



**IN THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**PETITION NO. 38 OF 2014.**

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 27, 28, 47, 48, 49, 73, 159, 165 (3) (d) 258 AND 259 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE CONSTITUTION**

**AND IN THE MATTER OF VIOLATION OF THE RIGHT TO HUMAN DIGNITY, FAIR ADMINISTRATIVE ACTION AND PROTECTION OF FREEDOM AND SECURITY OF PERSON AND LIBERTY**

**AND**

**IN THE MATTER OF ABUSE OF OFFICE BY THE 1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS**

**BETWEEN**

**KIMUNAI OLE KIMEIWA.....1<sup>ST</sup> PETITIONER**

**DAN ASHITIVA DAUDI.....2<sup>ND</sup> PETITIONER**

**SYLVESTER KIBET TOTONA.....3<sup>RD</sup> PETITIONER**

**MUSA CHEMITEI KIPKAMBA.....4<sup>TH</sup> PETITIONER**

**AMOS KIBET KONYAEL.....5<sup>TH</sup> PETITIONER**

**FRANCIS MUNGAI THUO.....6<sup>TH</sup> PETITIONER**

**AND**

**JOSEPH MOTARI MOSIGISI**

**(THE THEN DISTRICT COMMISSIONER,**

**RONGAI DISTRICT).....1<sup>ST</sup> RESPONDENT**

**DISTRICT CRIMINAL INVESTIGATION OFFICER**

**NAKURU DISTRICT.....2<sup>ND</sup> RESPONDENT**

**PRINCIPAL SECRETARY, MINISTRY OF**

**INTERIOR COORDINATION OF NATIONAL**

**GOVERNMENT.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioners are citizens of the Republic of Kenya and residents of Nakuru County. They were arrested on various dates between 7<sup>th</sup> to 15<sup>th</sup> of December, 2011 and charged under section 137 as read together with section 36 of the Penal Code with the offence of “hindering the burial of a dead body.” The particulars of the offence as given in the charge sheet were that on the night of 30<sup>th</sup> November, 2011 and 1<sup>st</sup> December, 2011, at Banita Farm in Rongai District within Rift Valley Province, jointly with others not presented to the Court, unlawfully disinterred the burial of the body of Francis Mbuthia and removed the body to Banita Dispensary.

2. In their pleadings, the Petitioners allege that after they were arrested and held beyond the constitutionally-mandated period of 24 hours, they were eventually charged at the Chief Magistrate’s Court in Nakuru.

3. The Petitioners were subsequently acquitted by the Court on 31/10/2013 under section 210 of the Criminal Procedure Code after the Learned Trial Magistrate concluded that the Prosecution had not established a prima facie case warranting the Petitioners to be put on their defence.

4. It is the Petitioners’ contention that they were wrongly and maliciously prosecuted with the offences. They, thus, filed the present Petition dated 4<sup>th</sup> of June 2014, seeking declaratory and other orders against the Respondents in the following terms:

*a) A declaration that the actions of the Respondents are and were unconstitutional hence null and void for violating the rights and freedoms of the petitioners under Article 27, 28, 47, 48 and 49 of the Constitution of Kenya, 2010.*

*b) An order that the petitioners be adequately and promptly compensated by the government of Kenya for violation of their constitutional rights above*

*c) General, exemplary and special damages*

*d) A declaration that the persons namely Joseph Motari and Superintendent Kassim Mshenga who occupied the offices of first and second respondent contravened Articles 10, 27, 28, 47, 48, 49 and 73 of the Constitution of Kenya, 2010.*

*e) The petitioners be paid costs of this petition.*

5. The petitioners have supported their petition by the Supporting Affidavit of the 1<sup>st</sup> Petitioner, Kimunai Ole Kimeywa.

6. The Respondents filed grounds of opposition through the Honourable Attorney General. They raised the following grounds:

*a. The petitioner has merely alleged that Articles 27, 28, 47 and 48 of the Constitution of Kenya, 2010 has been contravened without adducing any evidence to substantiate their allegations*

*b. The petitioners have not satisfied the evidence threshold to warrant issuance of the orders sought herein:*

*c. On the foregoing reasons we pray that the petition be dismissed with costs to the respondent.*

7. At the Court’s directions, the parties filed written submissions. During oral highlighting both parties relied wholly on their written submissions.

8. After looking at the pleadings and parties’ submissions, the following questions arise for determination:

a. Is the suit barred by the Statute of Limitations?

b. Is the suit fatally defective because the Petitioners did not serve a statutory notice on the Government?

c. Is the suit fatally defective for the joinder of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in their personal capacities?

d. Is there sufficient factual basis to grant the declarations sought?

e. What remedies, if any, should be granted?

f. Who should bear the costs of the suit?

9. All the issues appear multiple, the suit is actually quite straightforward since the facts are not in dispute. They are as established above.

**Is the Suit Barred by the Statute of Limitations?**

10. The Respondents argue that the suit is time-barred under section 3(1) of the Public Authorities Limitations Act, Chapter 39 of the Laws of Kenya. That section provides that no proceedings founded on tort shall be brought against the Government after the end of twelve months from the date on which the cause of action arose.

11. Here, the Respondents argue, the cause of action arose on diverse dates between 7<sup>th</sup> to 15<sup>th</sup> December, 2011 yet the suit was filed on 04/06/2014. In fact, the cause of action cannot be said to have arisen by 30/11/2012 when the Petitioners were acquitted since the suit sounds principally in malicious prosecution. Even then, however, by dint of section 3(1) of Chapter 39, the suit would be time-barred. The Respondent relied on *Thuranira Karauri vs. Agnes Ngeche Civil Appeal at Nyeri 192 of 1996 [1997] eKLR* where the Court of Appeal set aside the judgement and decree of the High Court because they found that the claim was time barred, which then rendered the suit incompetent and that the court lacked jurisdiction to entertain a time barred suit.

12. This argument would work if this was a suit sounding only in torts. However, looking at the pleadings, the substance of the suit can only be called a Constitutional Tort. Almost always a suit for malicious prosecution involves some allegation of deprivation of liberty as guaranteed in the Bill of Rights. This, then, implicates the concept of a Constitutional Tort in cases such as this one. As Prof. Michael Well explains, the prime objective of a constitutional tort is to protect a broad range of common law interests encompassed within the Bill of Rights' liberty interests in circumstances where the official's conduct is fairly characterized as an abuse of power.<sup>[1]</sup>

13. Consequently, I find a suit for malicious prosecution which implicates deprivation of liberty and diminution of dignity of Petitioners to be a Constitutional Tort one to which there is no categorical statute of limitations. I adopt the reasoning of Lenaola J. (as he then was) in *Njuguna Githiru v Attorney General [2016] eKLR* where the Learned Judge observed that:

*Nonetheless, I take into account the views of the court with regard to limitation in respect of claims for enforcement of fundamental rights. In a line of cases such as Dominic Arony Amolo 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. He went further to note the sentiments of the court in James Kanyita vs Attorney General and Another, Nairobi Petition No. 180 of 2011 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 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.'*

#### **Did the petitioner issue the statutory notice and if not is that fatally defective?**

14. Section 13 A of the Government Proceedings Act CAP 40 states as follows:

*Notice of intention to institute proceedings*

*No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing in the prescribed form have been served on the Government in relation to those proceedings*

15. The Respondents urge the Court to dismiss the suit because the Petitioners failed to give the statutory notice envisaged under this section. They rely on a number of pre-2010 cases including: **Barrack Omudho Aliwa and Another v Salome Arodi and Another Mombasa HC Succession Cause No 38 of 2008 (unreported)** and **Samson Lereya & Others v Attorney General & Others Nairobi HCCC No. 115 of 2006 (Unreported)**.

16. I do note, however, that our decisional law has taken a turn away from the formalist logic represented in this line of cases. For example, in **Kenya Bus Service Ltd & Another V Minister for Transport & 2 others [2012] eKLR**, Majanja J. held that:

*The provisions for demanding prior notice before suing the government is justified on the basis that the government is a large organization with extensive activities and fluid staff and it is necessary for it to be given the opportunity to investigate claims laid against it and decide whether to settle or contest liability taking into account the public expense. While the objectives are laudable, the effect of mandatory notice provisions cause hardship to ordinary claimants. I am of course aware that pre-litigation protocols, for example Order 3 rule 2 of the Civil Procedure Rules, require that notice be given before action is commenced but the penalty for non-compliance is not to lose the right to agitate the cause of action but to be denied costs incurred in causing the matter to proceed to action... The strictures imposed by these provisions must be considered in light of the right of access to justice. The right of access to justice protected by the Constitution involves the right of ordinary citizens being able to access remedies and relief from the courts. He went further to cite the case of *Dry Associates v Capital Markets Authority and Another Nairobi Petition No. 328 of 2011 (Unreported)*, the court stated, "[110] Access to justice is a broad concept that defies easy definition. It includes the enshrinement of rights in the law; awareness of and understanding of the law; easy availability of information pertinent to one's rights; equal right to the protection of those rights by the law enforcement agencies; easy access to the justice system particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay." He went to further state, *by incorporating the right of access to justice, the Constitution requires us to look beyond the dry letter of the law. The right of access to justice is a reaction to and a protection against legal formalism and dogmatism.**

**Section 13A of the Government Proceedings Act as a mandatory requirement for the institution of suit against the government violates the provisions of the Article 48 of the Constitution.**

17. Similarly, Hon. Justice Otieno P. J. O. in **Bob Thompson Dickens Ngobi v Kenya Ports Authority & others [2017] eKLR** stated that.

*... as various superior courts in this country have said more than once, that a statutory provision that seeks to hinder any person's access to justice, seeks to impose hurdles on the way of citizens from seeking accountability, openness and efficiency in service delivery by government or government agencies must be seen to violate Article 48 and must be held to be unconstitutional for being antibusiness, oppressive, and I dare add, suppress the need to interrogate the constitutional values of accountability, transparency and efficiency expected of state agencies.*

18. I adopt the reasoning in these two cases and hold that the penalty for not giving the requisite 30-day is disproportionate to the extent that the statute dictates that the suit be dismissed wholesale.

**Was it justifiable to sue the 1<sup>st</sup> Respondent in his Personal Capacity?**

19. The Respondent's next technical objection to the suit is based on Section 12 (1) of the Government Proceedings Act. That section reads as follows:

*Parties to proceedings*

*Subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney-General, as the case may be.*

20. The Respondents argue that the 1<sup>st</sup> Respondent is a public officer and he should not have been sued in his individual capacity.

21. The Respondents are correct that when sued as a result of discharging one's duties or functions, the proper course is to sue the Attorney General or the office and not the individual officer in their personal capacity. However, there are times when a particular Petitioner may feel that a public officer conducted himself so flagrantly that they were acting on their own; on their own frolic so to speak. In such circumstances, the Petitioner is at liberty to sue the public officer on their own in addition to suing the Government.

22. Is there a factual basis for Issuing the Declarations Sought?

23. As stated above, the facts of the case are not disputed. The Petitioners were arrested on diverse dates between 7<sup>th</sup> to 15<sup>th</sup> December, 2011. They were charged with the offence of hindering the burial of a body. The first four were arraigned on 08/12/12. They pleaded not guilty and were granted bail. It would appear that the other two were later on arrested and charged in a different criminal case. The two cases were consolidated on 19/01/2012 and a new plea taken. It would seem complaints regarding the 24-hour rule relate to these latter two.

24. In any event, the case proceeded to full hearing. The Prosecution called five witnesses and called its case. The Learned Trial Magistrate returned a verdict that no prima facie case had been established. In material part, the Learned Magistrate opined thus:

*In this case, the Prosecution has only proved that the Deceased's body was illegally exhumed. But the most important question (by whom?) remains unanswered. There is no evidence – whether direct, circumstantial, primary or secondary – adduced to link any of the Accused Persons to the offence they are charged with. All witnesses who testified said they did not see the accused persons committing the offence. I find that the prosecution has failed to establish a prima facie case against the accused.*

25. The Learned Magistrate found that the Prosecution had failed to establish a prima facie case for a second reason: the charge sheet was fatally defective. In the Learned Magistrate's words, the charge sheet was "drawn in poor and ungrammatical English that embarrasses the Accused, as it is difficult to fathom the offence they are charged with."

26. The Petitioners say that they were being used as "sacrificial lambs"; that the real target was Hon. Luka Kigen who had differences with the 1<sup>st</sup> Respondent. They claim that the act of disinterment was actually done by the office of the 1<sup>st</sup> Respondent and that their arrests were baseless. They claim that the 1<sup>st</sup> Respondent wanted them to falsely confess that it was Hon. Kigen who had disinterred the body and that they were only charged when they refused to do so.

27. The Petitioners say that the "entire trial was shambolic and abusive of process as the complainants were never disclosed in any real sense nor was there any remote connection between the crime and the Petitioners. It was a classic case of abuse of power of the people of Kenya and the security apparatus of the country" against the Petitioners. They believe that the criminal process was used to harass them and settle political scores in a ploy stage-managed by government officials.

28. All these factual allegations are not responded to or disputed by the Respondents. They are, therefore, taken to be established. In my view, if one gleans at the proceedings, the ruling by the Learned Magistrate, one will be justified to believe the theory advanced by the Petitioners that this was nothing but malicious use of the criminal justice system. In order to prove the claim of malicious prosecution in this regard, the following elements will need to be established (see *Murunga v Attorney General (1979) KLR 138*):

- a. The commencement or continuance of a criminal proceeding by the Respondents against the Petitioners;
- b. The final disposition of the proceedings which is indicative of innocence of the Petitioners;
- c. The absence of probably cause for the proceedings; and
- d. Actual malice on the part of the Respondents (animus malus).

29. Considering the egregious misconduct alleged by the Petitioners which is unrefuted and considering the record of the trial Court which shows absolutely no connection between the alleged crime and the Petitioners, it is easy to deduce that all the ingredients for malicious prosecution have been proved. I would, also, make the declaration that the actions of the Respondents were unconstitutional hence null and void for violating the rights and freedoms of the Petitioners under Articles 27, 28, 48 and 49 of the Constitution.

30. I make no finding regarding the sought declaration that Joseph Motari and Sup. Kassim Mshenga to be found to be unfit to hold office because there was insufficient material before me to warrant such a finding.

**Is the petitioner entitled to the General and special damages?**

31. Our law is now clear that citizens are entitled to damages for constitutional violations. See Article 23 of the Constitution.

32. In the present case, the Petitioners have cited *Joseph Karobia Kinyua v Commander of Kenya Army & Another [2015] eKLR* where the Petitioner was held in unlawful, solitary confinement for 87 days and was tortured. The Court awarded Kshs. 800,000/- as compensation. Other comparable cases include: *Lucas Omoto Wamari v Attorney General & another [2017] eKLR* (where Kshs. 500,000/- was awarded for malicious prosecution); *Johnson Muendo Waita v Odillah Mueni Ngui [2018] eKLR* (where Kshs. 300,000/- was awarded for malicious prosecution for trespass); *Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another* (where the plaintiffs were awarded Kshs 500,000.00 each general damages for malicious prosecution); and *Crispus Karanja Njogu vs. The Attorney General [2008] KLR* (where the Plaintiff who was Acting Senior Assistant Registrar in the Examinations Section of Kenyatta University, was awarded Kshs 800,000.00 general damages for malicious prosecution).

33. In the Ugandan case, *Dr. Willy Kaberuka vs. Attorney General Kampala ,HCCS No. 160 of 1993* the High Court of Uganda explained the principles which are taken into account in awarding damages for malicious prosecution or like constitutional violations as follows:

*The plaintiff suffered injury to his reputation. ....He must have suffered the indignity and humiliation. He is also entitled to recover damages for injuries to his feelings especially the possibility of serving a sentence...There are no hard and fast rules to prove that the plaintiff's feelings have been injured or that he has been humiliated as this is inferred as the natural and foreseeable consequence of the defendant's conduct. The plaintiff's status in Society is also a relevant consideration and for all these reasons the plaintiff is entitled to damages...A plaintiff who has succeeded in his claim is entitled to be awarded such sum of money as will so far as possible make good to him what he has suffered and will possibly suffer as a result of the wrong done to him for which the defendant is responsible.*

34. In the present case, there is no question that the Petitioners suffered immense trauma at being locked up charged with disrespecting the dead; their names were published in at least two national dailies produced in Court leading to humiliation in the eyes of the community. Taking all into consideration, I am of the view that each of the Petitioners is entitled to compensation in the sum of Kshs. 800,000/- (eight hundred thousand) for the ignominy they each suffered.

35. The general damages will earn interest from date of this judgment until payment in full. The Petitioners will also have costs of this suit.

36. Orders accordingly.

Dated and delivered at Nakuru this 16<sup>th</sup> day of January, 2019

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JOEL NGUGI

JUDGE

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[1] Michael Wells, *Constitutional Torts, Common Law Torts and the Due Process of Law*, 72 CHI-KENT L. REV. 617, 660.