



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 99 OF 2012

IN THE MATTER OF: SECTION 19 PART 5 OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: SECTION 84(6) OF THE FORMER CONSTITUTION OF KENYA

AND

IN THE MATTER OF: RULES 11, 12 AND 13 OF THE FORMER CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS & FREEDOMS OF THE INDIVIDUAL HIGH COURT PRACTICE & PROCEDURE RULES 2006)

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 22, 23, 27, 40 & 47 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

EVANS N. NJUGUNA PETITIONER

AND

HON. ATTORNEY GENERAL RESPONDENT

JUDGMENT

The Petition

1. The Amended Petition before the court is dated 15th October, 2012. In the petition the Petitioner alleges that his fundamental rights had been violated by the Respondents especially the right to protection of property, the right to equality and freedom from discrimination; the right to fair administrative action and the right to access to justice. The Petitioner prays for the following orders:

- (a) A declaration that the Respondent's agents, employees, and or/servants refusal to assist the Petitioner recover his lost money was a gross violation of his constitutional right under Article 27, 40 and 47 of the Constitution of Kenya, 2010.
- (b) The Respondents be ordered to pay general and exemplary damages for violation of the Petitioner's constitutional rights.
- (c) The court be pleased to assess and award compensation as provided for under Article 23(e) of the Constitution of Kenya, 2010.
- (d) The Respondents pay the costs of the proceedings and grant any other order that it shall deem fit.

The Background

2. The Petitioner's case is that on 18th July 2011 or thereabout, the Petitioner who is a transporter in Nairobi travelled to Mombasa to purchase a tipper for his transport business. He was in the company of a friend who happened to know Mombasa well and in particular where

to find the kind of lorry he wanted. After visiting several yards, the Petitioner, his friend Jackson Angaine, his wife and driver picked a Mercedes Benz tipper and agreed to pay the price for it. On 19th July 2011, the Yard Manager accompanied the duo to Equity Bank to assist them transfer the money to the company account but before doing so the Yard Manager, a Mr. Rajab Faki Munyi requested to be paid cash arguing that the company owed the bank a lot of money and that if deposited in the company account, the bank will retain the whole amount and as such the company would not be able to register the lorry as well as clear others at the port. Upon seeking advice from his guide, Jackson Angaine who seemed to know the Manager well, the Petitioner agreed to pay cash. Among his list of documents there is a withdrawal slip from Equity Bank. It is the Petitioner's evidence that on their way to the yard, the said Manager left for the port to clear other vehicles as he had put it. Meanwhile, Mr. Angaine and the Petitioner left for the Yard to pick the lorry.

3. On arrival at the yard, there was nobody and the lorry had been removed from where it was. It immediately occurred to the Petitioner that he had been conned. There and then, he demanded that Mr. Angaine, the main suspect and another person he was with, report the matter at Urban Police Station. At the police station, Mr. Angaine and his friend were arrested but instead of being locked up, they were taken out of the station to unknown destination on the orders of the DCIO.

4. The Petitioner's pleas to the DCIO to order Mr. Angaine to help trace the other conmen with a view to recover the lost money was ignored. As the petitioner was engaging the DCIO, the owner of the yard arrived and the Petitioner was ordered to leave the DCIO's office. The Petitioner was asked to return the following day. The Petitioner did not know what the DCIO and the yard owner discussed in his absence.

5. The following day, the Petitioner returned to the DCIO's offices but the DCIO could not attend to him. He became unfriendly and hostile. He did not want to answer any query from the Petitioner. He finally ordered the Petitioner to go home and wait for completion of investigations. The Petitioner's case is that had the DCIO acted speedily and promptly, he would have recovered the money or at least some of it from the conmen. Instead, the DCIO became extremely rude to the Petitioner and he finally ordered him to leave his offices and seek for assistance elsewhere. The Petitioner's petition to the PCIO as well as to the Commissioner of Police as shown from the letters annexed to the petition could not help. The two did not respond to the Petitioner's letters. The promised investigations by the DCIO were shoddy and a criminal case filed in the Chief Magistrate's Court, Mombasa against the suspects has never taken off and the Petitioner blames the police for intentionally failing to help him recover his money. He strongly feels that the Respondent's agents were vicariously liable.

The Response

6. The Respondent has opposed the petition vide a Replying Affidavit of Shadrack Kitheka sworn on 11th January, 2013. Mr. Kitheka depones that he is the Investigation Officer in Mombasa and that he investigated the matters of this petition. From the investigations it emerged that, on the 18th July, 2011 the Petitioner came to Mombasa in company of his wife **Jane Njambi Njoroge** with the intention of purchasing a tipper and when he arrived he was received by an acquaintance **Patrick Angaine** whom he told the reasons for his visit to Mombasa. The said **Patrick Angaine** introduced him to another person known as **Rajab Faki** who is a freelance motor sales agent. The party of four started looking for the type of motor vehicle **Mr. Njoroge** wanted to purchase and the said **Rajab Faki** took them to several showrooms in Mombasa. While in one of the showrooms they met one **Salim Omar** who is the manager they were taken to in Tudor where they were shown a Tipper Lorry and **Mr. Njoroge** confirmed it is what he wanted. The said **Rajab Faki** then obtained copies of import document and registration so as to confirm the particulars of the lorry. After **Mr. Njoroge** had viewed the tipper instead of him being taken back to the show room he was taken to building which **Rajab Faki** alleged was his office. There they agreed on the terms of the transaction, and the team proceeded to Barclays Bank Nkrumah Road. At the bank **Rajab Faki** told him that he was having a problem with his account and if **Njoroge** transferred money in that account it would be taken by the bank and that the best option was for **Njoroge** to withdraw Kshs.4.25million and hand it over to **Rajab Faki**. This was done and **Rajab Faki** immediately excused himself after he received the money and told **Njoroge** to meet him in his office. The said **Rajab Faki** disappeared with the cash, switched off his mobile phone and in a short while **Patrick Angaine** excused himself too but after an hour **Mr. Njoroge** became suspicious. **Mr. Njoroge** then went to Criminal Investigation Department, Urban, where he reported the matter. The investigations into the complaint were commenced and two suspects namely **Patrick Angaine** and **Solomn Karuri** who were said to have been in company of **Njoroge** were arrested and charged. A week later particularly on 29th August, 2011 through C.I.U. **Rajab Faki** was arrested. He revealed more names of people who were involved in the conspiracy including **Jane Kaviti**, **Iddi Etyang**, **Rashid Mwatondo**, **Salim Omar**, **Abdalla Abdullahim** all of who were later charged. **Iddi Etyang** who was released on cash bail, jumped bail and has never appeared for plea. A warrant of arrest has been issued in that respect. The Respondent states that all along the Petitioner has never mentioned **Juma Said Mustafa** nor have the investigations revealed anything linking him to the crime and which part he played to warrant his arrest. The Respondent states that there is no good reason to take and keep as an exhibit the tipper which was used by **Rajab** to obtain money from the complainant because this tipper was merely used as a bait to cause **Njoroge** part with the money. This is a vehicle which was in someone's yard ready for sale and it was not the owner of the yard who obtained money from **Njoroge** therefore impounding the tipper as an exhibit could result to another complain by the owner. While acknowledging that it was painful for the Petitioner to be conned, the Respondent states that the police did all they could to investigate, arrest and prosecute the suspects currently under trial. However, the matter is still open and if the Petitioner has any other information he is welcome to share it with the police. The Respondent's case is that the petition is *mala-fide* as the police have arrested, charged and are prosecuting 8 suspects while one suspect is on the run.

The Submissions

7. Parties with the leave of court filed submissions.

8. The Petitioner submitted that since the facts are indisputable, it is only the law that is now to be considered. The applicable law in this matter is the constitution and the Police Act. The Petitioner relied on Article 22 of the Constitution of Kenya, 2010 which gives the Petitioner the right to approach court if his right has been denied, infringed and/or threatened and under Article 23, the court has the power to declare violation of a right and then proceed to order for compensation. In the present case, the Petitioner submitted that equality and freedom from discrimination has been violated by refusing to act on the Petitioner's request to arrest the persons who conned him in order to recover the lost money, by failing to properly carry out investigations into the matter, by carrying out shoddy investigation on the matter and by ordering the Petitioner to leave his office when one of the main suspects arrived at the DCIO's office, Urban Police Station. This amounted to discrimination against the Petitioner and hence violation at his right under Article 27 of the Constitution of Kenya, 2010.

The Petitioner's case is that it is the responsibility of the state through its agents including the police officers to protect citizens from any arbitrary deprivation of property. In the matter at hand the Petitioner lost his money to conmen and immediately informed the police and even managed to arrest two of the main suspect and took them to the police but the police released them even before carrying out investigations. The Petitioner submitted that the police, the DCIO Urban Police, Mombasa colluded with conmen to deprive the Petitioner of Kshs. 4,250,000/=. To date the criminal case brought against some suspects is pending in court because the police are reluctant to prosecute it. The Petitioner's money was never recovered. It was submitted for the Petitioner that the police conduct, behaviour and inability to act amount to a violation of Article 40 of the Constitution of Kenya.

9. The Petitioner cited the case of **Meru High Court Civil Case No. 122 of 2002 - Gulled Mohamed Abadi vs. Attorney General & two others**. In that case, the plaintiff lost his animals to cattle rustlers. He followed them and found where they were being hidden. He reported the matter at Isiolo Police Station and to the District Commissioner, Isiolo but they failed to assist him. He lost all the animals to the rustlers in the process. In his Judgment, Justice D. A. Onyancha held "*I have no doubt in mind that under section 75 of the Constitution of Kenya, now repealed, every citizen of this country ...have a right to own property. They are all guaranteed protection from unlawful deprivation of such property...*"

The court found the government liable for breach of duty and awarded the plaintiff special damages.

10. In **Meru High Court Petition No. 8 of 2012- CK (A Child) vs. The Commissioner of Police** Justice Makau stated "... by failing to conduct prompt, effective, proper, corrupt free and professional investigations into the Petitioner's complaint, ... violated the Petitioner's right of access to justice". It is the Petitioner's evidence that he reported the loss of his money within 30 minutes. The Petitioner states that upon realizing that he had been conned, he managed to convince one of the main suspects, a Mr. Angaine to accompany him to Urban Police Station to report the incident. His pleas to the DCIO to order Mr. Angaine to help the police trace the other suspects were rejected. Although Mr. Angaine was arrested, he was never put in the cells.

11. The Petitioner believes that the police were compromised and/or were aware of the incident and might have been beneficiaries of the money the Petitioner lost. The Petitioner believes that the police officers were unable to help him when he needed help and that instead they colluded with those who conned him. By so doing, they violated the Petitioner's constitutional right under Articles 23, 27, 40 and 47 of the Constitution of Kenya 2010.

12. The Petitioner also referred to Article 23 (3) (e) "... in any proceedings brought under Article 22, a court may grant appropriate relief, including an order for compensation." Based on this Article, the Petitioner prays that just like in cases cited above, the court orders for compensation equivalent to the amount of money the Petitioner lost to the conmen that is Kshs. 4,250,000/=. The Petitioner also seeks costs of the suit.

13. On their part the Respondent submitted that the **National Police Service Act No 11 of 2014 at Section 24** clearly brings out the functions of the Police and more specifically subsection (e) which states that a major function of the police is the investigation of crime. The Respondent submitted that since the occurrence of the incident in which the Petitioner was allegedly conned, a total of 8 suspects had been arrested, charged and prosecuted. This is supported by the Replying Affidavit which was sworn by the District Criminal Investigation Officer and filed on 16th January, 2013. See the case of **Republic vs. Commissioner of Police and Another Ex Parte Michael Monari & Another [2012] eKLR** where the court stated as follows

"The police have a duty to investigate any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime [if they do not investigate]."

14. The Respondent submitted that through their agents conducted a thorough investigation, and the Petitioner by raising the issue that the police refused to help him is merely tainting of the image of the police. The police moved swiftly and arrested two individuals who were said to be in the company of the Petitioner. In separate dates the police were able to apprehend the motor sales agent who revealed the names of other suspects involved in the conspiracy to defraud the Petitioner.

15. The Respondent submitted that the claim by the Petitioner that his rights of equality and freedom from discrimination were violated is mere rhetoric that holds no water. Like any other person, the Petitioner reported the matter to the police and without bias the police acted upon his matter because it is their statutory duty. In regard to the protection of the right of property which is envisaged in Article 40 of the Constitution, the Respondent submitted that the police could not hold the tipper as exhibit simply because it had been used as bait to defraud the Petitioner. Therefore in totality the Respondents acted diligently and with prompt swiftness to apprehend the suspects and in no way can it be said that since the Petitioner was not reinstated to his original state then the police were incompetent in discharging their duties.

16. On the issue of damages the Respondent submitted that damages in constitutional matters are not meant to restore a person to the state they were in before the act complained of as is the principle in tortuous claims, but to give just satisfaction. The Respondent cited the case of **Maharaj vs. Attorney General of Trinidad and Tobago, (No. 2) PC [1979] AC 385** in support of that argument and submitted further that if the Court is inclined to grant the declarations sought, the Court should apply the principles considered by the court in the **Peter Ngari Kagume case (supra)**. The Respondent also referred the court to Lord Woolf in his paper "**The Human Rights Act 1998 and Remedies in M Andenes and D Fairgrieve (eds), Judicial Review in International Perspective: 11(2000), pp 429-436** where the author suggested some possible principles to be followed while granting relief or a remedy where fundamental rights have been infringed. The principles are:-

1. *If there is any other remedy in addition to damages, that other remedy should usually be granted initially and damages should only be granted in addition if necessary to afford just satisfaction.*
2. *The court should not award exemplary or aggravated damages.*
3. *An award should be "of no greater sum than that necessary to achieve just satisfaction."*

17. The Respondent submitted that the claim by the Petitioner for exemplarily damages is one for enrichment and not to achieve a just satisfaction. The Respondent urged the court to dismiss the petition with costs.

The Determination

18. I have carefully considered the petition and submissions. I raise the following issues for determination:

- (i) Whether the Respondent or its agent failed to serve the Petitioner;
- (ii) Whether any damages are payable to the Petitioner.

19. On the first issue, the facts constituting the petition are well articulated herein and I will not repeat. Those facts reveal that a man called Rajab Faki Munyi and Jackson Angaine, together with other suspects, conned the Petitioner of Kshs. 4,250,000/= by pretending to sell them a tipper lorry. Upon realizing that he was conned the Petitioner reported the matter to Urban Police Station. The Petitioner alleges that the police failed to take immediate action and that the said failure caused him to lose the entire money. The Petitioner's case is that had the police taken immediate action and apprehended the conmen at least part of the money would have been recovered. The Petitioner alleges that there was discrimination and that the police were compromised and that is the reason they did not do their work.

20. The Respondent has denied the allegation and stated that they acted by carrying out investigations which led to the arrest and charging of 8 suspects who are currently being prosecuted. As such it cannot be said that the Respondent failed to carry out its duty.

21. I have carefully considered the issue as to whether the Respondent failed to act. What comes across is that the Petitioner reported the matter to the police who investigated the matter which led to the charging of the 8 suspects. I do not see how the police failed to do their work. When the Petitioner made a report of a criminal offence to the DCIO at Urban Police Station, the Petitioner did not expect that the alleged suspects would be immediately arrested and the money recovered. The police have the duty to carry out investigations to establish a culpable cause. It is not logical to expect that upon report of a commission of a crime arrest would be made immediately and the offence resolved. I am satisfied by the Replying Affidavit of Shadrack Kitheka who was the Investigating Officer in this matter. Their investigations led to the arrest, charging and prosecution of 8 suspects. The prosecution is still underway. It has not been proved that wrong suspects were charged. Since the prosecution is still underway, the Petitioner cannot allege that the investigations were shoddy. He must wait for the criminal process to run its full course.

22. The Petitioner also alleges that the said criminal process is taking too long. That could be true. However, it is not the Respondent to blame for the alleged delay. The delay, if any, could be the result of several combined factors.

23. In the end I find that the petition lacks merit and that the Petitioner has failed to meet the minimum threshold for a constitutional petition. For that reason I do not need to consider issue number two whether damages are payable.

24. The petition is dismissed with costs to the Respondent.

That is the Judgment of the court.

Dated, signed and Delivered in Mombasa this 3rd day of May, 2018.

E. K. O. OGOLA

JUDGE

Judgment delivered in the Open Court in absence of the parties.

Mr. Kaunda Court Assistant present.