



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 123 OF 2017

JOHN KOGI SOLOMON MWANGI.....PETITIONER

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....1ST RESPONDENT

THE SANTON POLICE PATROL BASE OFFICE.....2ND RESPONDENT

(UNDER KASARANI POLICE STATION OFFICE)

JUDGMENT

1. **JOHN KOGI SOLOMON MWANGI**, the petitioner herein, who describes himself as a resident of Kangema sub- county, sued the respondents herein seeking orders for the production of the occurrence book showing the OB/16/9/9/2012 for purposes of satisfying transparency and accountability following the death of his son on Wilson Gichuhi (deceased) who was allegedly killed by a mob on the ground that he had stolen a motor cycle.

2. The petitioner's case is that following the death of his said son, he visited the 2nd respondent's office on 22nd January 2013 when the contents of OB No 16/9/9/2012 were read out to him by the officer on duty but that the said officer did not comply with the provisions of Articles 10, 73, 75, 232, 26(3) and 29(a) (c) and (d) of the Constitution. He also claims that the 2nd respondent did not comply with Public Officer Ethics Act and Leadership and Integrity Act.

3. In his submissions in support of the petition, the petitioner highlighted the alleged failures, by the 2nd respondent, to comply with the provisions of the Constitution when they failed to respond to the petitioner's letters, record witness statements and to make correct entries in the occurrence book.

The respondents' case

4. The 1st and 2nd respondents opposed the petition through the replying affidavit of the Cpl. Joseph Mwangi, dated 23rd October 2017 wherein he avers that he was on the 9th September 2012 travelling to work in a matatu when he received information that there was a dead body lying at a petrol station situate within Santon Area. He further avers that upon arriving at the scene, he found a dead body with piles of stones around it and on making enquiries on what had transpired, he gathered information that the deceased was a victim of mob justice after which photographs of the scene of crime were taken before the body was transported to the mortuary.

5. He further states that it was alleged that the deceased was stoned to death by an irate mob on claims that he had attempted to steal a motor cycle but that the police were yet to get information on the alleged owner of the motor cycle and the particulars of the said motor cycle. He further avers that police acted within their powers and have not violated any of the constitutional provisions as alleged.

6. At the hearing of the petition, Miss Robi, learned counsel for the respondent submitted that the petition does not meet the threshold of proof that is required in a constitutional petition as was set out in the cited case of **Anarita Karimi Njeru vs Republic [1976-80] 1 KLR 1283**. Counsel also submitted that if what the petitioner seeks in this petition is information contained in the Occurrence Book No. 16/9/9/2012, then he should have sought for the said information using the procedure provided for under Section 8 of the Access of Information Act which procedure, she conceded that the petitioner had already adopted through his letter dated 27th October 2017.

7. It was further submitted that the information sought by the petitioner through his petition had already been availed to him and to this court through the annexures attached to the respondent's further affidavit filed on 7th February 2018 and that the instant petition therefore lacks merit and is a waste of judicial time.

Determination

8. I have considered the pleadings herein and the parties written submissions together with the authorities that they cited. The main issues for determination are whether the petitioner is entitled to the orders sought in this petition and whether the petition meets the threshold of a constitutional petition. The petitioner's claim was that the 2nd respondent failed to comply with Articles 10, 26, 29, 73, 75, and 232 of the Constitution, the Public Officers Ethics Act and the Leadership and Integrity Act.

9. It is now trite law that a petitioner who comes before the court claiming that his rights under the constitution have been violated must set out with some level of particularity the specific right and the manner in which it was violated. This principle was established in the case of Anarita Karimi Njeru v Republic (No. 1) [1979] 1 KLR 154 and augmented by the Court of Appeal recently in the case of Mumo Matemu v Trusted Society of Human Rights Alliance Civil Appeal No. 290 of 2012 [2013] eKLR.

10. Of course, in a case such as the one before this court, the Court tries its best to understand the petitioner's case and discern what rights, protected by the Bill of Rights has been violated. This is consistent with the Court's duty to promote access to justice and protect the citizen's constitutional rights.

11. In the instant case, it was not in dispute that the petitioner's son was killed in unclear circumstances and that the 2nd respondent learnt of the said death long after it had happened and further that efforts by the police to get the real motive and culprits of the murder had not borne any fruits as at the time this petition was filed in court. The petitioner claimed that the respondents had violated the provisions of Articles 10, 26, 29, 43, 73, 75 and 232 of the Constitution which provides for the National values and principles, right to life, Freedom and security of person, Economic and Social Rights, responsibilities of Leadership, conduct of state officers and values and principles of public service respectively.

12. I however note that apart from citing the above stated provisions of the constitution, the petitioner did not explain the manner and nature of infringement of the said provisions by the respondents. This court is of the humble view that while it is unfortunate that the petitioner's son was murdered in a very senseless and barbaric manner, the respondents cannot, in the circumstances of this case be said to have been responsible for the said death or to have failed in the performance of any of their duties. I further find that while it would have been desirable for the petitioner to get a closure following the untimely death of his son by having the culprits brought to book, this court takes judicial notice of the fact that not all murder investigations can be resolved instantly and that at times it takes a long time to get a break in the investigations.

13. In the present case, I note the 2nd respondent's deponent explained the circumstances under which he found the body of the deceased lying next to a petrol station and the action that was taken in taking photographs of the scene and transporting the body to the mortuary. The said deponent further explained that he was not able to get the particulars of the alleged stolen motor cycle that allegedly precipitated the killing of the deceased or the said killers.

14. My take is that in the circumstances of this case, the cause of the death of the deceased is a matter that could have been better pursued through an inquest instead of a petition to this court as only an inquest can aid in unravelling the cause and circumstances under which the deceased was killed.

15. I further note that the occurrence book No. 16/9/2012, whose production the petitioner seeks through this petition has already been produced in the 2nd respondents annexure marked "MK1" attached to the further affidavit sworn on 7th February, 2018. Consequently, I find that the orders sought in the instant petition are already spent.

16. In a nutshell, I find that the petition is unmerited and the order that commends itself to me is the order to dismiss it with no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 9th day of January 2019.

W. A. OKWANY

JUDGE

In the presence of:-

Petitioner present in person

Miss Omuom for Robi for the respondents

Court Assistant – Kombo