



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CONSTITUTIONAL PETITION NO 5 OF 2014

KAGECHU MATHEW MUGUTA.....PETITIONER

VERSUS

- 1. CHARLES KIBET (FORMER OFFICER COMMANDING KIROGO POLICE STATION)**
- 2. GASPER MAKAU (FORMER OFFICER COMMANDING POLICE DIVISION MURANG'A)**
- 3. THE ATTORNEY-GENERAL.....RESPONDENTS**
- STEPHEN KURIA MUNENE.....INTERESTED PARTY**

J U D G M E N T

1. In his petition dated 11th and filed on 17/04/2014 the Petitioner, **Kagechu Mathew Muguta**, herein has alleged violation of **Articles 27 (Equality and freedom from discrimination), 29 (Freedom and security of the person) and 47 (Fair administrative action)** of the *Constitution of Kenya, 2010* in respect to himself and his deceased son and granddaughter. The petition was originally brought against **Officer Commanding Kirogo Police Station, Officer Commanding Police Division, Murang'a, the Attorney-General** (as Respondents) and one **Stephen Kuria Munene** as Interested Party. On 22/04/2016 the Petitioner filed an amended petition to name the particular officers who were commanding Kirogo Police Station and Police Division, Murang'a (1st and 2nd Respondents). The 3rd Respondent is the Attorney General of the Republic of Kenya sued in that capacity.

2. The background to the petition (as disclosed in it and the Petitioner's affidavit sworn in support thereof) is as follows. The Petitioner's son and granddaughter, then aged respectively 44 and 17 years, were murdered towards the end of the year 2007 (their death certificates disclose that they died from severe head injuries due to assault).

3. The Interested Party was arrested and charged with the murders vide *Nyeri High Court Criminal Case No 5 of 2008*. When the case came up for trial learned counsel for the accused raised a preliminary objection to the prosecution upon the ground of violation of the accused person's constitutional rights to be arraigned in court within a constitutional set period of time after arrest, and to be tried within a reasonable time. The accused had been arrested on 28/12/2007 but was not arraigned in court until 22nd January 2008, well beyond the period stipulated in the relevant section of the then Constitution of Kenya in place (since repealed and replaced by the *Constitution of Kenya, 2010*).

4. The trial judge (Makhandia, J), relying on the then current jurisprudence as pronounced by the *Court of Appeal* (then the apex court) acquitted the accused.

5. It is the Petitioner's case in this petition that the acquittal of the Interested Party before he was even tried was the fault of the police, particularly the 1st and 2nd Respondents. His further case is that the acquittal not only denied the deceased persons justice as victims, but also has caused him and his family "undue physical, mental and emotional stress seeing that (his) son's and granddaughter's lives were cut short without due reason and the Government failed to ensure justice was done".

6. The Petitioner therefore seeks "compensatory and other forms of such damages", costs of the petition and such other orders as the court may deem fit to grant.

7. After the Respondents were served, the 1st Respondent attended court in person on 27/09/2016 and stated that he did not intend to file any response to the petition. The 2nd Respondent also did not file any response.

8. On 21/11/2016 the 3rd Respondent filed grounds of opposition dated 15/11/2016. Those grounds are –

(i) That the petition does not disclose any constitutional violations or breaches by the Respondents.

(ii) That the Respondents acted within the law in arresting the Interested Party and conducting investigations.

(iii) That the Respondents completed investigations within seven days and were ready to arraign the Interested Party in court within the time stipulated by law.

(iv) That delay in arraigning the Interested Party in court was occasioned by the Petitioner in that he desired that the matter be conducted by CID and not officers from the police station to which the crimes had been reported.

(v) That Nyeri High Court Criminal Case No 5 of 2008 was not dismissed as a result of negligence by the Respondents as alleged by the Petitioner.

(vi) That fundamental rights and freedoms as contained in the Bill of Rights cannot be enjoined by deceased persons.

(vii) That the petition is frivolous and unmeritorious as the threshold for grant of the reliefs sought has not been met.

(viii) That the petition is otherwise incompetent, misconceived, misplaced and is an abused of the process of the court as the Petitioner's rights and fundamental freedoms have not been breached.

9. There is no replying affidavit filed on behalf of the 3rd Respondent; so his assertions of fact contained in his grounds of opposition have no grounding in evidence.

10. Without any replying affidavits filed by the Respondents, there were no contentious issues of fact to be canvassed by way of oral evidence, and so the court directed that the petition be disposed of by way of submissions. The Petitioner filed his submissions on 15/02/2017. I have read and considered those submissions. The Respondents never filed any submissions.

11. There is no doubt that this case raises important and serious issues decisions upon which might have far-reaching repercussions. However, it is to be noted that the Petitioner's son and granddaughter were murdered in the year 2007. The Interested Party was acquitted by the High Court on 19/05/2008. These facts are what the Petitioner's petition is based upon. The Petitioner has chosen to allege violation of his and the deceased persons' constitutional rights under the current **Constitution of Kenya, 2010** which came into effect only in August 2010, long after the alleged violations. A constitution, just like any other law, does not have retrospective application unless it expressly states so.

12. The Petitioner's petition ought to have been brought under the Constitution of Kenya then (2007/2008) in place. To that very important extent the Petitioner's petition is incompetent and misconceived and must be dismissed. It must be understood that this petition is not an ordinary suit based on alleged negligence of the Respondents. It is a constitutional petition that has alleged violation of the Petitioner's and his deceased son's and granddaughter's constitutional rights.

13. As to costs, I will not add to the Petitioner's suffering by ordering costs against him. In any case there has been hardly any participation in these proceedings by the Respondents.

14. In summary therefore, the Petitioner's petition herein is dismissed. Parties shall bear their own costs thereof. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 12TH DAY OF OCTOBER 2017

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 13TH DAY OF OCTOBER 2017