



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

PETITION NO.79 OF 2011

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
UNDER ARTICLE 25,27 AND ARTICLE 49**

BETWEEN

ANTONY MURITHI.....PETITIONER

VERSUS

**THE O.C.S MERU POLICE STATION.....1ST RESPONDENT
POLICE CONSTABLE ANTONY HORO.....2ND RESPONDENT
THE ATTORNEY GENERAL.....3RD RESPONDENT**

RULING

The petitioner Mr. Antony Murithi in his petition dated 30th August, 2011 averred that on 10th June, 2011 at Meru was arrested by police Officers from Meru Police Station for allegedly having committed an offence of rape on 13th May, 2011. That he was placed at Meru Police Station and was denied access to his advocate.

That on 12th June, 2011, which was on a Sunday, he avers that he was secretly removed from the cells at Meru Police Station, handcuffed and taken to Meru General Hospital. That on arrival at the said hospital he enquired the purpose of the visit and was informed by the Police Officer who had escorted him, one PC Horo that he had no business of knowing why he was there. That shortly thereafter he was ushered into a small room within the hospital whereof he met someone alleged to be a Clinical Officer. That he was ordered to sit down on the floor and handcuffs were similarly used to hold his legs together and restraining him from making any movements.

That the person who the petitioner met at the hospital and who according to the petitioner purported to be a Clinical Officer took a syringe and forcefully removed blood from the petitioner's body despite his protests, wails and screams. That petitioner's mouth was forced open by the said individual assisted by the Police Officer and they inserted a spoon like equipment into his mouth to scoop fluids from his mouth, which samples the said P. C. Horo took and kept them in his pocket and both left the hospital.

The petitioner avers that all this time he was not informed what was happening. That on 13th June, 2011 the petitioner avers that he was arraigned in court on 13.6.2011 charged with an offence of rape as per charge sheet marked "AMI" which states as follows:

“ Antony Murithi Njeru: On the 13th day of May, 2011 Imenti North District within Meru County intentionally and unlawfully caused his penis to penetrate the vagina of C.J. K, without her consent”

That on 25th July, 2011 when the case came up for hearing the prosecution applied for adjournment to enable them get a report from Government Chemist. The petitioner avers that all along he did not know of any report pending at the Government Chemists regarding the case.

The petitioner has also deponed that the prosecution had earlier on declined to furnish him with copies of witness statements as well as other documentary evidence until the said 25/7/2011 following court's intervention to have him supplied with the documents that the prosecution would rely on. The petitioner has annexed to his application several letters in support of his claim. That he had sought for statements without being supplied with the same. That upon receipt of the prosecution documents the petitioner aver that he was astonished to learn that police had allegedly forwarded his samples of blood, as well as saliva for analysis at the Government Chemist and annexed copies of the said documents to this application. He further avers that he was stunned beyond words to learn that besides his alleged samples, some clothes that included innerwear, blouse and jeans that he neither had knowledge of nor had been mentioned or shown to him, had been forwarded to the Government Chemist for comparison purposes with his samples that had been taken from him.

The petitioner aver that it is at that moment that he suspected that the officers would easily have subsequent to taking the samples illegally have stained the said clothes to merely fix him. The petitioner further aver the alleged offence was committed on 13th May, 2011 and he was

arrested on 10.6.2011 after almost a whole month down the line besides all along he lives in the same compound with the complainant. That the taking of samples from his body while handcuffed and without being informed, besides the same having been done stealthily on a Sunday and not allowing him to put on comments is a gross violation of his Constitutional rights.

The petitioner Mr. Antony Murithi filed petition challenging the way samples of blood and saliva was obtained from his body and seeking court's declaration that his Constitutional rights were infringed.

He alleged that the taking of samples of blood and saliva from his body was in a manner that violated his Constitutional rights and freedom as secured by Articles 27,27,22(1), 23(1) 49 and 258(1) of the Constitution of Kenya.

The petitioner further sought under Prayer 3 of the application that court do issue injunction order restraining the respondents from using data obtained as a direct result and to incidental to the blood and saliva samples taken from the petitioner on 12.6.2011 in Meru Criminal Case No.449/2011 pending the hearing and determination of this application.

The respondents were served with this application and entered Memorandum of Appearance on 13th September, 2011 but has not filed any replying affidavit or response. That court granted interim orders under paragraph No.2 and the same was extended on 21.9.2011. That on 15.11.201 respondent was granted one week to file and serve replying affidavit and matter was set down for hearing on 6th December, 2011 in presence of Counsel for the respondent. That on 6th December, 2011 respondent did not appear and matter was ordered to proceed. Under Article 25 of The Constitution of Kenya it is provided:-

“25. Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited –

(a) Freedom from torture and cruel, inhuman or degrading treatment or punishment;

(b) Freedom from slavery or servitude;

(c) The right to a fair trial; and

(d) The right to an order of habeas corpus.”

Under this article the fundamental rights and freedom that may not be limited include freedom from torture and cruel, inhuman or degrading treatment or punishment. The handcuffing of the petitioner both his hands and legs and taking him to Meru General Hospital without explaining him the purpose of being taken to the hospital was a torture, cruel, inhuman and degrading treatment or punishment.

In my view the respondents violated the petitioner's rights and fundamental freedoms which are not limited.

Under Article 27(1) (2) of the Constitution of Kenya, it is provided:-

“27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.”

Under this article everyone is equal before the law. The petitioner avers that he was not afforded right to equal protection and equal benefit of the law. That he was discriminated and the complainant was not treated the same way she was, in taking of blood and saliva samples from his body. He was not explained where he was being taken and the purposes for being taken out of Police station. He asserted that equality includes the full and equal enjoyment of all rights and fundamental freedoms.

I therefore hold that the petitioner was discriminated in the way he was treated by the respondents in failing to inform him his rights as an arrested person as enshrined under Article 49 of the Kenya Constitution. Petitioner should have been informed promptly in language he understands reason for his arrest, the right to remain silent and the consequences of not remaining silent and be allowed to communicate with an advocate and not to be compelled to make any confession or admission that could be used in evidence against the petitioner.

The respondents treatment of petitioner in unequal manner as the complainant and denying the petitioner his rights as an arrested person was unconstitutional Under Article 28 of the Constitution of Kenya in which it is provided:-

“28. Every person has inherent dignity and the right to have that dignity respected and protected.”

The handcuffing of the petitioner, taking him to hospital without explanation, forcing him to a small room and forcing him to sit on the floor, handcuffing his legs, assaulting him with a syringe to extract blood, forcing open his mouth and scooping fluid from his mouth was against freedom from torture, and cruel, inhuman and degrading treatment. The acts were acts of disrespect to the petitioner. The petitioner's inherent dignity and the right to have that dignity respected and protected was breached by the respondent.

The petitioner should not have been handcuffed both his hands and legs and treated in inhuman way simply because respondent wanted to get some samples from the petitioner.

Under Article 22(1) of the Constitution of Kenya it is provided:-

“22. (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”

Under Article 22(1) of the Constitution of Kenya every person is given a right to institute court proceedings to enforce his Constitutional rights and further that the High Court has jurisdiction to determine such matter by virtue of Article 23.

Article 23 of the Constitution of Kenya provides:-

“23. (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.”

Under Article 23(3) of the Constitution in any proceedings brought under Article 22, Court may grant appropriate relief, including a declaration of rights, or injunction or a conservatory order or a declaration of invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom in the bill of rights and is not justified under Article 24 or an order for compensation and/or an order of Judicial Review.

Under Article 258 of the Constitution of Kenya every person has right to institute court proceedings, claiming that this Constitution has been contravened or is threatened with contravention. This article is intended to ensure the Constitution is not contravened. The Article can be used to protect the Constitution as well as individual rights.

In the textbook, **CROSS AND TAPPER ON EVIDENCE 9TH EDITION under fingerprints, bodily samples and tracker dogs it is provided:**

“While s 21 still prevents a blood test from being taken without the consent of the subject, and this will remain the normal case, it is less clear that consent is required for tests of other substances. Probably where any taking would involve an assault the common law would dictate a similar result, at least in the absence of explicit authorization by the court. It is however possible, in some circumstances, to secure testable tissue without an assault, and in such a case there seems to be no obstacle to using it, even without the consent of the subject. If the court ‘s direction to submit to such a test is refused, s23 permits the court to draw any inference from such refusal as seems proper in the circumstances.”

These provisions apply only to civil proceedings in which parentage is in issue, but there seems no reason why such tests should not be used with the consent of the parties in other civil or criminal, proceedings. The Royal Commission on Criminal justice consider the question of DNA matching technique, and recommended the reclassification as ‘non-intimate’ of samples taken by plucking hair or by oral swabbing. It recommended also the retention of DNA records of those convicted of criminal offences for investigative processes, and of a wider group for the purposes of statistical matching. An attempt to implement these recommendation is to be found in the Criminal Justice and public Order Act 1994.

The wider group consist of those who provided samples which were processed for the purpose of the same investigation as one resulting in another’s conviction. “

It is clear from the above that even in Civil proceedings blood test is prevented from being taken without consent of the subject and probably where any taking of the blood sample would involve an assault. That in circumstances in which testable issue can be secured without assault there may be no obstacle to using such sample; even without consent of the subject.

In the circumstances of this case I find that the petitioner’s sample of blood and saliva was obtained without his consent and through assault in that syringe had to be used to extract his blood and that saliva was obtained through force. The samples were obtained through illegal means and as such, illegally obtained samples and incomplete disregard of fundamental rights and freedoms is tainted with illegality and cannot be used in any proceedings against the person whose fundamental rights and freedoms as enshrined in the Constitution has been breached. Any evidence obtained through any assault of whatever nature, or through torture or inhuman or degrading treatment or punishment is a violation, denial and infringement of a person’s right of fundamental freedoms of the bill of rights. It is unconstitutional and as such null and void for all purposes and intentions it cannot be used in evidence against such a person.

In this application I find and hold that the petitioner’s Constitutional rights were denied, violated, infringed by the respondents.

In the circumstances I grant an order of injunction restraining the respondents from using data obtained as a direct result and/or incidental to the blood and saliva samples taken from the petitioner on 12th June, 2011 in Meru Criminal Case No.449/2011

DATED AND DELIVERED AT MERU THIS 2ND DAY OF FEBRUARY, 2012

**J. A. MAKAU
JUDGE**

DELIVERED IN OPEN COURT IN PRESENCE OF:

1. Mr. Muriuki for the petitioner

**J. A. MAKAU
JUDGE**