



**Kainga v Mukhone & 2 others (Constitutional Petition
16 of 2019) [2024] KEHC 4485 (KLR) (2 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4485 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CONSTITUTIONAL PETITION 16 OF 2019**

RE ABURILI, J

APRIL 2, 2024

BETWEEN

AMBROSE ONYANGO KAINGA PETITIONER

AND

INSPECTOR WEKESA ERICK MUKHONE 1ST RESPONDENT

THE KENYA NATIONAL POLICE SERVICE 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. The facts of this petition are that the petitioner, Ambrose Onyango Kainga was a lawful passenger aboard a motor vehicle along Kendu Bay – Katito road at Pap Onditi area when the events forming the subject of this petition occurred on or about the 6th March 2015. On that fateful day, the petitioner avers that when they reached a police road block at Pap Onditi area, there was a misunderstanding between officers manning the road block and the driver of the motor vehicle registration No. KCB 640L, a Toyota Chopper, which the petitioner had boarded and in the process of disagreement, the driver tried to turn the vehicle back upon which the police officers used excessive force and shot live bullets targeting the motor vehicle which the petitioner had boarded and as a result, the petitioner sustained serious injuries on his right leg ankle.
2. The petitioner therefore filed this petition on the 23rd July 2019, seeking compensation for the injuries sustained and he alleges violation of his constitutional rights under Chapter 4 of *the Constitution*.
3. The petition was lodged against the 1st respondent in his personal capacity, the Kenya National Police Service who are the 1st respondent’s employer and the Attorney General in his capacity as the legal representative of the Government in civil matters pursuant to Article 156 of *the Constitution*.



4. The petitioner seeks the following orders against the Respondents:
 - a. That the Honourable Court do declare that the petitioner's rights under Chapter 4 of *the Constitution* was deliberately and grossly violated.
 - b. That the Honourable Court do award the petitioner compensation commensurate with the injuries that was deliberately inflicted on the petitioner.
 - c. That the Honourable court be pleased to order that the petitioner be paid for future medical treatment.
 - d. Interest on (a) and (b) above and costs of the petition.
5. In response, the respondents filed Grounds of Opposition dated 1st December 2020 in which they raised the following grounds:
 - a. That the petition is bad in law, vexatious and frivolous.
 - b. That the petition doesn't raise any constitutional issues.
 - c. That the petitioner ought to have filed suit through a plaint whereby the cause of action can be canvassed.
 - d. That the petitioner is guilty of laches thus time barred pursuant to the *Public Authorities Limitation Act*.
 - e. That the petition filed is a means of escaping Limitation of time to file a normal suit.
6. The petitioner testified in support of his petition and adopted his witness statement dated 26th June 2019 which reiterated the averments in his petition
7. In cross-examination, the petitioner testified that nobody else was shot during the incident and that a police Inspector came and took him to Pap Onditi Hospital for first aid. He reiterated that the 1st respondent was the one who had shot him. In re-examination, he testified that once the police took him to the hospital, they left him on his own and that he paid for his medical expenses. The petitioner then closed his case.
8. The respondents did not call any witness in their defence and instead opted to close their case.

Analysis and Determination

9. From the petition herein, the incident occurred on or about the 6th March 2015. The petitioner attached two Notices to institute suit to the Attorney General dated 5th December 2015 and 8th January 2016 respectively.
10. However, the instant petition was lodged in court on the 23rd July 2019, nearly four and a half years later. No reason was advanced for the delay in filing the petition or a suit for damages for the alleged unlawful shooting.
11. The issues for determination therefore are whether the petitioner is guilty of laches and whether the petitioner should have filed a suit as opposed to a constitutional petition.



12. The *Public Authorities Limitation Act*, Cap 39 of Laws of Kenya describes itself thus: An Act of Parliament to provide for the limitation of proceedings against the Government and a local authority, and for purposes incidental to and connected with the foregoing.
13. The Act further provides at section 2:
For the purposes of this Act—
 - (a) proceedings against the Government includes proceedings against the Attorney-General or any Government department or any public officer as such;
 - (b) proceedings against a local authority includes proceedings against any person employed by a local authority and sued or intended to be sued as such;
 - (c) a person is under a disability while he is a minor or of unsound mind or is detained in pursuance of any written law which authorizes the detention of persons suffering from mental disorder or unsoundness of mind.
14. A public officer is defined by Cap 2 as:
“public officer” means a person in the service of, or holding office under, the Government of Kenya, whether that service or office is permanent or temporary, or paid or unpaid;
15. The petitioner sued the 1st respondent in his capacity as Inspector Wekesa Erick Mukhone, the 2nd respondent as the 1st respondent’s employer and the 3rd respondent as the legal advisor of Government.
16. Clearly, therefore, by virtue of section 2 of Cap 39 and section 2 of Cap 2, the respondents were sued in their capacities as described by Cap 39.
17. Therefore, as to whether the instant petition is time barred, this court is called upon to interrogate whether the suit before it is a constitutional petition or a civil suit couched as a constitutional petition.
18. The petitioner herein seeks a declaratory order that his rights under Chapter 4 of *the Constitution* have been violated. He also prays for compensation for the injuries sustained as a result of the actions of the 1st respondent together with future medical expenses.
19. I am alive to the fact that the question of limitation of time in regard to allegations of breach of human rights and fundamental freedoms has in many cases been raised by the state and in the case of Joan Akinyi Kaba Sellah and 2 others v Attorney General, Petition No. 41 of 2014, the learned judge observed inter alia that in a line of cases such as Dominic Arony Amollo vs Attorney General, Nairobi High Court Misc. Civil Case No. 1184 of 2003 (OS) 2010 eKLR, Otieno Mak’ Onyango vs Attorney General and another, Nairobi HCCC No. 845 of 2003, (unreported), courts have consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights.
20. Further in James Kanyiiita Nderitu v Attorney General & Another, Nairobi Petition No. 180 of 2011, contrary to the submissions by the petitioners, the court held that 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 further stated that 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.



21. In the present petition, no reason has been advanced by the petitioner for the delay in lodging this petition since the alleged incident occurred on the 6th March 2015 till the date of filing this suit on the 23rd July 2019.
22. In Mombasa Civil Case No. 128 of 1962, *Rawal v Rawal* (1990) KLR 275 the learned judge stated thus:
- “The effect of any limitation enactment is to prevent a plaintiff from prosecuting state claims on the one hand and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time. It is not to extinguish claims”
23. This same point was further successfully made in *Abraham Kaisha Kanzila alias Moses Savala Keya t/ a Kapco machinery services and Milamo investments limited vs Government Central Bank of Kenya and 2 others*, Misc. Civil Application 1759 of 2004 where the court observed that:
- “In my view, failure by a constitutional court to recognize general principles of law including, limitation expressed in *the Constitution* would lead to legal awarding or crisis. It would also trivialize the constitutional jurisdiction in that Applicants would in some cases ignore the enforcement of their rights under the general principles of law in order to convert their subsequent grievance into a ‘constitutional issue’ after the expiry of the prescribed limitation periods.”
24. Further to the aforementioned position, although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings 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. See the case of *Communication Commission of Kenya & 5 others v Royal Media Services & 5 others* Petition 14, 14 A, 14 B & 14 C of 2014 (Consolidated); [2014] eKLR and *Mumo, Matemu v Trusted Society of Human Rights Alliance & 5 others* Civi Appeal No 290 of 2012; [2013] eKLR
25. Accordingly, there was thus a necessity of the petitioner establishing a nexus between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement.
26. I have considered the pleadings and evidence adduced in the petition and I am unable to find any nexus demonstrated in this petition. I say so because a case of unlawful shooting where one suffers injuries is different from a case of torture of an individual in the hands of police officers. The petitioner, from his own testimony, was not part of the disagreement between the driver of the motor vehicle that the petitioner had boarded and the police officers who fired live bullets that injured the petitioner. I am not satisfied that the petitioner established or even attempted to establish such a link.
27. It is therefore my finding that the instant petition was purely a civil suit couched as a constitutional petition and as such, it fell within the parameters of *Public Authorities Limitation Act*. Section 3(1) of the *Public Authorities Limitation Act* (PALA) Cap 39 Laws of Kenya provides that:

Limitation of proceedings

1. No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.



28. From the petition herein, the incident occurred on or about the 6th March 2015. The petitioner attached two Notices to institute suit to the Attorney General dated 5th December 2015 and 8th January 2016 respectively. The petitioner waited until the 23rd July 2019 when he lodged the petition. There was no reason advanced as to the lapse in time prior to lodging this petition which cause of action is a purely tortious claim. In addition, even if the petitioner was out of time in lodging the suit, he did not have to file a constitutional petition. He could have filed an application for extension of time within which to file suit as stipulated in section 27 of the [Limitation of Actions Act](#).
29. Accordingly, it is my finding and holding that the facts and evidence in support of the petition are of a purely civil suit which is subject to section 3(1) of the [Public Authorities Limitation Act](#) and therefore stale and is thus ripe for striking out. This petition is accordingly struck out with an order that each party bear their own costs.
30. This file is closed.

Dated, Signed and Delivered at Kisumu this 2nd Day of April, 2024

R.E. ABURILI

JUDGE

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