



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILINMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 323 OF 2015**

**IN THE MATTER OF APPLICATION UNDER ARTICLE 165 (3) (B), (D), 2, 10, 19, 20 (1) (2) (3),**

**(4), 21, 22 & 23 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND**

**FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF THE PROTECTION OF THE CONSTITUTIONAL RIGHTS ENSHRINED**

**IN CHAPTER FOUR OF THE CONSTITUTION IN SO FAR AS THE PETITIONER'S**

**CONSTITUTIONAL RIGHTS UNDER ARTICLES 27, 28, 40 & 47 HAVE BEEN VIOLATED**

**AND**

**IN THE MATTER OF PROTECTION TO PROPERTY**

**UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ALCOHOLIC DRINKS CONTROL ACT (ACT NO. 4 OF 2010)**

**AND**

**IN THE MATTER OF VINDICATION OF RIGHTS OF**

**PETER NDEGWA KIAI T/A PEMA WINES & SPIRITS**

**AND**

**IN THE MATTER OF AN APPLICATION**

**BETWEEN**

**PETER NDEGWA KIAI T/A PEMA WINES & SPIRITS.....PETITIONER**

**VERSUS**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY FOR INTERNAL SECURITY AND**

**COORDINATION OF NATIONAL GOVERNMENT.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT****The petitioners' case**

Briefly, the petitioners case is that on 4<sup>th</sup> July 2015, at around 10 am, the second and third Respondents' agents, in the company of a District Commissioner, a one George Natemba, Administration Police and chiefs under his command led a group of armed gang/hooligans under the guise of an operation against production and consumption of illicit liquor (second generation alcohol) descended on the duly licensed petitioners' business premises situated in Eastleigh, and engaged in unlawful destruction and looting of the petitioners' property wherefore stock worth colossal sums of money was looted and or unlawfully seized.

The petitioner avers that he is a licensed and authorized trader of alcoholic products sanctioned by manufacturers and dealers, namely Kenya Breweries Limited, London Distillers Limited, Africa Spirit Limited, Kapari Limited, Crown Beverage and Kenya Wines Agencies Limited and that despite lodging a complaint at Pangani Police Station and at the National Campaign Against Drug Abuse Authority (NACADA) no action was taken. The petitioner avers that the actions complained of contravened his rights under articles 40(1), 47, 28 and 27 of the constitution and that as a consequence of the matters complained of herein, he lost stock worth 32,000,000/=.

**First Respondents' Response**

In a Replying affidavit sworn by a one Dr. William N. Okedi, the Chief Executive Officer of the National Authority for the Campaign Against Alcohol and Drug Abuse averred that the deaths occasioned by illegal, unlicensed and substandard drinks necessitated the actions complained of as to contain the menace and the need to guard consumer rights, and that the crackdown in question was done in public interest and was undertaken within the confines of the law.

**Courts Directions on filing written submissions**

On 26<sup>th</sup> June 2016, parties were directed to file submissions within 14 days and a mention date was scheduled for 27<sup>th</sup> July 2016 to confirm compliance. On the said date, the counsel for the A.G asked for 3 three days to comply and a mention date was set for 18<sup>th</sup> July 2016. On the said date no submission had been filed. The Respondent at his request was granted 14 days to file and case was mentioned twice, on 17<sup>th</sup> August 2016 and 30<sup>th</sup> August 2016, but again no submissions were filed.

On 22<sup>nd</sup> February 2017 no submissions had filed. The Respondents counsel asked for 14 days to file. I granted them 14 days to file and fixed a mention date for 13<sup>th</sup> March 2017 but again on the said date no submissions had been filed. I fixed the matter for delivery of judgment on 16<sup>th</sup> May 2017 and directed that the Attorney General were at liberty to file their submissions if they so wished within 14 days from the said date. At the close of business on the fourteenth day, no submissions had been filed.

**Petitioners' Advocates' submissions**

Counsel for the petitioner cited violation of the petitioners rights under articles 40, 28, 47 of the constitution [1] and urged the court to award compensation to the tune of 32,000,000/= being the alleged value of the stock that was lost/destroyed and relied on annexure PNK 5 as testimony to the said value.

**Whether or not the petitioner proved his case to the required standard**

Regarding the constitutional issues raised in the petition, it must be borne in mind that the Constitution must be interpreted in a broad way and not in a narrow and pedantic sense. Certain rights have been enshrined in our Constitution as fundamental and, therefore, while considering the nature and content of those rights the Court must not be too astute to interpret the language of the Constitution in so literal a sense as to whittle them down. On the other hand the Court must interpret the Constitution in a manner which would enable the citizens to enjoy the rights guaranteed by it in the fullest measure subject, of course, to permissible restrictions.[2]

The spirit of the constitution must preside and permeate the process of judicial interpretation and judicial discretion.[3] The disposition of Constitutional questions must be formidable in terms of some Constitutional principles that transcend the case at hand and is applicable to all comparable cases. Court decisions cannot be *had hoc*. They must be justified and perceived as justifiable on more general grounds reflected in previous case law and other authorities that apply to the case before the court.[4] The privy council in the case of *Minister for Home Affairs and Another vs Fischer*[5] stated that:-

“a constitutional order is a document sui generis to be interpreted according to principles suitable to its particular character and not necessarily according to the ordinary rules and presumptions of statutory interpretation... It is important to give full recognition and effect to those fundamental rights and freedoms.....”

**Lord Wilberforce**, while delivering the considered opinion of the court in the above case observed:-

“A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to the language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation recognition of the character and origin of the instrument and to be guided by the

principle of giving full recognition and effect to those fundamental rights and freedoms.....”

My discernment from the foregoing jurisprudence is that in interpreting the Constitution, the court should attach such meaning and interpretation that meets the purpose of guaranteeing Constitutionalism, non-discrimination, separation of powers, and enjoyment of fundamental rights and freedoms.

This court cannot deviate from its own duty of determining acts which amount to infringement of constitutional rights of the citizens. In my view, every act of the state and its organs must pass through the test of constitutionality which is stated to be nothing but a formal test of rationality. In cases of violation of fundamental rights, the Court has to examine as to what factors the court should weigh while determining the constitutionality of the actions complained of. The court should examine the case in light of the provisions of the Constitution. When the constitutionality of an act of state agents is challenged on grounds that it infringes a fundamental right, what the court has to consider is the “*direct and inevitable effect*” of such actions. In my view, actions that infringe on fundamental rights unless they can be demonstrated to fall with exceptions under article 24 of the constitution are out rightly unconstitutional.

It is the sacrosanct duty of the government agents to remember that citizens while in their hands are not denuded of their fundamental rights under the Constitution. The restrictions imposed on fundamental rights have the sanction of law by which the enjoyment of fundamental right is curtailed but the citizens basic human rights are not crippled so that the government agents can treat citizens in an inhuman manner or engage in destruction of their properties. On the contrary, they are under obligation to protect fundamental rights of the citizens and prevent all forms of atrocities.

It is important for the court to address its mind to the question of the ambit of the courts' duty to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights as intended in our transformative constitution to ensure that the normative value system created by the Constitution permeates the common law.

The central question is the constitutionality of the common-law principles underlying the vicarious liability of an employer for the delictual acts of his/its employee. Courts must distinguish between the principles themselves and their application. The traditional notion of the application of these principles as matter of fact untrammelled by considerations of law or normative principles was found to be constitutionally untenable in by the South African constitutional court in *K v Minister of Safety and Security*[6] where the court held that the application of the principles were in need of development to conform to the normative framework of the Constitution. This meant that a court must bear in mind constitutional norms when deciding whether the case before it is in principle one in which the employer should be held liable. The principles themselves, are embodied in a two-stage test, focusing on the subjective question as to the state of mind of the employee, together with the objective question as to whether there is a sufficient link between the conduct of the employee and the employer's enterprise consistent with constitutional norms.

The particular question to be decided in this matter is the liability of the state for acts committed by its agents while on duty. In the above cited case, to determine whether or not the state was vicariously liable, the court used a two-stage common-law test for liability, developed in light of the normative framework of the Constitution. This test, drawn from the case of *Minister of Police vs Rabie*[7] had both a subjective stage (evaluating the state of mind of the employee) and an objective stage (considering the link between the delict and the employer's enterprise). The policemen in the said case, subjectively viewed, were found to have acted in pursuit of their own objectives. Their conduct, however, was sufficiently linked to their employment as policemen, particularly when viewed against the background of the Constitution. The state, accordingly, was held to be vicariously liable.

The principles of vicarious liability and their application have therefore to be developed to accord more fully with the spirit, purport and objects of the Constitution. This means that the existing principles of common-law vicarious liability have to be understood and applied within the normative framework of the Constitution, and the social and economic purposes which they seek to pursue. This implies that the court has to decide whether the case before it was of the kind that should, in principle, render the employer liable.

The Government has a statutory and constitutional duty to protect constitutional rights of the citizens and protect the members of the public. That duty also rests on its agents employed to perform their duties. The Respondents agents in this case were constitutionally obliged to protect the petitioner and to prevent destruction of his properties. In determining whether or not the Respondents are liable, the importance of the constitutional role entrusted to the government, and of nurturing confidence and public trust in its agents in order to ensure that their role is successfully performed, has to be kept in mind. The conduct of the Respondents agents constituted both a commission and an omission; the unlawful destruction of the petitioners property and the failure to protect his property rights.

In my view, the acts complained of viewed against the background of our Constitution, and, in particular, the constitutional rights of the applicant and the constitutional obligations of the Respondents, sufficiently renders the respondent liable.[8] I find that the Respondents are vicariously liable for the wrongful conduct of their agents. Destruction of the petitioners property was not part of the operation they were engaged in nor can such destruction be justified under the law.

The law enjoins government officers to be scrupulously fair to an alleged offender and to ensure fair investigation and fair trial and also to ensure that the citizens constitutional and fundamental rights are not violated. It is the duty of the courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments into these rights.[9] I do not think the conduct of the Respondents agents complained of in this petition was justifiable or grounded on the law. The said agents were under a legal duty to act fairly and undertake their operation within the confines of the law.

## **Damages**

It is now an established principle that violations of fundamental human rights must be remedied Kriegler J. Properly captured this in the Constitutional Court of South Africa case of *Ntanda Zeli Fose vs. The Minister of Safety and Security* where he expressed himself that:-

**“..... our object in remedying these kinds of harms should, at least be to vindicate the constitution, and to deter its further infringement. Defense speaks for itself as an object, but vindication needs elaboration. Its meaning, strictly defined, is to “defend against encroachment or interference.” It suggests that certain harms, if not addressed, diminish our faith in the constitution. It recognizes that a constitution has as little or as much weight as the prevailing political culture affords it. The defense of the constitution—its vindication is a burden imposed not exclusively, but primarily on the judiciary. In exercise of our discretion to choose between appropriate forms of relief, we must carefully analyses the nature of a constitutional infringement and strike effectively at its source....”**

The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting 'compensation' in proceedings under Article 23 of the constitution or seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalizing the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty, by not protecting the fundamental rights of the citizen or by subjecting the citizen to acts which amount to infringement of the constitution.

It is thus now well settled that award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under the constitution. The quantum of compensation will, however, depend upon the facts and circumstances of each case. I accept in principle that constitutional damages as a relief separate and distinct from remedies available under private law is competent because a violation of a constitutional right must of necessity find a remedy in one form or another, including a remedy in the form of compensation in monetary terms.

The remedy sought was a constitutional and not a delictual remedy, which had as its objective **(a)** the vindication of the fundamental right itself so as to promote the values of an open and democratic society based on freedom and equality and respect for human rights; **(b)** the deterrence and prevention of future infringements of fundamental rights by the legislative and executive organs of State at all levels of government; **(c)** the punishment of those organs of State whose officials had infringed fundamental rights in a particularly egregious fashion; and **(d)** compensation for harm caused to the petitioner in consequence of the infringement of the petitioner's fundamental rights.<sup>[10]</sup> Appropriate relief' in terms of the Constitution is relief that is required to protect and enforce the Constitution.<sup>[11]</sup> Depending on the circumstances of each particular case the relief might be a declaration of rights or such other relief as might be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it necessary to do so, the courts might even have to fashion new remedies to secure the protection and enforcement of these all-important rights.<sup>[12]</sup>

On the quantum of damages, award of damages entails exercise of judicial discretion which should be exercised judicially and that means that it must be exercised upon reason and principle and not upon caprice or personal opinion.<sup>[13]</sup> The jurisprudence that has emerged in cases of violation of fundamental rights has cleared the doubts about the nature and scope of the this public law remedy evolved by the Court. The following principles clearly emerged from decided cases;<sup>[14]</sup>

1. Monetary compensation for violation of fundamental rights is now an acknowledged remedy in public law for enforcement and protection of fundamental rights;
2. Such claim is distinct from, and in addition to remedy in private law for damages for tort;
3. This remedy would be available when it is the only practicable mode of redress available;
4. Against claim for compensation for violation of a fundamental right under the constitution, the defence of Sovereign immunity would be inapplicable.

I note that arriving at the award of damages is not an exact science, and also I am aware that no monetary sum can really erase the scarring of the soul and the deprivation of dignity that some of these violations of rights entail.<sup>[15]</sup> When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation is discretionary and, moreover, the violation of the constitutional right will not always be coterminous with the cause of action in law.<sup>[16]</sup>

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in helping the court arrive at a reasonable award. The court must consider and have regard to all the circumstances of the case. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution. The courts and tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available in the calculation of financial loss.

I am persuaded that the petitioner proved to the required standard that his rights were violated by the agents of the Respondents. Considering the nature of the violations of the constitutional rights, the above legal principles and bearing in mind the fact that it may not be easy to quantify violation of fundamental rights and freedoms, I find that the petitioner is entitled to an award of damages. However, the alleged stock in trade of Ksh. 32,000,000/= has in my view not been proved to the required standard.

Doing the best I can, I find that an award of a global sum of Ksh. 1,000,000/= would be reasonable compensation for violation of the petitioners' rights and compensation for the loss incurred. Accordingly, I enter judgement in favour of the petitioner as follows:-

i. **A declaration** be and is hereby issued that the rights of the petitioner under articles 40, 47 and 28 of the constitution were violated by the agents of the second and third Respondents.

ii. **That** judgement be and is hereby entered in favour of the petitioner against the Respondents jointly and severally in the sum of **Ksh. 1,000,000/=** by way of general damages.

iii. **That** the above sum shall attract interests at court rates from date of filing petition until payment in full.

iv. **That** the Respondents do jointly and severally pay the costs of this Petition to the petitioner plus interests thereon at court rates.

Orders accordingly.

**SIGNED, DATED, DELIVERED AT NAIROBI THIS 13<sup>TH</sup> DAY OF MAY, 2017**

**JOHN M. MATIVO**

**JUDGE**

---

[1] Counsel cited Keroche Industries Ltd & 6 Others vs A.G {2016}eKLR, Ahmed Issack Hassan vs Auditor General {2015}eKLR, R vs Cabinet Secretary-Ministry of Education Science & Technology & 2 Others {2016}eKLR

[2] See Mudholkar J in Sakal Papers v Union of India AIR 1962 SC 305 at p 311

[3] State vs Acheson {1991} 20 SA 805

[4] See Wechsler, {1959}. Towards Neutral Principles of Constitutional Law, Vol 73, Harvard Law Review P. 1.

[5] {1979} 3 ALL ER 21

[6] 2005 (6) SA 419 (CC).

[7] 1986 (1) SA 117 (A).

[8] 1986 (1) SA 117 (A)

[9]Bradley J. in Edward A. Boyd and George H. Boyd v. Unites States (1884) 116 U.S. 616

[10] Fose vs Minister of Safety and Security 1997 (3) SA 786 (cc) 1997 (3) SA p786 , citation 1997 (3) SA 786 (cc

[11]Ibid, per Ackermann J, Chaskalson P, Mahomed DP, Langa J, Madala J, Mokgoro J, O'Regan J and Sachs J

[12] Ibid

[13]Mbogo & Another vs Shah{1968} EA 93

[14] V.K. Sircar, Compensation for Violation of Fundamental Rights, a new remedy in Public Law Distinct

from relief of damages in tort, <http://ijtr.nic.in/articles/art7.pdf>

[15] Koigi Wamwere v Attorney General{2015} eKLR

[16]Attorney General v Ramanoop [2005] UKPC 15, [2006] 1 AC 338