



**Independent Medico-Legal Unit (IMLU) & another v Attorney General & 3 others  
(Petition 01 of 2019) [2024] KEHC 445 (KLR) (16 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 445 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
PETITION 01 OF 2019  
SN MUTUKU, J  
JANUARY 16, 2024**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL  
RIGHTS AND FREEDOMS UNDER ARTICLES 2, 3, 10, 19, 20, 21, 22, 23,  
25, 27, 28, 29, 48,49, 51, 129 AND 131 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTION 231 OF THE PENAL CODE AND IN THE  
MATTER OF ARTICLES 95 OF THE NATIONAL POLICE SERVICE ACT**

**BETWEEN**

**INDEPENDENT MEDICO-LEGAL UNIT (IMLU) ..... 1<sup>ST</sup> PETITIONER  
JOYCE ANDEYO ..... 2<sup>ND</sup> PETITIONER**

**AND**

**THE HON ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT  
THE CABINET SECRETARY, MINISTRY OF INTERIOR AND CO-  
ORDINATION OF NATIONAL GOVERNMENT ..... 2<sup>ND</sup> RESPONDENT  
THE INSPECTOR GENERAL OF THE NATIONAL POLICE  
SERVICE ..... 3<sup>RD</sup> RESPONDENT  
THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Petition**

1. By an amended Petition dated 4<sup>th</sup> February 2019, based on various provisions of [the Constitution](#) as shown on the face of the Petition, the Petitioners are seeking the following reliefs:
  - a. A declaration that this is a public interest case.



- b. A declaration that the Petitioners have all rights and guarantees as provided for under *the Constitution*, and as specially referenced herein.
- c. A declaration that the 2<sup>nd</sup> Petitioner is entitled to reparations and/or just compensation.
- d. An order for reparation, including compensation for pecuniary and non-pecuniary damages or a combination of both, under Article 23 of *the Constitution*.
- e. An order for rehabilitation of the victim herein.
- f. A declaration that the Respondents have failed and or abdicated their duty to protect the 2<sup>nd</sup> Petitioner.
- g. A declaration that the Respondents have violated the 2<sup>nd</sup> Petitioner's human rights, in that they have failed to adequately and or effectively record, investigate, prosecute and/or remedy a well-documented instance of assault under the Penal Code and torture under the *National Police Service Act*.
- h. An order and directions or both in relation to the institution and conduct of the prosecution of the officers of the 3<sup>rd</sup> Respondent herein who perpetrated the physical violence.
- i. A declaration that the Respondents have jointly and/or severally acted, or failed to act, in such a way as to contravene their constitutional, statutory and international obligations.
- j. An order that the state take immediate steps to adopt measures as may be necessary to ensure the prevention, punishment and eradication of all forms of institutionalized violence by public officers and especially Police Officers by advancing trainings for all police officers and enhancing punishment for police officers who carry out such acts.
- k. Where appropriate, sanctions and remedies be provided for under the Police Act.
- l. Where appropriate, sanction and remedies be provided for under the Penal Code.
- m. Costs.
- n. Such other Orders as this Honourable Court shall deem just and expedient to grant.

#### **Facts of the case**

2. The facts of the case reveal that the 2<sup>nd</sup> Petitioner was assaulted by the police officers from Kandisi Police Post on 19<sup>th</sup> August 2016 after police visited her place of work at Rimpa in Ongata Rongai. The 2<sup>nd</sup> Petitioner had a long-standing business-related rivalry with one Nekesa. The latter was suspected to have contacted police officers from Kandisi Police Post who arrested the 2<sup>nd</sup> Petitioner on that date and viciously assaulted her and fractured her left hand and caused a crack on the right kidney.
3. The Petitioners claim that the matter never investigated, and no report has been received since the time the 2<sup>nd</sup> Petitioner was informed that the matter would be forwarded to Kajiado for further action. They claim that the actions of the police amount to blatant violation of fundamental rights under *the Constitution* of Kenya.

#### **Violations of the Constitution**

4. The claim that to the extent that the Government of Kenya, Kenya State Organs and Kenyan State officials were responsible through acts or omissions, directly and indirectly, for the harm occasioned



on the 2<sup>nd</sup> Respondent, the following provisions of the international obligations, to which Kenya is a State Party, have been violated:

- i. Articles 1, 12, 18, 19, 25 and 26 of the International Convention on Civil and Political Rights.
  - ii. Articles 3(2), 5, 9, 12, and 14 of the African Charter on Human and People's Rights.
  - iii. Articles 1, 5, 7, and 8 of the Universal Declaration of Human Rights.
5. To the extent that the Government of Kenya, Kenya State Organs and Kenya State Officers were responsible for upholding and implementing the provisions of the Bill of Rights and their acts or omissions, directly or indirectly, were responsible for numerous acts of violence and human rights abuses, Articles 19, 21, 25, 27, 28, 29 and 31 of *the Constitution* were violated.
6. To the extent that the Government of Kenya, State Organs and State Officers were responsible for creating, managing, and administering police stations all over the country and particularly the Kandisi Police Post and its area of jurisdiction and officers stationed in that Police Post, through their acts or omissions, directly or indirectly, were the sites of numerous acts of violence and human rights abuses, the following provisions of the International obligations to which Kenya is a State Party were violated:
- i. Articles 1, 12, 18, 19, 25 and 26 of the International Convention on Civil and Political Rights.
  - ii. Articles 3(2), 5, 9, 12, and 14 of the African Charter on Human and People's Rights.
  - iii. Articles 1, 5, 7, and 8 of the Universal Declaration of Human Rights.
  - iv. To the extent that the Government of Kenya, Kenya State Organs and Kenya State Officers were responsible for creating managing and administering police stations all over the country and particularly Kandisi Police Post and its area of jurisdiction. Through their acts or omissions, directly or indirectly, were the sites of numerous acts of violence and human rights abuses, sections 14, 14A, and 15 of the Police Act and sections 231 of the Penal Code were violated.
  - v. To the extent that the Government of Kenya, Kenya State Organs and Kenya State Officers have not provided any, or any adequate compensation for the acts and/or omissions of human right abuses, Articles 23, 27, 28, and 29 of *the Constitution* have been violated.
  - vi. To the extent the Government of Kenya, Kenya State Organs and Kenya State Officers continue to be responsible, directly or indirectly for the harms and injuries suffered by the 2<sup>nd</sup> Petitioner and her family in that the 2<sup>nd</sup> Petitioner has lost her human dignity, is permanently maimed and will never regain some semblance of normalcy, Article 21 of *the Constitution* has been violated.

## Responses

7. The Respondents were served with the amended petition. The 4<sup>th</sup> Respondent responded to the petition through Grounds of Opposition dated 25<sup>th</sup> February 2020. The 4<sup>th</sup> Respondent stated that it is an independent office under Article 157 of *the Constitution* and is not under the direction of anyone or any office. That the 3<sup>rd</sup> Respondent is also an independent office under Article 243 of *the Constitution* with its own command. That the 4<sup>th</sup> Respondent's powers over the 3<sup>rd</sup> Respondent is limited as per the provisions of Article 157 (4) of *the Constitution* and has no control over police operations and could not practically and legally prevent the alleged illegal actions by the officers of the 3<sup>rd</sup> Respondent. That the 4<sup>th</sup> Respondent has not taken any action or made any decision under Article 157 of *the Constitution* capable of being challenged in court and has not violated any right of the Petitioners and that the 4<sup>th</sup> Respondent has discharged its duty under Article 157 (4) of *the Constitution*.



8. The 4<sup>th</sup> Respondent asked the court to dismiss the Petition against it.
9. No other Respondent filed any response to the Petition.

### **Submissions**

10. Other than the Petitioners, no other party has submitted on this matter. On 5<sup>th</sup> July 2022, I took oral submissions of Mr. Gichuki, learned counsel, for the Petitioners. Mr. Gichuki reiterated the facts contained in the amended petition to the effect that three police officers, two men and one woman, arrested the 2<sup>nd</sup> Petitioner on 19<sup>th</sup> August 2016 from her place of work at Rimpa in Ongata Rongai without disclosing the reason of their actions. That the officers dragged the 2<sup>nd</sup> Petitioner to the police motor vehicle and continued assaulting her. That she sustained injuries as a result of the assault. That she was taken to the Police Post from where she was taken to hospital, still in the hands of the police officers. That her statement was later taken and was called later to attend an identification parade but this was done because the police officers refused to participate in the identification parade.
11. Counsel named two of the officers involved in assaulting her as Makhoha and King'ori and stated that this matter was never referred to Kajjado for investigations and that no action has been taken to date.
12. I have considered the oral and written submissions together. Five issues have been raised for determination as follows:

### **Whether this is a public interest litigation**

13. Counsel submitted on whether this matter is a public interest litigation in the sense that it impacts beyond the 2<sup>nd</sup> Petitioner. He cited Articles 22 of *the Constitution* that 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 threatened and that such an action can be instituted by the persons or entities named under Article 22 (2) of *the Constitution*. He also cited Article 258 of *the Constitution* on similar provisions and submitted that the petitioners hold the view that they both have locus standi in this matter either as primary or secondary victim.

### **Whether the petitioners' rights and guarantees as provided under *the Constitution*, and as specifically referenced in the petition, were violated.**

14. On whether the 2<sup>nd</sup> Petitioner's rights have been violated, counsel cited Articles 19, 21, 22, 28, 29 and 40 of *the Constitution* as having been violated as well as relevant articles in International Instruments like including International Covenant on Civil and Political Rights, Universal Declaration of Human Rights, and African Charter on Human and Peoples' Rights, among others. He submitted that the 2<sup>nd</sup> Petitioner suffered in the hands of rogue police officers resulting in injuries that have been documented through a medical report that was filed in court.

### **Whether the Respondents have jointly and/or severally acted or failed to act in such a way as to contravene their constitutional statutory and international obligations.**

15. It was submitted that Article 73 (1) (a) of *the Constitution* provides that any authority assigned to a public officer is a public trust and Article 129 of *the Constitution* provides that executive authority derives from the people and shall be exercised in accordance with *the Constitution* in a manner consistent with the principles of service to the people of Kenya and to their well-being and benefit and that despite making reports and complaints to the relevant statutory offices, no investigations have been carried out as the law provides.



16. It was submitted that Article 232 of *the Constitution* provides for values and principles of public service, among them being high standards of professional ethics, responses, prompt, effective, impartial and equitable provision of services and accountability of administrative acts.

**Whether a court can make an order for reparation, including compensation for pecuniary or non-pecuniary damages or a combination of both under Article 23 of *the Constitution*.**

17. On this issue it was submitted in the positive that a court can make an order for reparation including compensation. It was submitted that the 2<sup>nd</sup> Petitioner sustained physical injuries as follows:
- i. Slightly displaced mid shaft fracture of the ulnar and radius of the left forearm.
  - ii. Deformity of the left arm.
  - iii. Soft tissue injury to the abdomen and right knee.
18. For reparation/damages, the Petitioners are asking for Kshs 500,000 being general damages for pain and suffering. They relied on Florence Amunga Omukanda & Francis Khashiyi Ivayo v. the Hon. Attorney General & 2 others [2016] eKLR.

**Analysis and Determination**

19. The record of the court shows that the Petition was served on the 1<sup>st</sup> Respondent and 4<sup>th</sup> Respondent on 18<sup>th</sup> October 2019 and that service was acknowledged by stamping by the 1<sup>st</sup> and 4<sup>th</sup> Respondents. The 1<sup>st</sup> Respondent, who, by virtue of Article 156 (4) of *the Constitution*, is the legal representative of the National Government, did not file responses to the Petition on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, nor participate in the matter despite evidence showing that there has been service of the process.
20. The 4<sup>th</sup> respondent opposed the Petition by filing Grounds of Opposition as captured in this judgment.
21. In my considered view, the issues for determination by this court are as follows:
- i. Whether the principle in the Anarita Karimi Njeru case requiring constitutional petitions be pleaded with reasonable precision was met.
  - ii. Whether the petitioner discharged the legal and evidential burden of proof required in a constitutional petition.
22. The central rule in constitutional petitions is that the Petitioner must plead his/her case with some degree of precision. This rule was pronounced by the Court in Anarita Karimi Njeru v. Republic [1979] eKLR where the Court stated as follows:

“..... we would, however, 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 his case) that he should set out with a degree of precision that of which he complains, the provisions said to be infringed and the manner they are alleged to be infringed.”



23. The “degree of precision” principle was reiterated in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR and also in *Communications of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR, where Supreme Court stated thus:
- “Although article 22(1) of *the Constitution* gives every person the right to initiate any pleadings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this article has to show the rights said to be infringed, as well as the basis of his/or her grievance. This principle emerges clearly from the High Court decision of *Anarita Karimi Njeru vs Republic* [1979] KLR 154; the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened and the manifestation of contravention or infringement such principles play a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”
24. The Petitioners have, from paragraph 39 to paragraph 44, listed the provisions of *the constitution* and the international legal instruments that have been infringed. The facts of this petition show that the 2<sup>nd</sup> Petitioner was arrested on 19<sup>th</sup> August 2016 at around 11.00am by police officers from Kandisi Police Post. Some of these officers have been named in the pleadings. She was subjected to physical assault causing her physical injuries.
25. The 2<sup>nd</sup> Petitioner is a citizen of this country who enjoys the assurances of Article 19 (3) (a) of *the Constitution* that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State, and I must add, are not granted by anyone. The rights and fundamental freedoms in the Bill of Rights, as guaranteed by our Constitution, are to be enjoyed by every person, to the greatest extent consistent with the nature of the right or fundamental freedom (Article 20 (2) of *the Constitution*). The same article, (20) (1), provides that the Bill of Rights applies to all law and binds all State organs and all persons.
26. The right to freedom from torture and cruel, inhuman or degrading treatment or punishment under Article 25 (a) is one of the rights that cannot be limited.
27. Article 28 guarantees every person inherent dignity and the right to have that dignity respected and protected and Article 29 provides that every person has the right to freedom and security of the person, which includes the right not to be—
- (a) deprived of freedom arbitrarily or without just cause.
  - (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58.
  - (c) subjected to any form of violence from either public or private sources.
  - (d) subjected to torture in any manner, whether physical or psychological.
  - (e) subjected to corporal punishment; or
  - (f) treated or punished in a cruel, inhuman, or degrading manner.
28. Kenya is a democratic state governed by the rule of law. It is the command of the law in this country that when any person is accused of committing a crime, those handling that arrested person must respect the rights of that person and act in accordance with Article 49 by informing that person promptly and in language that the person understands, of, inter alia, the reason for the arrest. It was the obligation of the police officers who arrested the 2<sup>nd</sup> Petitioner, for whatever reason, to have followed due process



by adhering to the law by informing her of the reason for the arrest; by not beating her or in any other manner subjecting her to any form of torture; by taking her to the police station or police post and booking her in for the offence allegedly committed; by commencing investigations and presenting her before the court to face the charges.

29. This is not what happened, going by the evidence of the Petitioners. There is evidence in the form of a medical report showing that the 2<sup>nd</sup> Petitioner was assaulted. She sustained fractures on her left forearm affecting the radius and ulnar and injuries on other parts of the body. The medical report dated 5<sup>th</sup> June 2018 shows that the 2<sup>nd</sup> Petitioner suffered deformity of the left forearm with restricted rotation movements, and tenderness of movement of the right knee and a healed scar on the right lumbar region of the abdomen.
30. After due consideration of the evidence presented in court, I am persuaded that the Petitioners have pleaded their case with precision and have demonstrated the rights said to have been infringed and the basis for their grievances. I have also noted the injuries sustained by the 2<sup>nd</sup> Petitioner. I have noted that the Respondents, especially the 3<sup>rd</sup> Respondent, through his officers, did not take action on investigating the matter or even forwarding it to the County Office for investigations even it was becoming difficult for Kandisi Police Post to handle the matter.
31. As to whether the Respondents are jointly and severally liable, I have shown in this judgment that other than the 4<sup>th</sup> Respondent, the remaining respondents did not contest this Petition. Is the 4<sup>th</sup> Respondent liable for actions of the officers of the 3<sup>rd</sup> Respondents?
32. The 4<sup>th</sup> Respondent is a creature of *the Constitution* under Article 157(1). His/her duties are specified under Article 157(6) as follows:

The Director of Public Prosecutions shall exercise State powers of prosecution and may—

- (a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.
- (b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
- (c) subject to clauses (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

33. The 4<sup>th</sup> Respondent is at the tail end of the process after arrest and investigations are completed. He/she then can act as provided under Article 157(6) of *the Constitution*. The officers of the 3<sup>rd</sup> Respondent do not get instructions from the 4<sup>th</sup> Respondent. The only link between the 3<sup>rd</sup> and 4<sup>th</sup> Respondents is found under Article 157(4) of *the Constitution* to the effect that:

The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.

34. The Petitioners have informed this court that no action was taken in respect to this matter and that the matter was not forwarded to Kajjido as promised. There is no evidence, from the Petitioners or the



- other Respondents, that the 4<sup>th</sup> Respondent was informed of this matter and failed to act as provided under Article 157(4) above. There is no evidence from any party that the investigations were carried out and completed and the file handed over to the 4<sup>th</sup> Respondent who then failed to act.
35. To my mind therefore, liability, if any, of the 4<sup>th</sup> Respondent has not been demonstrated. There is no evidence connecting the 4<sup>th</sup> Respondent with this matter in terms of any action or omission on the part of the 4<sup>th</sup> Respondent. I agree with the 4<sup>th</sup> Respondent that the 4<sup>th</sup> Respondent did not take any action or make any decision under Article 157 of *the Constitution* capable of being challenged in court and has not violated any right of the Petitioners. Consequently, I will and do hereby dismiss the Petition against the 4<sup>th</sup> Respondent.
36. In respect of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, evidence shows that the officers from Kandisi Police Post were on duty. In Florence Amunga Omukanda & Francis Khashiyi Ivayo vs. The Hon. Attorney General & 2 others, [2016] eKLR, the Court held, inter alia, that:
- “.....we find that the shooting of the 2<sup>nd</sup> Petitioner was negligent, unlawful, illegal and with use of excessive force. The Respondents are therefore liable for the act of the said officer. We find that they violated the 2<sup>nd</sup> Petitioner’s right to human dignity, which though not expressly protected the repealed Constitution, is, as was held in Charles Murigu Murithii & 2 others v Attorney General [2015]eKLR, the foundation of all other rights and together with the right to life, forms the basis for the enjoyment of all other rights. We also find that the right to security of person was similarly violated.”
37. The above case emanated from the clashes that ensued after the 2007 elections and was based on the repealed Constitution. *The Constitution* 2010 guarantees protection of human dignity under Article 28 as follows:
- Every person has inherent dignity and the right to have that dignity respected and protected.
38. In the Florence Amunga case cited above, the Court (three judge bench) cited with approval Sengendo vs. Attorney General [1972] EA 140 where the Court held that:
- “Therefore it is held that the soldiers were acting in the course of duty when they attacked the plaintiff.....The act of the soldiers was clearly wanton, unlawful and unjustified one. An act may be done in the course of a servant’s employment so as to make his master liable even though it is done contrary to the orders of the master; and even if the servant is acting deliberately, wantonly, negligently or criminally or for his own benefit, nevertheless if what he did is merely a manner of carrying out what he was employed to carry out then his master is liable. In all these cases which the question arises as to whether a particular act is or is not done in the course of employment, it is a question of fact, a question of degree. In almost every case there is a room for a different opinion....Upon the facts of this case, the act of the soldiers in shooting at the plaintiff, although it was a wanton, unlawful and unjustified act, was nevertheless a manner in which they proceeded to carry out duties for which they were armed with rifles and posted at the place whether the attack took place.”
39. Although differences can be drawn between this case and the above cited authority in that the case involved shooting, the point this court is drawing out is the liability of the employer in cases where the employee or servant acts or omits to act in a criminal and illegal manner while on official duty.
40. The officers of the 3<sup>rd</sup> Respondents were on duty when they confronted the 2<sup>nd</sup> Petitioner, arrested and assaulted her. They indeed took her to the Police Post in furtherance of the arrest. She was taken to



hospital under police guard. For this reason I hold the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents liable for the actions and omissions of the officers of the 3<sup>rd</sup> Respondent.

41. I find for the Petitioners. I find that the 2<sup>nd</sup> Petitioner's rights have been violated as shown in this judgment. I allow the Petition against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and make the following orders:
- i. I award Kshs 3,000,000 (Kenya Shillings Three Million) as general damages for pain and suffering.
  - ii. I award Kshs 200,000 (Kenya Shillings Two Hundred Thousand) for rehabilitation of the 2<sup>nd</sup> Petitioner, and
  - iii. I award Kshs 1,000,000 (Kenya Shillings One Million) as exemplary damages.
  - iv. Costs and interest at court rates from the date of filing this Petition to date.
  - v. Further, I direct that the actions and or omissions of the officers of the 3<sup>rd</sup> Respondent in respect of this matter be investigated by Independent Police IPOA and appropriate action be taken to prosecute them.
42. Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 16TH DAY OF JANUARY 2024.**

**S. N. MUTUKU**

**JUDGE**

