



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

PETITION NO. 21 OF 2019

AUGUSTINO MBUGUA.....PETITIONER

VERSUS

THE INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

1. **AUGUSTINO MBUGUA** (the petitioner) seeks orders that;

- i) A declaration be issued to the effect that the rights and fundamental freedoms in the bill of rights of the constitution of Kenya are unassailable.
- ii) A declaration that the petitioner's right to the security of his person as enshrined and contemplated in **article 29(c), (d) and (f)** of the Constitution of Kenya 2010, **Article 5 of the Africa (Banjul) Charter on Human and People's Rights and Article 7 of the Convention on Civil and Political rights against torture and other cruel and inhuman or degrading treatment or punishment** were violated by the reckless and negligent actions of the 1st respondent agents and/or servants.
- iii) A declaration that the petitioner's rights to human dignity and the right to have the dignity protected and respected as enshrined under **article 28** of the **Constitution of Kenya 2010** were violated by the state through its agent and/or servants.
- iv) A declaration that the petitioner's rights as expressly provided under **article 25(a) of the Constitution of Kenya** was violated in that the state failed to guarantee protection from limitation of the said right.
- v) A declaration that the actions by the police and or treatment of the petitioner by the police were reckless, negligent, cruel and inhuman in complete disregard of his rights to the same.
- vi) A declaration that the respondents and the government of Kenya re responsible through the doctrine of respondent superior for the actions of the perpetrators of the violation of the petitioners' rights.
- vii) A declaration issue that as a result of the breach and/or violation of the rights if the petitioner, he suffered damages, pain and suffering.
- viii) Costs be borne by the respondent.

PETITIONER'S CASE

2. The petitioner in his petition stated that on **2nd January 2019** at around 0100 hours he was driving home from **Eldoret town** and on arrival at **Brighton estate** he saw a vehicle that was trailing him from behind with its lights on dim mode. After seeing the vehicle, he decided to enter through a rough road towards **Eldoret polytechnic** where he joined the tarmac road. After joining the tarmac road, he drove towards Kapsabet and at the junction of **Kona Mbaya** intending to turn right to enter **Kona Mbaya**. However, since he was at a high speed, he hit a speed bump, swerved, lost control, and hit a booking office and his engine turned off.

3. The petitioner got out to assess the damage to the vehicle and tried to reverse. It took him 10 minutes to reverse the vehicle and as he attempted to join the main road, he noticed that the vehicle which had been trailing him was in front of him. He realised his vehicle had difficulty moving, so he parked on the side of the road to check what was affecting the mobility, and found out that it had a puncture.

4. While trying to drive away, a police vehicle registration **GK B 289R** came and parked in front of his vehicle, blocking him from moving forward. The driver of the vehicle asked him to identify himself, and he complied. As he was talking to the police driver, a female police officer alighted from their vehicle and came closer to him. Demanding to know why he had declined to stop when they stopped him. The petitioner responded that they never stopped him otherwise he would have stopped. The policewoman instructed him to get out of the car and he complied.

5. While pleading with the female officer, a male police officer alighted from the vehicle and pointed his gun at the petitioner and shot him on the left side of the chest. As he was being taken to hospital he requested the police officer to assist him in getting his phones from his pockets to communicate with his relatives but the said police officer took his phone and told the petitioner to be quiet.

6. As a result he sustained a gunshot injury through the chest, damaging the spinal cord, urethral stricture resulting in use of a catheter. He was admitted in hospital from the 2nd of January 2019 to 17th January 2019. The injuries were classified as severe soft and bony tissue injuries due to the gunshot that resulted in partial lower limb paralysis (muscle power grade 4) and permanent disability was assessed at 50%. Due to the nature of injuries he sustained he will need further treatment at an estimated cost of Kshs. 200,000/- for physiotherapy and rehabilitation.

7. The petitioner also sought a declaration that he is entitled to special, general and exemplary damages against the respondents jointly and severally.

Particulars of damages

a) Future medical expenses – kshs. 200,000/-

b) Medical Report – kshs. 6,000/-

c) Treatment expenses – kshs. 134,373/-

The petitioner also sought costs.

8. The respondent relied on a replying affidavit sworn by CPL Maurice Kituyi No. 53069 attached at **Langas Police** station, who deposed that on 1st January 2019 he reported on duty as a crime standby in aid of a duty officer and was using police vehicle registration number **GKB 289R** while in full police officer uniform. Around 1.30 am he and the duty officer decided to patrol within **Langas area** and on reaching **East London area** they spotted a clean saloon vehicle with the three occupants with dim lights and instructed them to stop but the occupants sped off. They chased after them and alerted all other police officers through their communications gadgets. They pursued the vehicle until **Kona Mbaya** junction and found the said vehicle in the middle of the road and the police driver blocked it from the front. He ordered the driver in it to identify himself but he kept silent.

9. The duty officer alighted and ordered the driver to alight but he defied the order and drove off almost running over the officer. At that point the petitioner opened the driver's door using his left hand and got out while holding an unidentified weapon in his right hand. It was then that a shootout ensued, and thereafter he saw the petitioner lying down, and on checking, realized that he had been hit by a ricochet bullet. The police quickly rushed him to **Moi Teaching and Referral Hospital**.

10. It is stated that the vehicle the petitioner was using had a registration number **VF38B6FZF 81680609** (which was suspect), and on further search of the vehicle a loose number plate **KAE 709Z** was recovered and upon search from NTSA turned out to belong to a **Peugeot** saloon fitting the description of the said vehicle (a proof that the petitioner was put to commit an unknown crime)-Annexed MK1(a) and (b) are copies of the photographs. Some **Cannabis Sativa** was also recovered in the petitioner's vehicle, and which was confirmed by the Government Chemist report and memo annexed and marked as MK2(a) and (b) respectively. An angle bar and cutter were among the weapons further recovered in the petitioners' vehicle, annexed and marked MK3 (a) and (b) respectively are copies of the photographs.

11. The vehicle the investigating officer was using was a police coloured vehicle and the occupants were all dressed in police uniforms that cannot be mistaken to be thugs or people trailing the petitioner (MK 5 was a copy of the photograph).

12. The petitioner was charged with the offence of **preparation to commit a crime contrary to section 308(2) of the Penal Code and being in possession of cannabis sativa contrary to section 3(2) of the Narcotic Drugs and Psychotropic Substances and Control Act vide CR.838/22/2019, CF1795/2019**. The matter is still pending trial in the Chief Magistrate's Court.

13. It is further contended that the petitioner stated that he saw a car trailing him, yet a police car is well marked and he knew this, but since he was on the wrong side of the law he decided to run away at a high speed to the opposite direction to avoid being arrested. The respondent maintains that the petitioner was flagged down by the police but he defied the orders and sped off. Further, the fact that the petitioner had unidentified weapons together with the cannabis sativa and the loose number plates recovered in his car clearly confirms that he was out to commit a crime and does not deserve any of the prayers.

14. It is argued that a party who alleges that violation or a threatened violation of his rights must with reasonable precision state the relevant articles of the constitution stated to have been violated or to be under that of violation. He must also outline with reasonable clarity the manner in which the respondent has purportedly infringed on the rights. He cited the case of **Augustine Gakure Monyo V County Government OF Murang'a (2016) ECLR** and the case of **Oscar Kipchumba Sudi v Ethics & Anti-Corruption Commission & 3 others (2017) ECLR** in support of this submission. It was the respondents' submission that the infringement must be demonstrated. The petition fails to meet the threshold of a constitutional petition.

15. The respondent **cited rule 9 of the Oaths and Statutory Declarations Rules** to submit that the supporting affidavit sworn on 5th September 2019 which has annexed documents marked as **ANM1-ANM7** which are neither marked or sealed with the commissioners' stamp as a mandatory requirement of the law and should be struck out of the record.

16. The respondent denies the allegation that the office of the ODPP questioned the manner in which the investigation was done through a letter alleged to have been done by the senior assistant Director of the DPP as the document does not form part of his annexures.

17. All the documents annexed are faulted as not being authentic due to lack the attestation by Commissioner of Oaths. The documents annexed to the supplementary affidavit sworn on 18th September 2020 are also not securely sealed with commissioners' stamp. The annexures are marked as ANM1-ANM3. The respondent cited various authorities where it is clear that where a party relies on uncommissioned or unmarked documents as exhibits, his claim must fail as this document cannot form part of the record.

18. It is also pointed out that the petitioner has also claimed special damages of kshs. 340,373/-. It is clear law that special damages must be proved for one to succeed. The petitioner herein has not proved nor attached evidence to warrant his claim.

The petitioner has failed to prove any of the alleged constitutional violations occurred and thus he is not entitled to costs.

ISSUES FOR DETERMINATION

WHETHER THE PETITIONERS' CONSTITUTIONAL RIGHTS WERE VIOLATED

19. It is a principle of law that anyone who wishes the court to grant a relief for violation of a right or fundamental freedom, must plead in a precise manner the constitutional provisions said to have been violated or infringed, the manner of infringement and the jurisdictional basis for it. In **Anarita Karimi Njeru v Republic (No.1)-[1979] KLR 154** the Court stated;

"... 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 reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed." (see also Meme v Republic & another [2004] 1 KLR 637)

20. The Court of Appeal in **Mumo Matemo v Trusted Society of Human Rights alliance [2014] eKLR**, stated that:

"...the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle"

21. The petitioner claims that his right to security was violated but he does not set out how the respondent violated these rights. In the absence of a ballistic report, the court cannot determine whose weapon fired the bullet that injured the petitioner.

22. The petitioner has not set out how his rights to human dignity were violated by the respondents to a reasonable degree of precision. He has also not proven how his rights under article 25(a) of the Constitution of Kenya were violated to a reasonable degree of precision. In order to determine that the constitutional rights were violated the petitioner would need to create a nexus between the injuries sustained and the respondents. Further, the applicant was arrested in possession of weapons and cannabis sativa. The 1st respondents' actions of taking the petitioner to hospital for treatment was in good faith.

23. The petitioner relies on various annexures in his supporting affidavit as proof of the injuries sustained. It is the respondents' contention that the petitioners' unmarked and unattested annexures should be expunged from the court record. A perusal of the annexures reveals that they are signed by a commissioner of oaths and stamped. I find that the annexures conform to the requirements of **Rule 9 of the Oaths and Statutory Declarations Rules** which requires;

'All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner and shall be marked with serial letters of identification.'

24. However, in order to prove that the respondents were liable for the special damages claimed, the petitioner needs to prove that the respondents were directly responsible for the injuries occasioned on the petitioner. What is so far presented (and which is yet to be determined by the lower court in the criminal case) is that there was a confrontation between the petitioner and the police, and that he too was armed with an unidentified object. Was that object a firearm? Did the bullet ricochet from his own weapon and hit him?

25. I concur with the respondent that the petitioner has failed to prove that his rights under article **29(c), (d) and (f)** of the Constitution of Kenya were violated mainly because there is no ballistic report to show whose firearm it was that got involved in the shooting. In the absence of the ballistic report there is no negligence which has been proved by the petitioner.

26. I would therefore have no basis upon which to declare that his constitutional rights were violated. Consequently, I hold and find that the petitioner has failed to establish that there were violations and as a result the petition fails in its entirety. The petitioner is not entitled to any of the orders sought, and the petition be dismissed with costs.

Virtually Delivered and dated this 2nd Day of December 2020 at Eldoret

H. A. OMONDI

JUDGE