



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

PETITION NO. 1 OF 2016

IN THE MATTER OF SECTION 84 OF THE CONSTITUTION OF KENYA (REPEALED)

AND IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL

RIGHTS AND FREEDOMS UNDER SECTION 72, 74, 76, 77 ND 81

OF THE CONSTITUTION OF KENYA (REPEALED)

BETWEEN

EUGENIA KATHOMI MIRITI.....PETITIONER

AND

THE ASSISTANT CHIEF NJAINA SUB-LOCATION.....1ST RESPONDENT

THE P.S MINISTRY OF INTERIOR & CO-ORDINATION OF

NATIONAL GOVERNMENT.....2ND RESPONDENT

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

J U D G M E N T

1. **EUGENIA KATHOMI MIRITI**, the Petitioner herein has brought this constitutional petition against state agencies namely; the Assistant Chief Njaini Sub-Location, (1st Respondent), the P.S Ministry of Interior and Co-ordinations of National Government (2nd Respondent) and the Attorney General of Kenya (3rd Respondent) for the following reliefs namely;

- a) A declaration that the Petitioner's right under Sections 72, 74, 76, 77 and 81 of the Constitution of Kenya (Now repealed) were breached by the respondents.
- b) An award of damages for the breach of the petitioner's fundamental rights and freedoms under sections 72, 74, 76, 77 and 81 of the Constitution of Kenya as repealed.
- c) An order of compensation of the petitioner for the injuries she sustained due to the breach of her fundamental rights and freedoms.
- d) Costs and interests at court rates from 20th September, 2009. to date.

2. The brief background of this petition is that on 20th February, 2009, the petitioner was set ablaze by a group of persons known to her on allegations that she was a witch. She is now seeking compensation from the respondents on the grounds that she suffered the ordeal while the first Respondent stood and watched thereby abdicated her statutory duties and responsibilities instead of saving her from the mob and resulted to the petitioner suffering grievous harm and infringement of her rights and fundamental freedoms.

3. The Petitioner's Case:

The Petitioner (PW2) testified in this court and told this court that on 20th February, 2009, at around 11 am, he went to attend a village meeting after being informed by a Sub Area (village elder) known as Joseph Githinji. He further stated that while attending the said meeting, the said Joseph Githinji, summoned one person in attendance to read out some names of persons who had passed on and heaped the blame on their demise on her. He further stated that he was beaten and escorted home by three persons namely Patrick Miriti, Kirimi Njeru and Emilio Mugendi purposely for her to go and remove alleged witches he had in her house. It was her evidence that her hands were tied and that the three named persons got 3 handbags in her house which they hanged on her neck before frog marching her to an open public utility space where the Assistant Chief used to hold public "barazas" or gatherings. Upon arrival, she stated that she was beaten severally on accusations that she was a witch and had bewitched several people in the area. According to her the crowd got more incensed when they could not find the witchcraft or paraphernalia used for witchcraft in the 3 handbags picked from her house and beat her more asking to reveal where she had kept them. She stated that her husband later turned up at the scene and asked the husband of the Assistant Chief what had happened but the husband named Njeru Charles or Mohammed responded in the negative before calling the Assistant Chief who arrived shortly thereafter. She added that when the Assistant Chief/1st respondent arrived, she called the police who turned up and took her to Hospital as the crowd dispersed.

4. The petitioner contends that she suffered inhuman and degrading treatment at the hands of the 1st respondent. She has detailed the injuries as 20% burns, extensive scarring, and loss of movement of the right shoulder. Her further medical reports filed reveal that she suffered 50% disability and in need of further surgery as well physical and occupational therapy. Dr. Nicholas Koome (PW1) testified and confirmed the cited injuries and degree of disability.

5. Paskwale Miriti (PW3), the petitioner's husband testified in support of his wife's petition. According to him the meeting called by the Sub-Area (village elder) must have had the blessings of the Assistant Chief. He further told this court that the Assistant Chief tried to rescue his wife from a mob but that she should have done more because she was vested with authority as the Assistant Chief.

6. In her written submissions through counsel Ms Muia Mwanzia and Co. Advocates, the petitioner contends that the Chief's Act (Sections 6, 8, 10 and 20) puts the chief or his assistant under a duty to protect and safeguard members of the public. To buttress this, she has cited the decision in Paul Waweru & 4 Others -vs- Attorney General [2016] eKLR where the court held that the State through its security agencies has an obligation and duty to facilitate a peaceful environment and ensure security of the person. It is submitted that an award of Ksh.5 million in general damages for injuries suffered and Kshs.10 million for breach of petitioners constitutional rights would be just and fair and the petitioner has relied on the case of Denish Ogumbe - vs- CS Ministry of Defence & Another [2017] eKLR to justify that award.

7. Respondent's Case

The first respondent, Fatuma Kaari Njeru (DW1) testified that on the material date (20th February, 2009), she was in her office when her husband (now deceased) called her informing her that the petitioner was about to be lynched. She told this court that she immediately got into a taxi and rushed to the scene to find a large crowd of people and in the midst, a person dashed from the crowd while on fire ran towards a banana plantation with the crowd in hot pursuit. She told this court that she immediately called the police who responded immediately and as a result the petitioner was rescued and two people arrested and later charged in court. She named one Charles Ntwiga as one of the persons who had brought fuel used to torch the petitioner on suspicion that she was a witch. She added that she testified as a prosecution witness in the Criminal Case No. Chuka Principal Magistrate's Court Criminal Case No.221 of 2009 where Charles Ntwiga Njeru and Joseph Kithinji Gakwirino were charged. According to the 1st Respondent had she not intervened, the petitioner would have been killed by a mob. She further justified the actions she took stating that she was a prosecution witness in the cited criminal case where one of the culprits (Charles Ntwiga) who meted violence against the petitioner was found guilty and convicted. She told this court that she properly played her role in maintenance of law and order. She denied having told the petitioner to sit down as she called for the police and also denied that there was a public meeting called by the Sub-Area (village elder) as she had not authorized for any meeting on the material day.

8. The respondents have submitted that the petitioner has not specified with clarity what rights were infringed. They also contend that the repealed constitution cannot be invoked as it was repealed even before the suit was filed. It is further contended that the petitioner's claim is not well grounded in law as the petitioner has failed to establish the connection between what befell her and the conduct of the 1st respondent.

9. This court has considered this petition and the evidence presented and submissions made by the petitioner's counsel. I have also considered the response made by the respondents through the 1st respondent and the submissions made through J.M Kiongo Senior Litigation Counsel from the office of the Attorney General. The main issue in this petition is whether the petitioner's rights under the repealed constitution were infringed by the actions of the 1st Respondent and if so whether the respondents are liable to damages.

10. Before I consider the above issues the respondents' contention that the petitioner's petition is defective for invoking the old constitution now repealed deserves a finding from this court. The cause of action in this petition arose on 20th February, 2009 before the promulgation of the present constitution of Kenya 2010. It therefore follows that at the material time (20th February, 2009) the old constitution was in force and any person has every right to invoke the provisions of old constitution if she/he feels that his rights as enshrined in that constitution were infringed or violated by the state or any state agency. The respondent's contention that this petition is defective for invoking the old constitution which has now been repealed, is unfounded in law as held in the case of Duncan Wang'a -vs- Attorney General [2012] eKLR and B.A and Another - vs- Standard Group Ltd & 2 Others [2012] eKLR, the violation of fundamental human rights must be remedied, and it matters not if the infringements occurred under the regime of the old constitution because the old constitution under Articles 72, 74, 76, 77 and 81 provided for fundamental freedoms and rights as well. The petitioner has therefore right to invoke the old constitution because the alleged violations occurred during the regime of the old constitution.

11. Now turning into the main issue in this petition which whether the petitioner's constitutional rights were infringed, is that it is always a principle of law found under **Section 107 of Evidence Act** that whoever alleges must prove. It is without doubt that the petitioner suffered grievous injuries at the hands of the crowd that beat her and set her ablaze on 20th February, 2009 on suspicion that she was a witch. The

injuries suffered were well illustrated by Dr. Nicholas Koome Guantai.

12. It is true that under the provisions of the Chief's Act (Cap 128 Laws of Kenya) Sections 6, 7 and the Chief's are given powers to maintain law and order and prevent breach of peace or crime in their areas of jurisdiction.

13. The petitioner told this court that the Sub-Area (village elder) acting under instructions from the chief had called for a meeting in the village. However the evidence for the convention of such a meeting is lacking in this case. It is not very clear whether Joseph Kithinji, who was later arrested and charged for causing grievous harm to the petitioner in the criminal case is the same Joseph Kithinji who had allegedly called for a meeting. If he is the same person as suspected by this court, then it is obvious that he was acting on his own and not on the instructions of the 1st respondent as she denied in court that she ever authorized any meeting on that material date.

14. This court further finds that the petitioner should have sued the people who began the episode of labelling her a witch because she stated in her evidence clearly that 3 people she named frog marched her to her home and recovered some hand bags which they tied on her neck before taking her back to the public gathering where they interrogated her and beat her with a view to forcing her to confess about witchcrafts.

15. This court has noted that two of persons named by the petitioner Charles Ntwiga Njeru and Joseph Kithinji Gakwirino were arraigned in court through ***Chuka Principal Magistrate's Court Criminal Case No. 221 of 2009*** charged with attempted murder of the petitioner and incitement to violence. The petitioner in this case has not sued the two individuals despite their culpability particularly Charles Ntwiga Njeru who was found guilty and convicted. This court has not been told why the petitioner chose to leave individuals who were responsible for her woes and instead chose to direct her actions against the Respondents.

16. This court finds that the petitioner has failed to establish a nexus between what befell her and the acts of commissions or omissions by the 1st respondent. In all fairness the 1st respondent responded immediately she was called on phone and found the petitioner already beaten and set on fire. This court finds that given the large crowd at the scene, even if it is true she arrived before the petitioner had been set ablaze (which I find not proved on a balance of probabilities) the much she could do was to call the police which she did. I also find that the first respondent co operated with other government agencies culprits who were arraigned in court and she was one of the prosecution witness (PW3) in the criminal trial. The accusations made against the 1st respondent on the action she took upon arriving at the scene, where the mob had surrounded the petitioner, in my view is remote and cannot be connected to the infringements of the petitioner's right by any stretch of imagination. The Assistant Chief acted fast and saved the life of the petitioner and should be commended for the actions she took and not condemned. Had she stood by and watched as the mob descended on the petitioner perhaps fate of the petitioner could have been far worse. There is no evidence tendered before me which suggests that the 1st respondent did not take her responsibilities and/or mandate of ensuring law and order prevailed in her locality. The witnesses who testified did not lay blame directly on the 1st respondent. The petitioner's blame on the 1st Respondent is that she stepped aside to call the police and that is when the mob set her on fire. I have however considered the circumstances obtaining at the material time which are

- (i) An agitated crowd baying for blood of a suspected witch;
- (ii) The Assistant Chief was alone and not armed,
- (iii) It was around 7 pm and darkness was approaching.

The 1st respondent in my considered view acted fast and wisely by calling the police who also responded quickly by coming to the rescue of the petitioner and later apprehending the suspects were who identified by the complainant (petitioner) and her witnesses.

17. In the foregoing this court finds no merit in this petition. The same is dismissed with costs.

Dated, signed and delivered at Chuka this 3rd December, 2018.

R.K. LIMO

JUDGE

3/12/2018

Judgment dated, signed and delivered in open court in the presence of Kiongo for Respondent and in presence of Petitioner in person.

R.K. LIMO

JUDGE

3/12/2018