



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 229 OF 2013

BETWEEN

LEONARD MUTUA MUNYAO 1ST PETITIONER

QUEEN ELIZABETH MUTUA 2ND PETITIONER

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

THE DIRECTOR OF PUBLIC

PROSECUTIONS 2ND RESPONDENT

JUDGMENT

Introduction

1. The petitioners are husband and wife. They bring this claim against the respondents claiming that the police violated their rights and fundamental freedoms. In their petition filed on 3rd May 2013 and amended on 6th September 2013 they seek the following orders:
 - a. *A declaration that the shooting, wounding and maiming of the 1st petitioner on his left leg by the police officer and the arrest and detention of the 2nd petitioner without considering that she was at an advanced stage of her pregnancy was in the circumstances a violation of the petitioners' fundamental freedom from being subjected to any form of violence contrary to Article 29(a), (c), (d) and (f) of the Constitution of Kenya.*
 - b. *A declaration that the arrest and detention of the 1st petitioner for a period of one month commencing 21st August, 2013 and arrest of the 2nd petitioner was a violation of the petitioners' fundamental rights to personal freedom, liberty, rights of an arrested person contrary to Article 29(a) and 49(1) (a),(f) and (i) of the Constitution of Kenya.*
 - c. *A declaration that the detention of the petitioners in police custody incommunicado without access to any persons from the outside world was a violation of the petitioners' fundamental freedom to human dignity and the right to have the dignity protected, fundamental freedom from cruel, inhuman and degrading treatment and the fundamental right to healthcare services and emergency treatment contrary to Article 28, 29(f), 43(2) and 51(1) of the Constitution of Kenya.*
 - d. *A declaration that the arrest of the petitioners, failure to prefer any proceedings, inhumane and*

- the eventual termination of pregnancy resulting from the stress the 2nd petitioner underwent while in custody led to the petitioner suffering post-traumatic stress disorder was a violation of the fundamental right of the petitioner to cruel, inhuman and degrading treatment contrary to Article 27(1), (2) and 29(d) and (f) and 49(1)(c) of the Constitution of Kenya and was in the whole circumstances an abuse of the criminal law and process of the court and amounted to false imprisonment.*
- e. *General damages as the court shall assess to the declarations of violations of fundamental rights and freedoms in (i) to (iv) above.*
 - f. *An award of exemplary, aggravated and/or punitive damages for blatant, callous, oppressive and high handed violation of the Constitutional rights by officers of the government.*
 - g. *Costs of the petition.*
 - h. *Interests on prayers (v) and (vii) above.*
2. The petition was accompanied by affidavits sworn by the petitioners on the 23rd April 2013. They also gave sworn testimony.

Petitioners' Case

3. The 1st petitioner testified that on 21st August 2003 at about 3 pm he was at Machakos Country Bus Station, Nairobi going about his business. He was suddenly injured on his left leg and then he fell. He stated that he heard a gunshot but did not know where it came from. He heard further gunshots while he was on the ground. The 2nd petitioner, his wife, and some of her friends took him to St. Mary's Hospital, Lang'ata. Upon arrival at St. Mary's, he was not treated but was transferred to a police vehicle which took him to Kenyatta National Hospital where he was admitted for treatment at about 7 pm.
4. The 1st petitioner sustained a comminuted fracture of left femur as a result of the gunshot. He testified that he was discharged on 6th October 2003. He complains that during the time he was held incommunicado under police guard for the entire period he was at the hospital. He states that he was prevented from seeing any visitors apart from his wife.
5. The 1st petitioner was never charged with any offence. He contends that the shooting was unjustifiable since he was neither armed nor involved in any criminal activity. He testified that the country bus station is an open public area with many people and it was careless for the police to shoot into the crowd without regard for his safety.
6. The 2nd petitioner testified that she was informed that her husband had been shot by one of her friends at the Bus Park where she also works. She rushed to the scene and was helped by well-wishers to take him to St. Mary's Hospital. While at the St. Mary's, they found policemen waiting for them. They were asked to board the police vehicle which took them first to Lang'ata Police Station. She was arrested and remained at Lang'ata while her husband was taken to Kenyatta National Hospital.
7. At around 7 pm, the 2nd petitioner testified that she was taken by police officers to their house in South B, Fuata Nyayo Village, where they conducted a search for weapons. No gun or weapons were found in the house. At about 8 pm, she was taken to Central Police Station, Nairobi and later transferred to Kamukunji Police Station where she was released at 8.30 pm without any charges being preferred against her.
8. The 2nd petitioner testified that at the time of her arrest she was 37 weeks pregnant. She delivered a premature baby who died 6 days after the delivery. She blamed the events she underwent for her loss.
9. The petitioners rely on written submissions on 1st April 2014. They contend that the arbitrary actions by the police were evident by their preconceived plan which involved conducting a search

at the petitioners' house. Counsel for the petitioners submits that police arbitrarily detained the 1st petitioner at the hospital and that his statement was recorded while he was under the guard of police officers. He argues that if the police intended to release the 1st petitioner immediately, there would have been no reason record the statement in hospital.

10. Counsel further submits that the 2nd petitioner was detained in the police station without preferring charges against her and holding her incommunicado. Counsel argues that the actions of the police in the circumstances contravened the provisions of **Article 25** of the **United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment** ('*the Torture Convention*') and **Article 29** of the Constitution of Kenya which protects the freedom and security of the person including prohibiting torture, cruel and inhuman or degrading treatment.
11. The petitioners submit that they cannot be barred from seeking redress on account the **Public Authorities Limitation Act (Chapter 39 of the Laws of Kenya)** which provides a one year limitation period for bringing claims against the State. Counsel cited the case of **Wachira Waheire v Attorney General Nairobi HC Misc. Appl. No. 1184 of 2003 [2010]eKLR** and **Charles Gachathi Mboko v Attorney General Nairobi HC No. 833 of 2009(OS) [2014]eKLR** where the court held that the right of redress under the Constitution cannot be curtailed by statute. The petitioners submit that due to the infringement of their rights they are entitled to relief.

Respondents' Case

12. In opposing the petition, the respondents rely on the replying affidavit sworn on 28th November 2013 by Inspector Japheth Muluimo who also testified. He is the officer charged with investigating the events of 21st August 2003. The respondents denied that the petitioner's rights and fundamental freedoms were violated by the police as alleged or at all.
13. Inspector Muluimo testified that according to his investigations, on 21st August 2003, police officers were on patrol at the OTC/Ukwala Bus Stage which is near Machakos Country Bus Station. While at the stage the officers saw three suspicious persons who they believed were robbers. They were challenged to stop but they started running towards the Machakos Country Bus Station. One of the robbers attempted to hijack a matatu but his pistol fell. The other robbers started shooting and the police officers shot back. Two members of the public, a man and a woman, sustained gunshot injuries on their legs. He further testified that two police officers were killed at the scene while two robbers were shot dead while one suspect managed to escape with injuries.
14. Inspector Muluimo testified that as a result of the shooting at Machakos Bus Park, the police suspected that the 1st petitioner might have been involved with the robbers. As a result, police officers intercepted the 1st petitioner at St. Mary's Hospital where he had been taken and took him to Kenyatta National Hospital as they carried out investigations. His statement was taken while he was in hospital. He further testified that after carrying out the investigations, it was established that the 1st petitioner was innocent. He stated that the 1st petitioner was not under arrest as he was not booked into any police station as required by police procedures. He produced the part of the investigation diary to support his testimony.
15. As regards the 2nd petitioner, Inspector Muluimo stated that she was released the same day of the incident and requested to report to Central Police Station the next day to record the statement. He maintained that the respondents did not violate the petitioners' rights as they were carrying out their mandate to investigate the events that led to the killing of police officers.
16. The respondents submit that the petitioners' evidence does not disclose any violation of their rights and fundamental freedoms. They submit that the police acted in accordance with the law and as such they should not be held liable. Counsel for the respondents submits that the petitioner

claim is stale and should not be allowed, as the petitioners have not given an explanation why they have slept on their rights for a period of 10 years before filing suit. Counsel relied on the case of ***Charles Gachathi Mboko v Attorney General (Supra)***.

Determination

17. Before I embark on a consideration of the issues raised in the petition, I note that the petitioners have relied on the provisions of the Constitution. The events giving rise to the petition occurred in 2003 during the currency of the former Constitution. The Constitution is not retrospective and as such this matter must be resolved using the equivalent provisions of the former Constitution hence the reference to Constitution in this judgment is reference to the former Constitution.

18. I have considered the petition, the depositions, the evidence and the submissions of both parties. The following issues fall for determination:

- a. Whether this petition is statute barred;
- b. Whether the petitioners have established the violation of their fundamental rights and freedoms; and
- c. If (b) is answered in the affirmative, what relief are the petitioners entitled to.

Limitation

19. Issues of limitation of time, delay, laches are required to be pleaded and in the absence of a pleading to that effect in the replying affidavit, there is no factual basis for finding that the petitioners' claim is barred (***Town Council of Awendo v Nelson Oduor Onyango and Others KSM CA Civil Appeal No. 161 of 2010 [2013]eKLR***). The former Constitution did not provide for a time limit within which a constitutional application could be filed. However, the grant of relief would be defeated by inordinate delay and laches particularly where the rights of the respondent are prejudiced (See ***James Kanyiita Nderitu v Attorney General and Another, Petition No. 180 of 2011 (Unreported)***, ***Peter Kagume & others v Attorney General Petition No. 128 of 2006 (Unreported)*** and ***Durity v Attorney General (2002) UKPC 20***).

20. In any case, I do not think the respondents are prejudiced as Inspector Muluimo testified that the inquest into the events of 21st August 2003 at the Machakos Country Bus Station was still being held at the Magistrates Court at the time of hearing the case.

Unlawful shooting

21. The use of force of firearms by the police is dealt with under **section 28** of the ***Police Act (Repealed)*** which was applicable at the time and which provides that:

28. A police officer may use arms against-

- a. *any person in lawful custody and charged with or convicted of a felony, when such person is escaping or attempting to escape;*
- b. *any person who by force rescues or attempts to rescue another from lawful custody;*
- c. *any person who by force prevents or attempts to prevent the lawful arrest of himself or of any other person;*

Provided that arms shall not be used-

- i. *As authorized in paragraph (a), unless the officer has reasonable ground to believe that he cannot otherwise prevent the escape, and unless he gives warning to such person that he is about to use arms against him and the warning is unheeded;*
- ii. *As authorized in paragraph (b) or paragraph (c), unless the officer has reasonable ground to believe that he or any other person is in danger of grievous bodily harm or that he cannot*

otherwise prevent the rescue or, as the case may be, effect the arrest.

22. **Section 21** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** allows the police or a private person who endeavours to arrest a person suspected of having committed an offence to use all means necessary to effect arrest where arrest is forcibly resisted. **Section 21(3)** thereof forbids the use of unreasonable force in effecting arrest in the following terms, “*Nothing in this section shall justify the use of greater force than was reasonable in the particular circumstances in which it was employed or was necessary for the apprehension of the offender.*”

23. The collective effect of the aforesaid provisions is that the use of force is permitted by the law to effect a lawful arrest or prevent escape from lawful custody but that the force must be reasonable in the circumstances. In **Charles Munyeki Kimiti v Cpl Joel Mwenda and Others Nyeri CA Civil Appeal No. 129 of 2004 [2010]eKLR**, the Court of Appeal considered the liability of police officers in the use of force. The Court stated, “*Whether or not police have used excessive force in effecting arrest is a matter of degree dependent on the peculiar circumstances of each case. In deciding whether liability should attach for alleged careless or negligent use of firearm by police in effecting arrest, the court should take into account, among other things, that the pursuit and arrest of dangerous and armed criminals is a hazardous operation and that it is in the public interest that the police operations are not unreasonably impeded by the decisions of the courts.*” (See also **M’Ibui v Dyer (1967) EA 315**)

24. The onus of proof is on the 1st petitioner to show that the police used excessive and unreasonable force in the circumstances. The evidence of the 1st petitioner is that he was shot by the police in a crowded area. It is undisputed that Machakos Country Bus Station is a busy market and a major transport hub. The officers attempted to stop and arrest the robbers before they started firing. In my view, the fact of shooting in a crowded area is not, of itself, decisive of the respondents’ liability. The police are not prohibited from using firearms in a crowded place. It only means that they have to exercise extra caution when they are required to use lethal force in such conditions. The petitioner did not demonstrate by evidence that the police were careless. The evidence is clear that there were armed robbers who were being pursued. It was not unreasonable for the police to shoot at the robbers when they were being shot at. The result of the events is that there were two dead policemen and two dead robbers and despite the crowded nature of the market only two members of the public were injured.

25. The 1st petitioner’s evidence was that he only saw police officers with guns and attributes the shooting to police officers. The respondent’s witness denied the 1st petitioner’s allegation stating that investigations revealed that the source of the gun shot could not be ascertained. I find that if indeed the 1st petitioner was shot by a police officer, the fact that he was shot on the leg negatives any negligence on their part given the events surrounding the shooting. The force was clearly aimed at the robbers who were equally armed. I find and hold that the 1st petitioner has not discharged his burden of proof. My conclusion is that the shooting was likely accidental and an accidental shooting does not attract liability.

Unreasonable Search

26. It is not disputed that a search was conducted at the petitioners’ house without a warrant. **Section 76(1)** of the **Constitution** provides that, “*Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.*” **Sub-section (2)** thereof permits searches to be conducted in accordance with law provided the law accords with what is acceptable in a democratic society. The issue in these proceedings is whether the search was conducted in accordance with the law.

27. The circumstances under which a search without a warrant could be conducted are set out in **sections 20** of the **Police Act (Repealed)** which is equivalent to **section 60** of the **National Police Service Act (Chapter 84 of the Laws of Kenya)** provides, in part, as follows;

20(1) *When an officer in charge of a police station, or a police officer investigating an alleged offence, has reasonable grounds to believe that something necessary for the purposes of such investigation is likely to be found in any place and that the delay occasioned by obtaining a search warrant under section 118 of the Criminal Procedure Code will in his opinion substantially prejudice such investigation, he may, after recording in writing the grounds of his belief and such description as is available to him of the thing for which search is to be made, without such warrant as aforesaid enter any premises in or on which he expects the things to be and there search or cause search to be made for, and take possession of, such thing*

28. Although there may have been a justification for the search, the law is that before conducting a warrantless search, the police officer is required to record the grounds and reason for the belief that the persons searched are suspects and that they are in possession of a gun or other weapon. In this case such a record was not produced in court to justify the search conducted in the petitioners' house. The extract of the investigation diary produced by the respondents does not record the fact that a search of the petitioners' house was in fact conducted. In the absence of such a record required by the **section 20** of the **Police Act**, I find and hold that the search violated **section 76** of the Constitution and the law in this respect.

29. I would venture to add that the reason for requiring a record of the warrantless search and the ground for belief are not idle. The law is intended to protect the subject from unreasonable searches and to facilitate an independent review of the circumstances of the search in order to determine whether it was conducted in accordance with the law. Failure to record the circumstances, diminishes the value of an *ex-post facto* inquiry which is necessary prevent abuse of the law.

Arrest and Detention

30. The issue concerning the 1st petitioner is whether he was under arrest while in hospital. Counsel for the 1st petitioner argued that the petitioner was guarded by two policemen at the time of recording the statement and that if the police intended to release him immediately then there would be no reason to record the statement in hospital. It is important to note that the events of 21st August 2003 were under investigation and that the 1st petitioner was a suspect. He recorded a statement and the police subsequently concluded that he was not involved in the incident. It would be unreasonable for the police to wait until the 1st petitioner was discharged from hospital to record his statement.

31. The 2nd petitioner was held in the police station for 5 hours within which time her statements were recorded. She was later released at night.

32. On the evidence available I am unable to conclude that the 1st petitioner was in police custody while in hospital as alleged. By releasing 2nd petitioner within 24 hours of her arrest after conducting a search of the petitioners' house, it is apparent that the police had concluded that the petitioners were not involved in the felonious incident. I conclude that the purpose of the police by the 1st petitioner's bedside was to record his statement at the time he was a suspect.

Cruel, Inhuman and Degrading Treatment

33. The petitioners have accused the police of cruel, inhuman and degrading treatment meted on them by the police in the circumstances of the case. Cruel and inhuman treatment for purposes of the prohibition stated in **section 74(1)** of the Constitution does not refer to ordinary inconvenience or discomfort arising from arrest and detention in police custody.

34. The meaning of torture, cruel, inhuman and degrading treatment are derived from international law conventions that prohibit torture such as the **International Covenant on Civil and Political Rights** and the **Torture Convention**. In **Republic v Minister For Home Affairs and Others ex parte Sitamze [2008] 2 EA 323**, Justice Nyamu, citing various authorities stated as follows; ‘The provisions of section 74(1) of the Constitution of Kenya are echoed in Article 7 of the International Covenant on Civil and Political Rights, 1966, (ICCPR) which states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Torture means ‘infliction of intense pain to the body or mind; to punish, to extract a confession or information or to obtain sadistic pleasure. It means infliction of physically founded suffering or the threat to immediately inflict it, where such infliction or threat is intended to elicit or such infliction is incidental to means adopted to elicit, matters of intelligence or forensic proof and the motive is one of military, civic or ecclesiastical interest. It is a deliberate inhuman treatment causing very serious and cruel suffering. “Inhuman treatment” is physical or mental cruelty so severe that it endangers life or health. It is an intentional act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.’ Likewise the provisions of the **Torture Convention** cited by the petitioners defines torture in the following manner, “An act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed.”

35. While I sympathise with the predicament of the petitioners, I find and hold that their treatment does not rise to the level of a constitutional infraction. It was neither intentional nor severe. I find and hold that in light of the meaning assigned to cruel, inhuman and degrading treatment, **section 74(1)** of the Constitution was not violated by the respondents.

Reliefs

36. The only violation I have found the respondents liable for is the unreasonable search conducted in the petitioners’ house. I award the sum of Kshs. 80,000.00 to vindicate the petitioners’ right in this respect.

37. In the light of the findings above the final orders are as follows;

- a. **I declare that the petitioners’ rights under section 76 of the former Constitution were violated as a result of the unauthorised search of their house conducted by the police on 21st August 2003.**
- b. **The petitioners are awarded Kshs. 80,000.00 as general damages**
- c. **The damages shall accrue interest at court rates from the date of this judgment.**
- d. **The petitioners are awarded costs of the suit.**

DATED and DELIVERED at NAIROBI this 14th April 2014.

D.S. MAJANJA

JUDGE

Mr Wanjohi instructed by Muriuki Ngunjiri Advocates for the petitioners.

Mr Spira, Prosecution Counsel, instructed by the Directorate of Public Prosecutions for the respondents.