



**Nyangau v Attorney General & 2 others (Constitutional Petition
E003 of 2021) [2024] KEHC 1256 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1256 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CONSTITUTIONAL PETITION E003 OF 2021**

JK SERGON, J

FEBRUARY 8, 2024

**IN THE MATTER OF SECTION 84 OF THE REPEALED CONSTITUTION (NOW
EQUIVALENT ARTICLE 23 (1) AND (3) OF THE CONSTITUTION OF KENYA, 2010)**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER SECTION 70 (A) AND ©, 71 AND 74 OF
THE REPEALED CONSTITUTION (NOW EQUIVALENT OF ARTICLE 21 (1),
26 (1) AND ARTICLE 29 © AND (D) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF SECTION 14 (1) OF THE POLICE ACT CHAPTER
84 OF THE LAWS OF KENYA (NOW EQUIVALENT OF SECTION
24 OF THE NATIONAL POLICE SERVICE ACT NO. 11A OF 2011**

BETWEEN

CHARLES MOMANYI NYANGAU PETITIONER

AND

THE HONOURABLE ATTORNEY GENERAL 1ST RESPONDENT

**THE MINISTER OF STATE FOR PROVINCIAL ADMINISTRATION AND
INTERNAL SECURITY (NOW CABINET SECRETARY FOR INTERIOR AND
COORDINATION OF NATIONAL GOVERNMENT) 2ND RESPONDENT**

**THE POLICE COMMISSIONER KENYA POLICE (NOW INSPECTOR
GENERAL OF POLICE) 3RD RESPONDENT**



RULING

1. The petitioner herein has moved to court by way of a petition dated 1st February, 2019 seeking the following reliefs;
 - (i) A declaration that the refusal and/or failure to undertake their constitutional and statutory duty to provide adequate security to avert the violence and loss to the petitioner was an unlawful violation of the fundamental rights and freedoms of the petitioners as protected and guaranteed under the constitution;
 - (ii) The 1st, 2nd and 3rd respondents be ordered to pay damages to the petitioners for the loss suffered for violation of their fundamental rights and freedoms as protected and guaranteed under the constitution;
 - (iii) The 1st, 2nd and 3rd respondents be ordered to pay special damages to the petitioner for the loss of his business stock, household goods, 2 motor vehicles, 2 television sets, a video deck, 8 sewing machines, household items and cash lost in the attack Kshs. 135,000/= ; and
 - (iv) Or that such other orders as this honourable court shall deem fit
2. A brief factual background to the petition is as follows; On 31st December, 2007 at Bondet Tea Estate in Kericho District (now Kericho County) within the former Rift Valley Province the petitioners were violently robbed of their properties, subjected to violence and the petitioner's wife raped by known assailants as a result of which their right to security of the person and life were violated and further that the said attacks occasioned loss of property, source of livelihood and human dignity to the petitioners.
3. The petitioner stated that there were several intelligence reports from the National Security Intelligence Service (NSIS) warning of the post-election violence in inter alia Kericho District between the Kipsigis Community and the Abagusii Community.
4. The petitioner faulted the 2nd and 3rd respondents for having negligently failed and/or refused to provide adequate security to avert the violence against the residents of Kericho and specifically the petitioners even after receiving such warning and intelligence reports of impending violence against the Abagusii people living in Kericho District by the Kipsigis.
5. As a result of the negligence, refusal and/or failure of the 2nd and 3rd respondents to provide adequate security to the Abagusii community in the district of which the petitioners faced apparent danger of violence by the Kipsigis people, the petitioners suffered loss, damage and injury to person and property and proceeded to particularize the loss occasioned by the negligence of the 2nd and 3rd respondents.
6. The petition is supported by the supporting affidavit of Charles Momanyi Nyangau the petitioner herein reiterated that on 31st December, 2007 at Bondet Tea Estate in Kericho within Rift Valley Province at around 9:00 pm his family was violently attacked, robbed of their properties, subjected to violence and his wife raped by known assailants as a result of which their right to security of the person and life violated during the post-election violence.
7. The petitioner stated that after the attack they made a report to the police on 4th January, 2008 at Kericho Police Station and were issued with an OB Number 4/4/1/2008, subsequently two of the perpetrators who participated in the attack upon being identified by the petitioner and his wife were charged at the Kericho Principal Magistrate's Court vide Criminal Case No. 66 of 2008, however, the perpetrators were acquitted on 29th July, 2009 under section 210 of the Civil Procedure Code.



8. The petitioner reiterated that even after the warning and prediction by the National Security Intelligence Service government agency mandated to identify threats against the state security, collect and analyze intelligence in these threats and advise the government accordingly the above notwithstanding, the 2nd and 3rd respondents abdicated its duty to him neglected, failed and/or refused to protect his right to life and freedom and security of the person as guaranteed under the constitution and as a result of the said abdication of their constitutional and statutory duty by the 2nd and 3rd respondents suffered loss of property, money, livelihood and human dignity as enumerated in his petition.
9. The 1st, 2nd and 3rd respondents filed grounds of opposition in response to the petitioner's petition dated 26th May, 2023 opposing the petition of the following grounds; the petition did not disclose a violation of the petitioner's fundamental rights and freedoms, the petition did not meet the threshold set out in Anarita Karimi Njeru v Republic, that the 2007/2008 post-election violence was spontaneous and the police did everything they could to contain the situation and further to this that the police did not have prior information on the possible attack of the petitioner, the petitioner had not demonstrated that the police failed to act on his complaint or to answer any distress plea made by him and in any event the Criminal Case No. 66 of 2009 emanating from the petitioner's complaint was duly investigated and prosecuted.
10. The 3rd Respondent filed a replying affidavit dated 21st November, 2023 which was sworn by Peter Mwanzo Nyaga a Commissioner of Police deployed in the Directorate of Operations, Kenya Police Service.
11. The 3rd Respondent maintained that the Service had discharged its constitutional and statutory mandate by recording the petitioner's report, conducting comprehensive investigations into the matter and arraigning the suspects in a court of law to be tried according to the law, the suspects were taken through a lawful court trial process *vide* a Criminal Case No. 66 of 2008 and subsequently acquitted of all the charges under section 210 of the Criminal Procedure Code on 29th July, 2009.
12. The 3rd Respondent stated that the petitioner was guilty of laches and faulted the petitioner for the inordinate delay in filing the instant petition and stated that were not in a position to avail all evidence in this matter as some of the documents had been destroyed pursuant to the Records Disposal Act, cap 14 Laws of Kenya and Chapter 59 of the Service Standing Orders on National Police Service Records furthermore the lower court proceedings and judgment were destroyed way before the instant petition was served upon them.
13. The 3rd Respondent stated that the Service did not abdicate its duty to protect the petitioner or any other person, notwithstanding the then prevailing demanding policing circumstances and that the police officers from Kericho and throughout the country did their best to respond to the spontaneous outbreak of unprecedented violence following the disputed 2007 elections including the circumstances that gave rise to the instant petition.
14. The 3rd Respondent contended that the instant petition is unmerited and ought to be dismissed with costs to the 3rd Respondent since the Petitioner has not demonstrated any particular violation of rights by the 3rd Respondent.
15. This court directed the parties to file written submissions and the respondents complied and filed joint submissions.
16. The Respondents maintained that the instant petition did not meet the threshold required for a constitutional petition as set out in the case of Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272. The Respondents faulted the petitioner for failing to set out with a degree of precision



- the complaint, specific provisions of the law alleged to have been infringed and cited the case of *Japheth Ododa Origa v Vice Chancellor University of Nairobi & 2 Others* [2018] eKLR in which the court stated as follows; “It is a principle in constitutional litigation that a party seeking reliefs through a constitutional petition on the basis of violation of the *constitution*, constitutional rights and fundamental freedoms, the petitioner must plead with a higher degree of precision; show constitutional or fundamental freedoms violated, the manner of violation, the Constitutional provision in question or violated and the jurisdictional basis for the litigation.”
17. The Respondents maintained that the police did their best to uphold their constitutional and statutory mandate to protect life and property particularly in the circumstances of the 2007 post-election violence despite falling short of the United Nations recommended police to population ratio of 1:1450. The Respondent cited the case of *Charles Murigu Murithii & 2 Others v Attorney General* [2015] eKLR whereby a three judge bench dismissed the petition under similar circumstances stated as follows; “for an applicant to succeed in a claim grounded on violation of constitutional rights to property owing to police failure to offer protection, the applicant must demonstrate that the acts complained of were directly perpetrated against him by the Police; that the police had placed the applicant in danger he would otherwise not have faced or that a special relationship existed between the applicant and the police on the basis of which police protection had been assured.”
 18. The Respondents contended that the petitioner lodged the complaint after the attack, upon which the police commenced investigations and the suspects arraigned in court and charged bide Kericho Criminal Case No. 66 of 2008, they were later acquitted.
 19. The Respondents faults the petitioner for the unexplained delay and laches in approaching the court, and in the absence of a cogent explanation for the delay, this court should dismiss the petition. They cited the case of *James Kanyita Nderitu v. Attorney General & Another*, Petition No. 180 of 2011 in which the court observed as follows; “Although there is no limitation period for filing proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under section 84 of the *constitution*, is entitled to consider whether there has been inordinate delay in lodging the claim. The Court is obliged to consider whether justice will be served by permitting a respondent, whether an individual or the State in any of its manifestations, should be vexed by an otherwise stale claim. Just as a petitioner is entitled to enforce its fundamental rights and freedoms, a respondent must have a reasonable expectation that such claims are prosecuted within a reasonable time.”
 20. The Respondents submitted the instant petition is defective and should be dismissed with costs.
 21. The Petitioner filed his submissions in which he contended that he was within the exceptions set out in *Charles Murithii’s case* (supra), hence the State’s responsibility was activated as the State had prior information that Kisii persons residing within Kericho District, and the property of such persons were at risk of being exposed to acts of violence and further that the Respondent’s prior knowledge of the risk of violence posed to the Petitioner and his property activated a special duty of care to the Petitioner.
 22. The Petitioner cited the case of Petition No. 132 of 2011 & 197 of 2012 (Consolidated) *Florence Amunga Omukanda & Another v Attorney General & 2 Others* (2016) eKLR where the court extensively discussed the positive and negative obligations of the State to provide security and thus uphold and preserve constitutional rights of the citizens. The Petitioner maintained that the State had violated its constitutional and statutory duty and therefore the Petitioner was entitled to the reliefs sought in the petition.
 23. I have considered the pleadings and submissions by the parties. I find that the sole issue for determination by this court is whether the petition meets the threshold for a constitutional petition, which answer is in the negative. In *Grays Jepkemoi Kiplagat v Zakayo Chepkoga Cheruiyot* [2021] eKLR



the court observed as follows; “It is indisputable that a constitutional petition to be sustainable as such must at a minimum satisfy a basic threshold. It must with some reasonable degree of precision identify the constitutional provisions that are alleged to have been violated or threatened to be violated and the manner of the violation and/or threatened violation. I do not suppose it is enough to merely cite constitutional provisions. There has to be some particulars of the alleged infringements to enable the respondents to be able to respond to and/or answer to the allegations or complaints. ”

24. I concur with the respondents who submitted that the 2007/2008 post-election violence was spontaneous and the police did everything they could to contain the situation furthermore the police did not have prior information on the possible attack of the petitioner, the petitioner had not demonstrated that the police failed to act on his complaint or to answer any distress plea made by the petitioner. In any event the 3rd Respondent conducted comprehensive investigations into the attack on the petitioner’s property on 31st December, 2007 and arraigned the suspects in a court of law. The suspects were taken through a lawful court trial process *vide* a Criminal Case No. 66 of 2008 and subsequently acquitted of all the charges under section 210 of the *Criminal Procedure Code* on 29th July, 2009.
25. I have considered the case of *Charles Murigu Murithii & 2 Others v Attorney General* [2015] eKLR which was cited by the respondents, whereby a three judge bench dismissed the petition under similar circumstances and stated as follows; “for an applicant to succeed in a claim grounded on violation of constitutional rights to property owing to police failure to offer protection, the applicant must demonstrate that the acts complained of were directly perpetrated against him by the Police; that the police had placed the applicant in danger he would otherwise not have faced or that a special relationship existed between the applicant and the police on the basis of which police protection had been assured.”
26. In the premises, I am not convinced that there was no violation and/or infringement of any constitutional provisions under the Bill of Rights to justify the petitioner to invoke the constitutional jurisdiction of this Court. The instant constitutional petition is not sustainable and constitutes an abuse of the process of the Court and it is accordingly dismissed with no order as to costs.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 8TH DAY OF FEBRUARY, 2024.

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J.K. SERGON

JUDGE

In the presence of:

C/Assistant – Rutoh

Kiarie Mungai for the Petitioner

No Appearance for the Respondent

