



No. 2761

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL CONST. PETITION NO. 33 OF 2010

IN THE MATTER OF SECTION 84(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

UNDER SECTIONS 71 , 74 AND 77 OF THE CONSTITUTION OF KENYA

BETWEEN

HELLEN GESARE
PETITIONER

AND

REPUBLIC.....RESPONDE
NT

JUDGMENT

On 31st March, 2010, **Hellen Gesare**, hereinafter “*the petitioner*” lodged the instant petition praying that this court declares that the assault on her by administration police officers from Rigoma Administration Police lines (APs) in the company of the area District Officer (D.O) on 12th September, 2007 was illegal and a violation of her constitutional rights, that she was therefore entitled to compensation by them pursuant to section 72(6) of the Constitution of Kenya and that this court should proceed to assess the quantum of damages payable in that regard.

The petition was expressed to be brought under section 71, 74, 77 and 84(1) of the Constitution of Kenya. It was informed by the fact that on 12th September, 2007 or thereabouts, the petitioner was at her home when AP's in the company of the area D.O assaulted her without any just cause and reason. She was thereby seriously injured. The AP's and the D.O had come to ascertain boundaries to the land parcels belonging to the petitioner pursuant to a court order. Following the assault, the petitioner was rushed to Kisii Level Five Hospital by a good Samaritan where she was hospitalized and her left hand plastered. She remained with the plaster for over three months during which period she suffered pain and was completely unable to go about her daily chores. The assault was unprovoked, without just cause and her efforts to have those responsible held to account has been unsuccessful, hence the petition. The petitioner's constitutional rights under section 71, 74 and 77 of the old Constitution of Kenya had been violated and the petitioner had suffered loss and damage. As far as she was concerned being assaulted in broad day light and in public as it happened in her case amounted to torture, inhuman and degrading treatment, the pain inflicted on her in the process amounted to torture and inhuman treatment and she was denied protection of the law.

At the time the AP's assaulted her, they were carrying out their duties as police officers and the Attorney General being the Chief Legal Advisor was sued on behalf of the Permanent Secretary, Provincial Administration and Internal Security who is vicariously liable for the acts of the said AP's and D.O.

In support of the petition, the petitioner swore an affidavit. The said affidavit merely elaborated and or expounded on what the petitioner had said in the petition. Suffice however, to add that if indeed the AP's were law enforcers and were convinced that the petitioner had committed an offence known at law, they should have arrested her and charged her in court. That she had not approached the court earlier because she expected help from police and state law officers which help was however not forthcoming.

When the petition was served on the Attorney General, hereinafter "***the respondent***", he reacted by filing grounds of opposition. The respondent maintained that the petition was frivolous, vexatious and an abuse of the process of court, was unfounded as it did not raise any matters that required constitutional interpretation, the petitioner's remedy lay within the realm of common law, she was guilty of laches and undue delay, and had not named the alleged assailants hence prejudicing the respondent's defence. Finally, the petitioner had come to court with unclean hands and had failed to disclose to court material particulars.

When the petition came up for plenary hearing, on 23rd November, 2010, **Mr. Maroro**, learned counsel for the petitioner and **Mr. Eredi** Provincial Litigation Counsel agreed to canvass the same by way of written submissions. Subsequently they filed and exchanged the written submissions which I have carefully read and considered alongside cited authorities.

I must from the outset state that the petitioner has been less than candid with court. Such a person is therefore undeserving of courts assistance. The petitioner has not said what was behind the alleged police raid. If anything, she has painted them in very bad light as being rogues and bullies. That out of nowhere, they just descended upon her and without any provocation and or just cause beat her senseless. This is too weird to be true. However, going through the written submissions of the respondent, one gets the inkling of what actually transpired. The petitioner's written submissions are not helpful at all in this regard.

It would appear that on 27th July, 2007, the D.O, accompanied by the District Surveyor and AP's visited land parcel numbers **Nyamira/East Kitutu Mwamokaya 1/604** and **150** respectively pursuant to a court order issued on 4th April, 2007 in **Keroka SRMCCC No. 100 of 2007**. The purpose of the visit as ordered by court was to allow the District Surveyor to establish the boundaries between the parcels of land owned by the parties involved in the suit including the petitioner so as to allow for the burial of the

body of the deceased, **Daniel Peter Ayenda** which had been lying at Gucha Hospital Mortuary. Though there is no hard and credible evidence to conclude that it was during such implementation of the court that, there was some fracas, and or altercation of soughts between the petitioner and the D.O together with his team, to my mind that seems to have been the case. However, as I said earlier on, this is an issue which was well within the knowledge of the petitioner. It was upto her to let the court know what exactly transpired on the material day. I do not think that the D.O and his crew are mad people who will descend upon an innocent old woman such as the petitioner with kicks and fists in the process fracture her hand without provocation or just cause. There was nothing personal about the visit. They stood to gain nothing in carrying out the court order. They had no interest in any of the parcels of land.

If indeed the petitioner's claims were correct, one would expect that a report of the incident would have been filed with the police or local administration for appropriate action. However, as at now there is no report of any assault to any person, the petitioner included by either the D.O or his officers on that day and place to any person in authority. There is no tangible and credible evidence that the petitioner ever made any effort to have the matter investigated by reporting the alleged incident to the relevant authorities for appropriate action or redress. Further, it is hard to belief that the petitioner who claims to have been assaulted seriously on 12th September, 2007 and her limb fractured could wait for another two days before she attended hospital for the management of her condition and or injuries. Why would somebody who has a fractured arm wait for 2 days before seeking medical attention?

In any event, for a contravention of a fundamental right to exist and be enforceable, the requirements set out in the following cases must be met. However, in the circumstances of this case they have not been met. In **Matiba –vs- Attorney General H.C Misc. Appl. No. 666 of 1990 (UR)**, the court held:

“...An applicant in an application under section 84(1) of the Constitution is obliged to state his complaint in the provision of the Constitution he considers has been infringed in relation to him and the manner in which he believes to have been infringed. Those allegations are the ones which if pleaded with particularity invoke the jurisdiction of this court under the section. It is not enough to allege infringement without particularizing the details and the manner of infringement...”

In **Anarita Karimi Njeru –vs- Republic (No. 1) 1979 KLR 154**, it was held: ***“... We would 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 this case), that he should set out with reasonable degree of precision that of which he complains the provision said to be infringed and the manner in which they are alleged to be infringed...”***

In the case of **Cyprian Kubai –vs- Stanley Kanyonga Mwenda NBI HC Misc. App. No. 612 of 2002 (UR)**, **Khamoni J.** rendered himself on the issue thus: ***“... An applicant moving the court by virtue of section 60, 65 and 84 of the Constitution must be, precise and to the point not only in relation to the section, but also to the subsection and where applicable the paragraph of subparagraph of the section out of 71 to 83, allegedly contravened plus relevant act of that contravention so that the respondent knows the nature and extent of the case to respond to enable the respondent prepare accordingly and also to know the extent and nature of the case it is handling...”***

See also **Kenya Bus Services Ltd & 2 Others –vs- Attorney General & 2 Others (2005) eKLR**. This was the law that informed our earlier Constitution which has since been repealed. However, this petition was filed during the regime of the old Constitution and it is on that basis that this petition shall be judged.

The petition as drawn is fatally defective as correctly observed by the learned Provincial Litigation Counsel. The petition does not set out the relevant sections of the repealed Constitution that were

violated, secondly, the section cited and relied upon by the petitioner have no relevance at all to the complaints in the petition. Section 71 of the repealed Constitution dealt with protection of right to life. From the pleadings, the petitioner is not claiming that her right to life was violated by the respondent. Section 74 of the repealed Constitution may have advanced the petitioner's case. However, she did not particularize the subsection she relied on. In any event subsection 2 thereof seems to shield the respondent from any liability. It is to the effect that nothing contained in or done under the authority of law shall be held to be inconsistent or in contravention of the section. It is common ground that what the respondents were doing in the petitioner's home was pursuant to a lawful court order. Finally, the petitioner also anchored her petition on section 77 of the repealed Constitution. However, that deals with fair trial. It is what is commonly referred to as fair trials provisions of the previous Constitution. The complaint of the petitioner has nothing to do with her prosecution in court.

The petitioner seems to appreciate that she cited the wrong provisions of the constitution aforesaid. She has urged me to ignore section 71 cited for it may have been wrongly and inadvertently cited. Otherwise her intent was to bring the petition under sections 71, 74 and 77 of the repealed Constitution. A party to litigation can only get what he has asked for. If the petition wished to anchor her application on the above sections, she would have done so quite easily by amending the petition before the hearing of the same inter-partes. She did not do so. She is now asking this court from the bar to effect such an amendment. That is a request that is wholly unacceptable.

For all the above reasons either single or collectively, I hereby dismiss the petition with no order as to costs.

Judgment dated, signed and delivered at Kisii this 31st day of March, 2011.

ASIKE-MAKHANDIA

JUDGE