



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL PETITION NO. 48 OF 2011

B.A.
(Suing through the mother as next friend).....1ST PETITIONER

D.A.O..... 2ND PETITIONER

AND

STANDARD GROUP LIMITED..... 1ST RESPONDENT

CHILDREN OF GOD RELIEF INSTITUTION

(NYUMBANI)..... 2ND RESPONDENT

LEA TOTO PROGRAMME.....3RD RESPONDENT

JUDGMENT

1. This petition arises out of the publication by the 1st respondent of a photograph taken at what the petitioners refer to as a fun day held in Nairobi on 8th of December 2007. The 2nd petitioner, the mother of the 1st petitioner was aggrieved by the publication of the photograph and asserts that it violated her rights and those of the 1st petitioner by revealing their HIV status without their consent. She asserts that their right to privacy equally before the law and non-discrimination guaranteed by the constitution of Kenya, 2010 have been violated by such publication.
2. In the petition dated the 21st of March 2011 which is supported by the affidavit sworn by the 2nd petitioner, the petitioners seek the following orders:
 - (a) **A DECLARATION** that the Respondents' publication herein violates the Petitioners' rights to human dignity; and, the Petitioners' right to privacy.
 - (b) **A DECLARATION** that the said publication threatens the Petitioners' rights to equality before the law, equal protection and benefit of the law; and the petitioners' fundamental freedom from discrimination;
 - (c) **A DECLARATION** that the publication herein contravenes the 1st Petitioner's best interest under Article 53(2) of the Constitution;
 - (d) **A DECLARATION** that the Respondents' publication contravenes Section 22(1) of the HIV AND AIDS PREVENTION AND CONTROL ACT. No. 14 of 2006; and is further in contravention of

Section 19 of the CHILDREN ACT, No. 8 of 2001;

- (e) A PERMANENT INJUNCTION to restrain the Respondents, their employees, servants or agents from publishing or causing to be published any information or photo(s) of the 1st Petitioner herein within their possession or power;
- (f) Apology by the Respondents to Petitioners in the same daily of the publications;
- (g) General damages;
- (h) Exemplary damages;
- (i) Costs
- (j) Refund of filing fees for the Application and Petition herein.

3. The respondents filed affidavits in opposition to the petition. All the parties also filed written submissions which they highlighted before me on the 15th of February 2012.

4. Mr. Miyare presented the case for the petitioners, Mr. Echesa Werimo appeared for the 1st respondent, while Mr. Mutula Kilonzo Jnr appeared for the 2nd and 3rd respondents.

The Petitioners' Case

5. The petitioners are mother and daughter while the 3rd respondent is a community based outreach programme of The Children of God Relief Institute Nyumbani Children's Home, the 2nd respondent. According to the petitioners, the 3rd respondent provides services to HIV positive children and their families in the Kangemi, Waithaka, Kawangware, Riruta, Mutuini, Ruthimitu, Kibera and Kariobangi communities of Nairobi, Kenya.

6. The 2nd petitioner depones at paragraph 7 of her affidavit that any child may be taken for HIV/Aids testing by the 3rd respondent, but this does not qualify such a child for registration as a constituent of the 3rd respondent. Only those found to be HIV positive are registered as members of the *Lea Toto* programme.

7. On 8th December, 2007, the 2nd and 3rd respondents organised a fun day for children from various children's homes. The 2nd petitioner was asked to permit her daughter, the 1st petitioner, to attend the fun day which she did. The 1st petitioner attended the fun day accompanied by her brother.

8. The 2nd petitioner avers that on the 23rd of December 2007, the 1st, 2nd and 3rd respondents published or caused to be published at page 4 of the Sunday Standard pull-out called "Twinkle", a photograph of the 1st petitioner together with other children carrying foodstuffs. She states that the names of the children, including that of her daughter, were included in the photograph.

9. The 2nd petitioner avers that the publication of the photograph was intended to portray the 2nd and 3rd respondents as committed to their mission of providing home based care to children who are HIV positive. The 1st petitioner states further that the publication revealed to the public that the 1st petitioner is HIV positive.

10. The 2nd petitioner contends therefore that as a result of this revelation, her own HIV status was revealed. The revelations amounted to a disclosure of information concerning the results of HIV/AIDS test of the petitioners without their prior written consent.

11. The 2nd petitioner alleges that the publication has caused her anxiety, depression and psychological trauma, and that she has lost friends as a result of the publication.

12. In his submissions before the court, Mr. Miyare contended that the 2nd respondent is known locally and internationally as a home that takes care of HIV positive children. The publication of the photograph therefore identifies and discloses unlawfully the status of the 1st petitioner, and since the health status of the 1st petitioner has been disclosed, the health status of the 2nd petitioner, who is the mother of the 1st petitioner, has also been disclosed.
13. The petitioners contend that the publication was made with the knowledge and consent of the 2nd and 3rd respondent who had custody of the 1st petitioner. The conduct of the respondents therefore violated the constitutional rights of the petitioners under Article 27, 28, 31, 19 and 53(2) of the Constitution.
14. In particular, the petitioners argue that their **right to dignity** has been violated. By disclosing the petitioners' health status without caring about the impact on the petitioners, the respondents have lowered the petitioners in the estimation of other members of society in light of the stigma associated with HIV.
15. The petitioners argue further that the publication of the photograph has violated their **right to privacy**. This right, especially for the minor, is conferred by the Constitution, the Children Act and the Convention on the Rights of the Child. It protects the minor against unnecessary publication, and the publication by the respondents was not made in the best interests of the child but was made for profit by the respondents.
16. The petitioners contend that their right to **equal protection of the law** guaranteed under Article 27 was also violated. The conduct of the respondents denied the petitioners this right which is also provided for under the HIV and Aids Act and the guidelines thereunder, as well as the HIV policy.
17. With regard to the status of the parties, the petitioners argue that the Lea Toto Programme can be sued in its own name. It is a charitable institution established under the Children Act to provide care for children with HIV. The Constitution at Article 2 imposes an obligation on all persons to observe its provisions on protection of fundamental rights and these provisions are enforceable against both individuals and government.
18. Mr. Miyare submitted that under the Constitution, the term 'persons' refers to both corporate and unincorporated entities. Even though Lea Toto is an unincorporated entity, it is a person with a duty to observe the human rights of others.
19. Mr. Miyare submitted further that before an institution qualifies to provide care for children under the Children Act, it must be registered by the Department of Children Services. The fact of registration of the 3rd respondent confers upon it the status of a legal entity with capacity, obligations and duties. He urged the court to consider the provisions of Article 159 of the Constitution which enjoins the court not to be bound by technicalities.
20. The petitioners asked the court to strike out the affidavits sworn on behalf of the 1st respondent by Jenipher Wachie and Nelly Matheka as they were sworn without authority and are incompetent.
21. On the argument by the 2nd and 3rd respondents that the court could not grant the remedies sought by the petitioners, he referred the court to Article 23(3) (e) and submitted that the court could grant both general and exemplary damages.
22. On the argument that the petitioners have recourse to a civil remedy which is time barred, it was the petitioners' position that the availability of another remedy is not a bar to a claim for violation of fundamental rights.
23. To the submission by the 2nd and 3rd respondent that the court cannot give declarations on future violations, Mr. Miyare submitted that Article 22 provides for such orders where there is a

threatened violation. He therefore urged the court to grant the prayers sought by the petitioners.

The 1st Respondent's Case

24. Mr. Echesa presented the case for the 1st respondent. He relied on the affidavits sworn by Jenipher Wachie and Nelly Matheka on the 10th and 14th of September 2011 respectively. He also relied on the 1st respondent's written submissions dated 1st November 2011.

25. The 1st respondent concedes that the photograph in question was published in its '*Picture Album*' in the *Twinkle* section of its newspaper on the 23rd of December 2007. This section deals with issues relating to children, and the intention of the 1st respondent was to make children, even the ones living in children's homes, feel cared for in the Christmas season.

26. The event was held in CGHU Girls Secondary School in Highridge, Parklands, and the 1st respondent submits that the attendance of its journalist Jenipher Wachie, was at the invitation of the organisers, the Rotary Club. It was not with a view to finding out the HIV status of the petitioners

27. The 1st respondent denies that the photograph reveals the HIV status of the petitioners or any health status whatsoever. It submits that it had not at any time interviewed either the 2nd or 3rd respondent with regard to the HIV status of the petitioners.

28. Mr. Echesa took issue with the allegation made from the Bar by Counsel for the petitioners that the 3rd respondent is known locally and internationally as a home that cares for HIV positive children. He submitted that this argument was not in the pleadings and asked the court to disregard it.

29. He referred the court to the extract in question which is from a magazine known as *Twinkle* published in the Sunday Standard and submitted that on the face of it, there is no indication of the health status of the children or individuals who appear on that page.

30. Mr. Echesa submitted further that there was no evidence from the petitioners to show that the programme by Lea Toto caters only for HIV positive children, and even if that was the case, the journalist who covered the event had no idea of the medical status of the petitioners. It could therefore not be said that the effect of the publication was to disclose a status not known about.

31. With regard to the alleged violation of the petitioners' rights under Article 31(c), Mr. Echesa argued that there was no specific innuendo that could be implied from the publication that the children in it are infected as association to the institution does not lead to the conclusion that the individuals depicted have HIV.

32. With regard to the petitioners' reliance on the provisions of the HIV Act, Mr. Echesa submitted that no test has been disclosed and the sole aspect relied on is the association of the child with the Children's Home.

33. On the alleged violation of the right to human dignity, it was the 1st respondent's position that it has not been shown how the right is related to the facts in the petition.

34. Mr. Echesa submitted that the affidavits sworn in support of the 1st respondent's case were properly before the court and should not be struck out as urged by the petitioners. The deponents had averred that they have been authorised to swear the affidavits which averment was sufficient. The source of the deponents' authority had been identified on oath.

35. Mr. Echesa submitted that the petitioners had not demonstrated how the rights of privacy and human dignity had been violated to warrant a constitutional remedy. He referred the court to the case of **Alphonse Mwangemi Munga & Others-v-African Safari Club Petition No. 564 of 2004** and argued

that this petition was intended to avoid the civil action for defamation which the 2nd petitioner had intended to bring. The petition was not being pursued in the interests of the 1st petitioner but in the interests of the 2nd petitioner.

36. With regard to the remedies sought by the petitioners, it was the 1st respondent's position that there is no power under Article 23 for the court to make an order for an apology. Further, it was the 1st respondent's position that general and exemplary damages fall outside the purview of Article 23. He therefore urged the court to dismiss the petition with costs.

The 2nd and 3rd Respondents' Case

37. Mr. Kilonzo for the 2nd and 3rd respondents associated himself with the submissions of the 1st respondent on the petition. He relied on the affidavit sworn by Sr. Mary Owens on the 24th of June 2011 and the written submissions dated 7th November 2011.

38. The 3rd respondent contends that it is an outreach programme of the 2nd respondent and does not therefore exist as a legal entity capable of being sued.

39. With regard to the substantive issues raised in the petition, the 2nd and 3rd respondents also concede that the 1st respondent had published the photograph at page 4 of its *Twinkle* Magazine on the 23rd of December 2007. The photograph had been taken at a fun day for children from various children's homes organised by the Rotary Club. The 2nd petitioner had issued a demand for an apology through her lawyers, but upon the claim being time barred, had opted to file this constitutional petition.

40. Mr. Kilonzo urged the court to consider the prayers sought by the petitioners, specifically prayer 1 which is a prayer for a declaration that the right to human dignity had been violated. He referred the court to the case of **Anarita Karimi Njeru (1976-80) 1 KLR 1272** and submitted that it will be difficult for the court to grant a declaration on prayer 1 as no Article has been cited as having been violated.

41. Mr. Kilonzo submitted further that there was no publication by the 2nd and 3rd respondent as understood in defamation and that 2nd and 3rd respondent did not cause the publication or dissemination of the article which formed the basis of the petition.

42. Mr. Kilonzo referred the court to the case of **Justice Amraphael Mboghli Msagha – v-The Chief Justice & Others** with regard to the issues to consider in granting declarations. He submitted that the prayers being sought by the petitioners relate to the future and the court cannot grant an order that anticipates a violation. He argued further that it is not in every case in which an allegation of a violation has been made that there is a violation. The petitioners are looking for a remedy as their cause of action in defamation had lapsed.

43. The 2nd and 3rd respondents denied that they violated or threatened to violate any of the rights of the petitioners. They contended that no sufficient material had been placed before the court on the basis of which the court could make a finding that there had been a violation of the petitioners' rights.

44. According to the 2nd and 3rd respondents, the right to privacy and human dignity that were the crux of the petitioners' case were not provided for in the constitution in force at the time the cause of action arose. The new Constitution did not confer rights retrospectively and the petitioners could not therefore claim breach of rights that had not been granted to them under the constitution at the time the cause of action arose. They relied in support of this submission on the case of **Keshavan Madhava Menon-v- State of Bombay 1951 AIR 128** and **Donald Veldman-v-The Director of Public Prosecution CCT 19/05**

45. The respondents therefore urged the court to dismiss the petition with costs.

Issues for Determination

46. The parties to this petition have in their submissions proposed different issues for determination. In my view, these issues can be consolidated and reduced to the following:-

- i) Whether the 3rd respondent is capable of being sued in its own name;
- ii) Whether the respondents are bound by the Bill of Rights;
- iii) Whether the petitioners can claim for violation of constitutional rights under the new Constitution in respect of violations that occurred prior to its promulgation;
- iv) Whether the respondents violated the petitioners' rights and fundamental freedoms as alleged;

Legal Capacity and Liability under the Bill of Rights

47. I will deal with issues number i) and ii) with regard to the capacity of the 3rd respondent and the liability of the respondents under the Bill of Rights together. The 3rd respondent has submitted that it is not a legal entity capable of suing and being sued in its name. It has been defined by the petitioner as a programme of the 2nd respondent, and it submits that it is a community based outreach programme of the 2nd respondent and does not exist as a legal entity. The question then is whether a programme within an organisation can properly be sued in its own name.

48. Article 260 has a very wide definition of the term '**person**' as follows:

“person” includes a company, association or other body of persons whether incorporated or unincorporated;

49. The 3rd respondent which is a programme of the 2nd respondent has been sued individually. From the pleadings before this court, it does not appear to be a 'person' even within the wide definition provided by Article 260. It is a part of the 2nd respondent, and the enforcement of any orders of the court in this matter would clearly be enforceable against the incorporated entity, the 2nd respondent. Even allowing for the wide definition of the term 'person' in the constitution, the joinder of the 3rd respondent is, in my view, superfluous as the outreach programme does not exist independently of the 2nd respondent.

Liability Under the Bill of Rights

50. The Constitution contemplates both vertical and horizontal application of the Bill of Rights. It is not just the state which is under an obligation to observe and respect human rights- the Constitution requires **all persons** as well as the state to respect its provisions generally and the provisions of the Bill of Rights in particular. Article 2(1) of the Constitution provides that

‘This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.’

51. At Article 20 (1), it is provided that

‘The Bill of Rights applies to all law and binds all State organs and all persons.’

52. These provisions of the Constitution read together with the definition of '**person**' in Article 260 make it clear therefore that the provisions of the Bill of Rights are intended to be binding on all persons,

whether natural or legal, incorporated or unincorporated. The 1st and 2nd respondents are therefore bound by the Bill of Rights and would be liable if found to have violated the rights of the petitioners.

Whether the Constitution of Kenya has Retrospective Application

53. The photograph that forms the basis of this petition was taken on the 8th of December 2007. The act of publication complained about took place on the 23rd of December 2007 and was not repeated. The Constitution then in force was the 1963 constitution. The question then is whether the petitioners can claim for violation of constitutional rights guaranteed under the new Constitution in respect of a violation that occurred prior to its promulgation where such violation is not a continuing violation.

54. The petitioners allege violation of the right to human dignity, privacy and equality before the law. They cite Articles 27, 28 and 31 of the new Constitution. While the principle of non-discrimination was enshrined in the former constitution at Section 82, the right to human dignity and privacy have been recognised and protected only under the new Constitution.

55. I agree with the submissions by the 2nd and 3rd respondents that the petitioners cannot claim for alleged violation of rights under the current Constitution in respect of violations that allegedly occurred prior to its promulgation. The decisions of the courts in India and South Africa respectively in the cases of **Keshavan Madhava Menon-v- State of Bombay** and **Donald Veldman-v-The Director of Public Prosecution (supra)** cited by the respondents with regard to the non-retrospective application of the constitution in those countries are clear and of persuasive authority.

56. More persuasive, however, is the decision of the High Court in the case of **Joseph Ihuo Mwaura & 82 Others-v- The Attorney General Petition No. 498 Of 2009** where Majanja J, observed as follows:

‘The Constitution promulgated on 27th August 2010 is not retrospective hence its provisions would not apply to matters that occurred before the effective date of the Constitution. Unless otherwise provided, the provisions of the Constitution, 2010 cannot govern matters done under a different legal regime.’

57. Had the act complained of in this petition resulted or been alleged to result in violations of a continuing nature, then it would have been possible to consider the petition against the provisions of the current Constitution. This, however, is not the case. The petitioners’ claim in respect of the rights protected under Articles 28 and 31 of the Constitution must therefore fail.

Non-Discrimination and Equality Before the Law

58. The petitioners allege that the respondents’ acts were in violation of their rights under Article 27 of the Constitution. Even though they have not cited the provisions of the former constitution, I will consider whether the facts of this petition demonstrate violation of the right to non-discrimination and equal treatment before the law guaranteed under Section 82 of the former constitution, which is similar in content in some respect to the right provided for under Article 27. Section 82 provided as follows:

82. (1) Subject to subsections (4), (5) and (8), no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to subsections (6), (8) and (9), no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority.

(3)....

59. Unlike the current Constitution, the provisions of Section 82 prohibited discrimination by a person acting in an official capacity. It recognised vertical but not horizontal application of the Bill of Rights.

Thus, even had the petitioners cited this provision of the former constitution, it would not, regrettably, have been possible to find in their favour.

60. Indeed, even had it been possible to apply the provisions of the former or the current Constitution to the facts of this case, I am of the view that they do not disclose any violation of the petitioners' rights as alleged.

61. The petition is based on the publication of a photograph of the 1st petitioner in the *Twinkle Magazine* published by the 1st respondent. I have looked at the publication in question. It is titled '*Picture Album*' and carries photographs of children from different homes. The first caption with the photographs states that

'Recently, children from different homes were treated to a Fun Day and given presents. These are images from that function'.

62. The photographs that follow show children from two institutions which are identified in the photographs as Lea Toto Childrens' (sic) Home and Soweto. In my view, there is nothing in the photographs or the captions that even remotely suggests the health status of the children. Indeed, there is nothing in the photograph that indicates what the 2nd and 3rd respondent are about, and the submission by counsel for the petitioners that the 2nd and 3rd respondent are known nationally and internationally as institutions that care for children with HIV is not borne out by the pleadings, submissions or evidence before the court. Indeed the 2nd respondent is not even mentioned in the captions accompanying the photographs.

63. It would indeed be a stretch to conclude, as the 2nd petitioner did, that the photographs disclosed the health status of the 1st petitioner and therefore her own status, and thus violates their rights under the Constitution, the HIV Aids Control and Prevention Act, or the Children Act.

64. In the circumstances, I find no merit in this petition and the same is dismissed with no order as to costs.

65. I am grateful to the Counsel appearing for the parties for their well researched arguments and helpful authorities.

Dated at Nairobi this 20th day of April 2012

MUMBI NGUGI

JUDGE