



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Misc Appli 667 of 2007

DR JAGDISH SONIGRA.....APPLICANT

Versus

MEDICAL PRACTITIONERS & DENTISTS

BOARD & TWO OTHERS.....RESPONDENT

JUDGMENT

The petitioner, Dr. Jagdish Sonigra has brought this petition dated 20th June 2007 against the Medical Practitioners and Dentists Board, Mary Ng'ang'a (as the next friend of Irene Ng'ang'a) and the Attorney General (1st to 3rd Respondents). It is brought pursuant to Section 84(1) of the Constitution, alleging threatened contravention of his rights to a fair trial or inquiry as secured by Section 77 (9) of the Constitution. He seeks the following orders:-

- (a) A declaration that the 1st Respondents has and will infringe on the petitioner,s Constitutional rights by proceeding to hold the inquiry;
- (b) That the decision to hold the inquiry dated 8th May 2007 is unlawful and void;
- (c) That the inquiry proceedings pending before the 1st Respondent be terminated forthwith;
- (d) That the costs of this petition be provided for.

In support of the petition is the affidavit of the petitioner dated 20th June 2007 plus annexures thereto, a further affidavit of the petitioner dated 30th July 2007 and the petitioners affidavit dated 20th June 2007, in support of the Chamber Summons that sought stay of the proceedings before the 1st Respondent. The petitioner also filed submissions on 22nd October 2007. Mr. Gachuhi of Kaplan & Stratton argued the petition on behalf of the Petitioner.

Both the 1st and 2nd Respondents opposed this petition. Professor Julius Kyambi swore an affidavit dated 31st July 2007 and a further affidavit dated 24th September 2007 in opposition to the petition. Ms Mwihaki argued the Petition on behalf of the 1st Respondent and filed submissions on 9th November 2007.

The 2nd Respondent also filed a replying affidavit dated 29th June 2007 and a further affidavit dated

19th July 2007. Professor Muigai urged the petition on behalf of the 2nd Respondent and filed skeleton arguments on 23rd October 2007.

Mr. Atanda appearing for the Hon. The Attorney General did not file any papers in response to the Application but associated himself with submissions made on behalf of the 1st and 2nd Respondent.

A factual background of this matter is set out in the affidavit of the petitioner and the Respondent. The Applicant deponed that he is a medical practitioner specialized in anaesthetics which he has practiced for 19 years. That on 6th September, he was asked to prepare a patient Irene Ng'ang'a for surgery to extract a tooth by Dr. Owino. When preparing the patient for general anaesthesia, the patient unexpectedly, severely and adversely reacted to the anaesthetic agents which led to cardiac arrest and serious brain damage. About April –May 2004, he and the late Dr. Owino were asked to appear before the 1st Respondent for a preliminary inquiry. He did appear and never heard from the Committee again till 8th May 2007 when he received a notice to appear before the Board (JS 1). His lawyers received a copy of the Report of the Preliminary Inquiry Committee on 10th June 2007 (JS 2) which indicates that the 2nd Respondent made her complaint to the Board on 21st March 2003. It is the Applicants contention that upon receipt of the complaint the 1st Respondent had a statutory duty under S. 20 of the Medical Practitioners & Dentists Act, Cap 253 Laws of Kenya, to act expeditiously and within reasonable time. That it has taken 6 years from the date of the incident to the notification of an inquiry on 8th May 2007 and the applicant is apprehensive that he will not get a fair trial due to the delay since some of the witnesses have passed away and some of the witnesses' whereabouts are unknown. Mr. Gachuhi also submitted that since the petitioner appeared before the committee in 2003, the Respondent has not shown what steps were taken from that date to the time the Petitioner was notified of the inquiry in May 2007. That there are no statements from any of the people intended to be called as witnesses and no minutes of the Preliminary Inquiry Committee (PIC), that the affidavits of the Respondent have not specified how this particular complainant was handled. That the onus is on the Respondent to demonstrate that there was no undue delay in holding the inquiry.

Counsel relied on the case of **GERALD MACHARIA GITHUKU V REP CA 119/04** where the court considered Sections 72 and 77 of the Constitution and the court held that its duty is to enforce the law and in this case it will not look at the merits of the charge which the petitioner faces but give due regard to S. 77 of the constitution. He said that in balancing rights of the Applicant against the public it should be noted that the rights of the 2nd Respondent have been taken care of in the civil suit that was filed before the civil court.

In his affidavit, Prof. Kyambi deponed that he is the chairman of the 1st Respondent. That the Board comprises Medical and Dental Practitioners and that the Board has various functions which include registration, licensing of all practitioners and private institutions, inspection of the institutions, co-ordinating activities that relate to professional development for all practitioners and determining complaints lodged against practitioners or institutions. That since 1997 they have handled over 500 complaints of which only 5 have warranted the setting up of tribunal. That from the petitioner's own account of what happened upon the patient being given anaesthesia, it is a matter that needs to be inquired in to in order to prevent future incidents. He said that procedure by the Board is that once one is interviewed by the PIC. and the committee finds no merit in the complaint, it is dismissed outright and the party is advised of it forthwith. That since the petitioner received no such advice, he knew that the complaint was outstanding and that taking into account the operations of the Board, the inquiry proceedings were brought within reasonable time. That the petitioner has brought this petition prematurely to avoid the inquiry.

Ms Mwihi observed that the petitioner is vague in his affidavit in that he has not stated which witnesses these are that cannot be traced. That even if Dr. Owino is deceased, he was not an anaesthetist and that besides there are documents that were written by the said doctor which can be considered.

Counsel submitted that the inquiry is for the public good and the profession need to know what

happened because it was not a normal occurrence for a patient to react the way Irene did under the circumstances.

In opposing the petition, Mary Goretti Ng'ang'a the next friend of Irene Ng'ang'a deponed that she took Irene to Dr. Owino on 5th September 2001 for a dental check up. The Dr. booked her for surgery on 6th September 2001 at Nairobi Hospital where Dr. Sonigra was to attend the patient as the anaesthetist. After Dr. Sonigra administered the drugs on her, she suffered a cardiac arrest and cerebral damage as a result of which she was hospitalized in High Dependency Unit (HDU) and general ward for 3 months. Since then Irene is not able to talk, unable to go about the usual duties, is learning how to walk and requires 24 hours care. That on 5th February 2003 a demand was sent to the petitioner and liability was denied (MG 1 & 2). The 2nd Respondent made a complaint to the Medical Practitioners and Dentists Board for negligence and breach of duty (MG 3) and the 2nd Respondent filed HCC 387/03. That the proceedings before the Board were commenced within a reasonable time as the committee had to ensure that all evidence on medical reports are put together and considered before a finding could be made on whether the inquiry is merited or not. That Dr. Amayo made a medical report as to the Irene's condition and it is dated 2nd November 2005 (MG 1) and the same condition still persists. That Irene suffered physical, social, emotional deficit and requires assistance in all her activities.

Professor Muigai, Counsel for the 2nd Respondent submitted that the issues raised in the petition are an afterthought and that the constitutional provisions are cited for an unjust cause considering that this goes to the question of the life of a young person who was rendered a vegetable after the Applicant administered anaesthesia and the competence of the Petitioner is in question. He also submitted that Section 77 (9) of the Constitution is not contested in that the Tribunal is established by law, that it is independent and impartial or that the hearing before the tribunal will not be fair. That the only question is what is a reasonable time within which a tribunal can hear and determine a matter before it. He urged that a reasonable time under S.77 (1) of the Constitution cannot be the same as that under S.77 (9). This is because under S.77(1) a person is charged with a criminal case and may be in remand or coming up for mention every 2 weeks and then lives are disrupted and their very lives might be jeopardized.

That under S.77 (9) it is a totally different process where the tribunal will be trying to establish the extent of civil rights and obligations and that reasonable time in this case is subject to availability of personnel for the tribunal to carry out their mandate.

Counsel further urged that the constitutional provisions can not be read in isolation and they do not speak with one voice but several and it is for the court to reconcile them. That under S.70 of the Constitution, the petitioner has the right to a fair hearing within a reasonable time and the Board has the right to protect public interest whereas the 2nd Respondent has the right to protection of her private rights. That it would be unfair to dispose of this matter on a technical point. That even if the Applicant has other remedies the only way that the dispute can be addressed substantively is through the Board, just like filing of a civil suit is no bar to criminal charges being preferred. That the tribunal is a process established by law and there is no material to warrant the interference with that process.

I have considered the petition, the affidavits both in support and opposition, submission by all Counsel the arguments filed on behalf of all the parties. The undisputed facts leading to this dispute are:-

1. That the petitioner administered anaesthesia to Irene Ng'ang'a in preparation for the extraction of her 3rd molar tooth when the said Irene Ng'ang'a unexpectedly severely and adversely reacted to anaesthetic agents leading to cardiac arrest and serious brain damage. The dental surgery was to be performed by Dr. Owino, now deceased;
2. A complaint was lodged to the 1st Respondent by the 2nd Respondent by letter dated 21st March 2003 and after that, the petitioner was asked to appear before a Preliminary Inquiry Committee (PIC) established by the 1st Respondent;

3. On 8th May 2007, the 1st Respondent served a notice on the petitioner to appear before the Board of the 1st Respondent to answer several charges contained in the said notice 'JS 1.

4. Prior to that, on 29th April 2003, the 2nd Respondent filed HCC 387/03 seeking general damages, special damages and costs for the injuries she suffered as a result of alleged petitioner's negligence when he administered drugs on her that have caused her permanent injuries i.e. complete loss of memory, severe irreversible change of personality and severe psychological trauma. It is in that civil case that the court will determine whether or not the petitioner was negligent in the manner that he handled Irene in administering anaesthesia that resulted in her injury.

In the instant case, the petitioner is apprehensive that he will not get a fair hearing before the 1st Respondent Board by reason of the length of time taken between the occurrence of the incident, the complaint made, investigations and the decision made on 8th May 2007. I must clarify that the mandate of this court is not to look into the merits of the decision of 8th May 2007 to conduct an enquiry but to establish whether or not the petitioner's right to a fair hearing will be infringed by the delay in the conduct of the said inquiry.

The 1st Respondent is a statutory body constituted under S.4 of the Medical Practitioners and Dentists Act Cap 253 Laws of Kenya. Complaints of misconduct received by the 1st Respondent are referred to the Preliminary Inquiry Committee (PIC) which is set up under Rule 3 of the Medical Practitioners and Dentists (Disciplinary Proceedings) Procedure Rules. Rule 4 prescribes the functions of the PIC to be; to receive and review complaints against Medical Practitioners and Dentists, and to determine and report to the Board whether an inquiry should be held, pursuant to Section 20 of the Act, in respect of the subject.

The PIC after considering the complaint may reject the complaint if it has no merit and inform the claimant of that decision forthwith, or if the PIC is of the opinion that the complaint warrants reference to the Board, it will refer it to the Board with its findings and recommendations. In the instant case, Mary Gorretti the mother of Irene Ng'ang'a made a complaint to the Board on 21st March 2003, (MG 3), 1 ½ years after the incident. The PIC Report made pursuant to the complaint was prepared in March 2007, 4 years after the complaint and the petitioner was then notified of the enquiry on 8th May 2007, almost 6 years after the incident. The rules relating to these proceedings do not indicate within what time the complainant should be made or within what time the PIC should prepare and present its report to the Board. The question is whether the time taken by the 2nd Respondent to make the report to the Board is unreasonable and whether the time taken by the PIC to prepare its report that led to the inquiry is also unreasonable and therefore infringes on the petitioners right to fair hearing.

S. 77 (9) of the Constitution which is alleged to be likely to be infringed if the inquiry proceeds to hearing reads as follows:

“S. 77(9) A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.”

It is apparent that the petitioner is not complaining about the incompetence or composition of the Board. His complaint relates to the 2nd part of that provision, (S.77 (9)) relating to **“a fair hearing within a reasonable time.”**

So, what is a reasonable time? The Constitution does not define what a reasonable time means. S. 58 of the Interpretation and General Provisions Act Cap 2 Laws of Kenya provides that where no time is prescribed or allowed within which anything shall be done, such thing shall be done without unreasonable delay, and or often as due occasion arises.

There being no definition of what a reasonable time I think it is left to the courts discretion to consider what a reasonable time would entail considering the particular circumstances of each individual case. That is why the Court of Appeal in **KAZUNGU KASIWA MKUNZO V REP C AP 239/04**, said that the constitution does not set out what ‘**reasonable time**’ is because it has to take into account several factors in determining what a reasonable time is and each case should be considered on its peculiar facts. In the instant case, the court will have to consider the length of the delay, the explanation given by the Board to justify the delay and the special circumstances of the case if any and this being a public law matter, the effect it will have on the public.

In the case of **GITHUNGURI V R(1986) KLR 165**, where there had been a delay of 4 years in bringing the charges against the Applicant, the court considered the fact that the Attorney General had earlier on decided not to prosecute the matter and in absence of fresh evidence, the court found the delay to be a violation of the Applicant’s rights. In this case, the Board has explained in the affidavit of Professor Kyambi, that the Board being the only body charged with registration, licencing of all Practitioners, determining complaints and coordinating all actions relating to the continuous professional development in that field, have heavy responsibilities since the members are involved in many other engagements. Prof Kyambi also said that they have received 500 complains since 1997 of which only 5 have warranted the establishment of a tribunal.

Apart from the explanation that the members of the Board are heavily burdened with their other responsibilities, I find that the explanation by Professor Kyambi does not bring out clearly what the PIC undertook for the period of 4 years from the time the complainant was made on 21st March 2003 to March 2007. The report of the PIC was exhibited as JS 2 but the PIC should have gone further to explain why it took 4 years to come up with that report.

On the other hand, from the date of the incident on 6th September 2001, the complaint was not made to the Board until 21st March 2003 about 1 ½ years later. The only possible explanation is the fact that the Irene was seriously injured, was in ICU for 3 months and discharged for homecare. It is notable that Irene has improved but cannot manage many things on her own and needed care. The circumstances of Irene had suddenly changed and even the person taking care had to adapt. Under those circumstances, it is my view that the period of 1 ½ years is not unreasonable delay.

Even if the delay of 6 years was not justified, will the applicant’s rights to a fair hearing be prejudiced by that delay? As properly argued by the Respondents, the petitioners’ rights cannot be considered in isolation. S.70 of the constitution which is the foundation of Chapter V of the Constitution which generally provides for the rights guaranteed by the Constitution, clearly states that the said rights are subject to the rights of others and the public interest.

The Section reads:

“S 70 whereas every person in Kenya is entitled to the fundamental rights and freedom of the individual, that is to say, the right, whatever his race, tribe, place or origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following-

- (a) life, liberty.....
- (b)
- (c)

The provision of this Chapter shall have the effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”

The fundamental rights guaranteed under Chapter V are not absolute. They are subject to limitations provided for under S.70 and the various provisions under the other provisions, Ss. 71-83 of the Constitution. In the instant case, what happened to Irene Ng'ang'a was not a normal occurrence. She suffered serious injuries that have rendered her a vegetable. Would it not be proper that a Board which is well versed in that field do enquire into what happened when the petitioner administered anaesthesia to Irene? In the PIC report they have raised several issues that need to be considered at the inquiry i.e.

“(i) whether the conduct of General anesthesia led to a hypoxia episode that caused cardiac arrest from which the patient was resuscitated;

(ii) whether the patient's current condition clearly arose from the anaesthetic intervention that went wrong;

(iii) whether Dr. Sonigra's pre-operative assessment of the patient and the decisions made as to the anaesthetic management required in the circumstances obtaining at the time, were made with reasonable care and skill;

(iv) Whether Dr. Sonigra's assessment and anaesthetic management of the patient after she developed complications were performed with reasonable care and skill;

(v) whether Dr. Sonigra's performance, in the circumstances, amounted to serious misconduct judged according to the written and unwritten rules that govern the medical profession;

(vi) whether Dr. Sonigra is guilty of infamous or disgraceful conduct in a professional respect.”

The listed issues can only be understood and dealt with by a specialist in the field of medical practitioners. All these issues are for that consideration by the Board and in the long run, are not only for the benefit of Irene Ng'ang'a but for the public at large. Whatever went wrong when anaesthesia was administered, may help to avert a repeat of the same or if the Petitioner made a mistake, and the same is discovered, another life may be saved as a result. It is of great public interest that what happened to Irene is unearthed and it can only be done by the Tribunal set up under Cap 253 which is composed of experts in that field. And I would find that despite some delay on the part of the Board, what occurred on 6th March 2001 cannot be swept under the carpet. It is of great public importance and the rights of Dr. Sonigra cannot override those of the public at large. This case is distinguishable from the case of **GERALD MACHARIA GITHUKU V R CR AP 119/04** in which the appellants convicted of robbery with violence contrary to Section 296(2) Criminal Procedure Code alleged Breach of their rights under S. 72 (3) in the Court of appeal. The court found that although the delay of 3 days in bringing the appellant to court 17 days after his arrest instead of 14 days, in accordance with S. 72(3) of the Constitution, the delay did not give rise to any substantial prejudice to the appellant, The court considered that the failure to abide by S.72 (3) should not be disregarded and the court held that the prosecution had failed to satisfy that the appellants were brought to court within a reasonable time. Unlike the instant case, that case dealt with S. 72 (3) of the Constitution which clearly stipulates the time for bringing of an accused person before the court, to be 14 days but in this case, there is no specific time stipulated. That case is also different from the instant in that the accused had been denied his right to liberty through detention in custody for 8 months. The facts of this case are also different from the **GITHUNGURI CASE**. I would hold that in the special circumstances of this case, the delay of 6 years is not unreasonable and will not infringe on the Applicant's rights to fair hearing. The fact that Dr Owino is deceased should not be a bar to the hearing. The petitioner did not name or refer to any other witnesses that cannot be found due to the delay. The Tribunal consists of people with great expertise and they will use that expertise in making a judgment as to whether the evidence that will be adduced will be sufficient to arrive at a fair decision. If they arrive at a decision that the Petitioner does not agree with, the Petitioner has a right of appeal to the High Court.

Lastly, is the HCC 367/03 a bar to these proceedings? I say no. The case in the civil courts is in a totally different jurisdiction from the matter before the Board. In HCC 367/03 the plaintiff Irene Nga'ang'a will seek to determine her civil rights as to whether the Applicant herein was negligent in

discharging his duties and claims damages for injuries suffered. The matter before the Board is an inquiry into the conduct of the petitioner and it is the Board which will take the necessary steps against the Petitioner if the allegations against him for the injury to Irene. The Inquiry by the PIC will seek to protect the public unlike the suit filed by the 2nd respondent (HCC 367/03) which is a private law issue personal to Irene.

The 2nd Respondent had the right to pursue both remedies, though the 2nd Respondent would not directly benefit from the proceedings before the Board save for buttressing her case in the civil court, if the petitioner is found guilty of misconduct by the tribunal.

The upshot is that there is no merit in the petition. A delay of 6 years in this matter cannot override the public interest at stake. And balancing both the Petitioner's and the public interest, it is proper that the 1st Respondent do proceed with the inquiry. The Petition is hereby dismissed with each party bearing their own costs.

Dated and delivered this 14th day of March 2008.

R.P.V. WENDOH

JUDGE

Mr. Gachuhi for the Petitioner

Ms. Mwihaki for 1st Respondent

Mr. Mugere holding brief for Prof. Muigai for the 2nd Respondent

Mr. Atenda for the 3rd Respondent

Daniel: Court Clerk