of the Fourth Schedule of the Constitution provides that health is a devolved function under the supervision and licensing of the 4th and 5th Respondents and that the 6th Respondent exercises the role of policy making and not supervision of the 1st and 2nd Respondents. It is the 6th and 7th Respondents' case that the Petitioner has not established his claim and that this petition is an abuse of the court process.

Analysis And Determination

9. After careful consideration of the pleadings and submissions by the Petitioners, 1 and 2nd Respondents and 6th and 7th Respondents and the authorities that they cited, I note that the issue for determination is whether the Petitioner's fundamental rights under the Constitution were violated by the Respondents.
10. To begin with, the report by Dr. Edwin Nyaura, a consultant Psychiatrist with the County Government of Kisumu confirms that SOO is on treatment for acute psychotic episode which is an illusionary illness that can be a one-time occurrence, usually of sudden onset, or can occur repeatedly or may be the early phase of mental illness. In view of the foregoing, I find that the 4th and 5th Respondents have provided medical support and facilities for treatment of persons who suffer from mental illness as does SOO.
11. Having said that, I find that the issues raised as against the 4th to 7th Respondents relating to health issues are in the circumstances of this petition not merited.
12. A Petitioner who desires the court to give judgment in its favour in a constitutional petition must meet the threshold of the principle of sufficient precision. In the case of Anarita Karimi Njeru V R (No 1) 1979 KLR 154 where the court stated that:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) 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. This position was emphasized by the Court of Appeal in Mumo Matemu v Trusted Society Of Human Rights Alliance & 5 Others [2013] e KLR when it stated:

“We cannot but emphasise the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims.”



14. As at 02.07.2017 when SOO was taken to the 1st Respondent by the 3rd Respondent, he was 2 months short of his 18th birthday and was therefore a minor. He was a form 4 student. He remained in the custody of the 1st and 2nd Respondents until May, 2019 which was long after KCSE exams had been undertaken and therefore missed his studies and examination.
15. Article 43 (1) (f) guarantees every person the right to education and Article 53 (1) (b) guarantees every child the right to compulsory basic education. Article 53
- (3) makes it clear that a child's interests are of paramount importance in every matter concerning the child. A child's right to compulsory education is replicated in section 28(1) of the *Basic Education Act* which requires the Cabinet Secretary to implement the right of every child to free and compulsory basic education. In that regard, a child has a constitutional right to have basic education as a matter of compulsion.
16. Parents have a legal responsibility to take their children to school. To that extent, section 30 of the *Basic Education Act* provides thus;
- 1 "Every parent whose child is-;
- (a) Kenyan, or
- (b) resides in Kenya;
- Shall ensure that the child attends regularly as a pupil at a school or such other institution as may be authorized and prescribed by the Cabinet Secretary for purposes of principal, mental, intellectual or social development of the child.
17. Section 30 (2) makes it an offence where a parent fails to take his or her child to school providing that a parent who fails to take his or her child to school as required under subsection (1) commits an offence and on conviction, is liable to a fine of Kshs. 100,000/= or one-year imprisonment or both, signifying the importance the state attaches to education for the children.
18. The right to education cannot be compromised on the basis of one's religious beliefs or the way one manifests those beliefs. In this respect, I am persuaded that the 3rd Respondent not only failed in his duty to take SOO to school but by removing him from school also breached his right to education.
19. Article 39(1) of the *Constitution* guarantees every person the right to freedom of movement. S.O.O was detained at the 1st Respondents' church for a period of 25 months from 02.07.2017 until May, 2019. Freedom of movement, mobility rights, or the right to travel is a human rights concept encompassing the right of individuals to travel from place to place within the territory of a country, and to leave the country and return to it. The right includes not only visiting places, but changing the place where the individual resides or works. There is no doubt that SOO had his freedom of movement curtailed when he was in the custody of the 1st and 2nd Respondent and could not move in and out of the facility as he wished. I am therefore persuaded that his right to freedom of movement was violated.
20. Article 28 of the *Constitution* guarantees every person's right to freedom and security of the Freedom and security person, which includes the right not to be (d) subjected to torture in any manner, whether physical or psychological.



21. As was held in the Greek Case (1969) 12 YB 1 1969 ECHR cited by Lenaola J. (As he then was) in the case of Milka Wanjiku Kinuthia & 2 others v Attorney- General [2013] eKLR;

“The notion of inhuman treatment covers at least such treatment as deliberately causes suffering, mental or physical, which, in the particular situation is unjustifiable. The word torture is often used to describe in human treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be de-grading if it grossly humiliates him before others, or drives him to an act against his will or conscience.”

22. The term "torture" also engulfs the concept of torment. The word "torture" in its denotative concept includes mental and psychological harassment. (See Joginder Kumar v. State of U.P. (1994) 4 SCC 260, paragraph 23).

23. In this case, we are not physical torture but essentially the mental and physiological effects of the unlawful denial of education and freedom on SOO.

From the material before me, I find that the removal from school of SOO by 3rd Page 9 of 11 Respondent, in the year he was to sit his KCSE examination, and his confinement at the 1st Respondent's church by 2nd and 3rd Respondents subjected SOO to psychological torture.

24. In final judgment, I make the following orders:

- 1) There shall issue a declaration that the 3rd Respondent violated SOO's constitutional rights guaranteed under Article 43 (1) (f) when he removed him from school thereby denying him his right to education
- 2) There shall issue a declaration that the 1st, 2nd and 3rd Respondents violated SOO's constitutional rights guaranteed under Article 39 (1) of the Constitution when they confined him to 1st Respondents' church for a period of 25 months from 02.07.2017 until May, 2019 thereby denying him his right of movement.
- 3) There shall issue a declaration that the 1st ,2nd and 3rd Respondents violated SOO's constitutional rights guaranteed under Article 28 of the Constitution which guarantees him the right not to be subjected to torture in any manner, whether physical or psychological.
- 4) That judgement be and is hereby entered in favour of the SOO in the sum of Ksh. 500,000/= by way of general damages payable by 1st ,2nd and 3rd Respondents jointly and severally.
- 5) The 1st, 2nd and 3rd Respondents do pay the costs of this Petition to the 1st Petitioner plus interests thereon at court rates.

DATED AT KISUMU THIS 22ND DAY OF OCTOBER 2020

T. W. CHERERE

JUDGE

Court Assistants

For 1st Petitioner

For 2nd Petitioner

1st & 2nd Respondent



3rd Respondent

4th & 5th Respondent

6th & 7th Respondent

- Amondi/Okodoi

- Mr. Odongo for Odongo Awino & Company Advocates

- N/A

- Mr. Aoko for Aoko Ondieki & Company Advocates

- In person- Absent

- N/A

- Ms. Esendi for the Attorney General

