



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

PETITION NO. 7 OF 2017

IN THE MATTER OF SECTION 84 OF THE CONSTITUTION OF KENYA (REPEALED)

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTION 70 & 71 OF THE CONSTITUTION OF KENYA (AS REVISED IN 2001, REPEALED)

BETWEEN

RAEL KENDI MBAE (Suing as the legal representative of the

estate of Patrick Mbae M'Muruga (deceased).....1ST PETITIONER

VERSUS

THE O.C.S NKUBU POLICE STATION.....1ST RESPONDENT

THE P.S. MINISTRY OF INTERIOR &

COORDINATION OF NATIONAL GOVERNMENT.....2ND RESPONDENT

THE HON ATTORNEY GENERAL.....3RD RESPONDENT

J U D G M E N T

1. By a petition lodged in the Chuka High Court on 30th June 2016, the petitioner sought the following prayers: -

- a) A declaration that the deceased's right to life under sections 70 & 71 of the Constitution of Kenya (2001) now repealed was infringed.
- b) An award of damages as compensation to the estate of the deceased for breach of the deceased's fundamental right to life under sections 70 & 71 of the Constitution of Kenya (2001) now repealed.
- c) Costs and interest at court rates.

2. On 8th March 2017, Limo J, who had taken the evidence of PW1 found that the events which form the subject matter of this petition took place in Meru. He therefore ordered the matter transferred to this court.

3. Although there was intention to consolidate this matter with Constitutional Petition Nos. 5 and 6 of 2017, the consolidation never took place and this matter therefore proceeded separately.

4. In the petition, the petitioner alleged that on 15th May 2004, the deceased was fatally injured by bullets fired by police officers from Nkubu Police Station. That the police under the command of the 1st Respondent arrived at Miruriri Market and opened fire indiscriminately.

5. That the deceased was at the time unarmed, hence his right to life was curtailed as a result of the 1st Respondent's officers' negligence. That the 1st Respondent is under the instructions of the 2nd Respondent hence vicariously liable for the acts and/or omissions of the 1st Respondent in the cause of his duty. There was no response by the respondents.

6. **PW1 Rael Kendi** testified that **Patrick Mbae Muringa (“the deceased”)** was her Husband. That on the material day at about 2am, she was at home with the deceased when they received a call that thieves had attacked the market where they had a shop. At around 5am, she accompanied the deceased with other village mates to the market to ascertain what had transpired.

7. While she remained in her shop, the deceased and others went around to check on the stalls that had been broken into. She then heard gunshots and screams. She later realized that the deceased and two others, **Erick Mwenda and Imbanya Njagi**, had been shot and taken to Meru General Hospital where he later succumbed to the injuries he had sustained from the gunshots.

8. She blamed the police for the death of the deceased as he was innocent. She produced the **death certificate (Pexh 1), Post-mortem report (Pexh 2) and grant of letters of Administration ad-litem (Pexh 3)** in support of her case.

9. **PW2 David Mbae M’Arimi** testified that he owned a shop at Miruriri Market. That on the night of 15th May 2004, he and others called the police and informed them that they had been attacked by thieves who were breaking the doors to their stalls. The police came at about 5:30am in the morning after the thieves had already left. At the time, he and the others were seated outside his shop. When the police arrived, they opened fire at them. As a result of the shooting **Patrick Mbae, Njenga Erick Mwenda and Kibaara Njagi** sustained injuries from which they died.

10. He told the court that he is the only one who escaped the bullets. The police collected the injured and took them to Meru General Hospital where they died. He blamed the police because he had called them at 2:30 a.m. and they did not come until 5:30 a.m. He and his colleagues were unarmed at the time the police shot at them.

11. The respondents did not call any evidence. The issue for determination is whether the deceased’s fundamental right to life had been violated and if so, whether his estate is entitled to compensation.

12. The facts leading to the claim occurred in 2004 under the **2001 Constitution (now repealed)**. The Jurisdiction of this court is anchored on **section 84 of that Constitution** which provided as follows:-

“Subject to subsection (6), if a person alleges that any of the provisions of Section 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or) in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.”

13. In **John Kipng’eno Koech & 2 Others v Nakuru County Assembly & 5 Others, [2013] eKLR** the Court held that *locus standi* under **section 84(1) of that Constitution** was established in two respects. Firstly, if the contravention related to the petitioner personally, and Secondly, if the contravention related to a detained person. In the present case, the petitioner has been granted letters of administration in respect of the estate of the deceased. She has *locus standi*.

14. There has been a delay in bringing this petition. The cause of action arose in 2004 while the petition was filed in 2016 and after the enactment of the new Constitution. There was a 12-year delay in bringing these proceedings.

15. In **Peter Mauki Kaijenja & 9 others v Chief of the Defence Forces & another [2019] eKLR** the Court held: -

“In considering such delays, the court cannot avoid taking judicial notice of the immense difficulties, which prevailed at the period of the alleged violations making it impossible for aggrieved persons to file cases of this nature against the government. The 2010 Constitution opened the doors of justice thereby making it possible for aggrieved persons to institute cases of this nature. ... Regarding the period prior to the promulgation of the 2010 Constitution, I am persuaded that the then prevailing political environment made it impossible for victims to file cases of this nature in court. The next question is whether the delay of 3 years and 7 months after the 2010 Constitution is unreasonable and whether it has been explained. ... In considering whether delay is inordinate, the court has a discretion, to be exercised judicially upon a consideration of all the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the period of the delay, and the explanation offered and any possible prejudice to the Respondent.”

16. The delay from 2010 when the new Constitution was enacted and 2016 is about six years. That may not be unreasonably long. In view thereof, I hold that the delay was not unreasonable as no prejudice is to be suffered by the respondents. The petition is properly before the court for determination.

17. I now come to the main issue of whether the deceased’s right to life was infringed by the respondents. The petitioner cited the provisions of **section 70 and 71** of the repealed Constitution. **Section 70** of that Constitution provided: -

“Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely;

a) Life, liberty, security of the person and the protection of the law.

b) Freedom of conscience, of expression and assembly and association”

18. On the other hand, **Section 71** provided: -

1) No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted.

2) Without prejudice to any liability for a contravention of any other law with respect to the use of force in those cases hereinafter mentioned, a person shall not be regarded as having been deprived of his life in contravention of this section if he dies as a result of the use of force to such an extent as is reasonably justifiable in the circumstances of the case;

a) for the defence of any person from violence or for the defence of property;

b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c) for the purpose of suppressing a riot, insurrection or mutiny; or

d) in order to prevent the commission by that person of a criminal offence, or if he dies as the result of a lawful act of war”

19. The evidence on record is that the deceased was seated with others outside **PW2**'s shop at the material time. Police officers from Nkubu Police Station arrived at the scene and without any warning shot at them whereby 3 of the said persons, the deceased included, died. The deceased was unarmed at the time.

20. The post-mortem report produced in evidence showed that the deceased died as a result of gun shots. There was no evidence to rebut the testimony of **PW2** that the shooting was unwarranted and did not fall under any of the exceptions set out in **section 71 (2) of that Constitution**.

21. In view of the foregoing, it is my finding that the shooting of the deceased by officers of the 2nd respondent was uncalled for and unlawful. It led to the death of the deceased and therefore infringed his right to life. I find on a balance of probability that the petitioner has established a case of infringement of the deceased's right to life under **section 70 & 71 of the Constitution of Kenya (2001)** now repealed

22. The next issue is whether there should be compensation. Compensation depends on the facts and circumstances of each case. In **Patrick Mauki Njenga (supra)**, the court held:-

“Award of damages entails exercise of judicial discretion, which should be exercised judicially. The discretion must be exercised upon reason and principle and not upon caprice or personal opinion. The jurisprudence that has emerged in cases of violation of fundamental rights has cleared the doubts about the nature and scope of this public law remedy evolved by the Courts. The following principles clearly emerge from decided cases;

i) Monetary compensation for violation of fundamental rights is now an acknowledged remedy in public law for enforcement and protection of fundamental rights;

ii) Such claim is distinct from, and in addition to remedy in private law for damages for tort;

iii) This remedy would be available when it is the only practicable mode of redress available;

iv) Against claim for compensation for violation of a fundamental right under the constitution, the defence of Sovereign immunity would be inapplicable.

23. The petitioner submitted for Kshs.4,000,000/- on the basis of the decision in **Mburu Njuguna (suing on behalf of the estate of John Macharia Mburu (deceased)) v. Chief, Korogocho Location & 3 Others [2014] eKLR**.

24. I have considered that the deceased was a businessman aged 50 years. On my part, I consider an award of Kshs.2,500,000/- to be appropriate.

25. Accordingly, the petition is hereby allowed and judgment is entered for the petitioner as follows: -

a) A declaration is hereby issued that the deceased's right to life under section 70 & 71 of the Constitution of Kenya (2001) now repealed was infringed.

b) The 2nd respondent is to pay the petitioner as compensation, Kshs. 2,500,000/=.

c) Costs and interest is awarded at court rate to the petitioner.

It is so decreed.

DATED and DELIVERED at Meru this 19th day of September, 2019.

A. MABEYA

JUDGE