



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 422 OF 2014

BETWEEN

HEILDAH AWUOR OGOLPETITIONER

AND

THE TRUTH JUSTICE AND

RECONCILIATION COMMISSION.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

Introduction

1. The Petitioner, Heildah Awour Ogol, is the widow and legal representative of Benjamin Monye Ogol (deceased) who died on 16th August, 2008. In her Petition, she claimed that during the deceased's lifetime, he worked in different capacities in the Public Service including as a teacher, District Officer and District Commissioner. That upon retirement, he was appointed and worked as the Chairman of Sony Sugar Company and as Election Co-ordinator in Nyanza Province.
2. She alleged that on or about the 23rd May, 2013, she came to learn that her late husband had been mentioned adversely in the report of the Truth, Justice and Reconciliation Commission (TJRC) and was listed as one of the persons to be prosecuted for alleged human rights violations. She specifically stated in that regard that her late husband had been mentioned as follows at page 31 of Volume IV of the TJRC Report;

“The Commission has identified individuals who were involved in the torture and ill-treatment of, amongst others Mwakenya and FERA suspects and recommends their investigation and, where there is sufficient evidence prosecution. In particular, the Commission recommends the prosecution of the following; James Opiyo, James Mathenge, Sam Chelimo, Munene Muhindi, John Mburu, S P Okwemba, Petkay Miriti, G Kosgey, James Kilonzo, James Gachanja Kariuki, Christopher Karanja Kiarie, Noah Arap Too, Geoffrey Kinoti, Leonard Wachira, Elias Mjomba, Thomas Kiarie, Nyaga Wambora and Benjamin Ogol.”

At page 129 of Volume IV of the report it was also allegedly stated that;

“Mr. Benjamin Ogol - it was alleged that he was involved in the torture and ill-treatment of Mwakenya suspects. He was summoned on 20th, May 2013 but he failed to attend the Commission’s hearings in 24th June, 2011 at 9.00am at the Kenyatta International Conference Center. The Commission recommended to the Director of Public Prosecutions for his prosecution.”

Petitioner’s Case

3. In that context, the Petitioner claimed that her family has never received any summons for her late husband to attend the Commission’s hearing and in any event that the Commission’s recommendation and findings are erroneous because at the time the Commission was exercising its mandate, Mr. Benjamin Ogol had long died and therefore no summons could be served on him. Further, that there is nothing in the report to show that the Petitioner’s husband was involved in the crimes he is alleged to have committed and lastly, that the recommendation cannot be acted upon because a dead person cannot be prosecuted for criminal offences allegedly committed while he was alive.
4. The Petitioner also stated that the report is unfair and unreasonable and has exposed her and her family members to ridicule by members of the public and has lowered her dignity and that of her family.
5. She added that she decided to file a Petition with a view of correcting the erroneous view contained in the report that Mr. Ogol had been summoned but refused to attend the Commission’s hearing on the stated date, a fact that was interpreted by the Commission as defiance which meant that he was guilty of the allegations. She also stated that she seeks to clear her late husband’s estate of any wrong doing on its part.
6. The Petitioner went further to contend that her constitutional rights together with those of her family members are likely to be infringed if the erroneous information regarding her late husband is not deleted and/or corrected as is provided for in **Article 35(2)** of the **Constitution** and it was her contention that failure of the Commission to address the issues raised by her family members amounts to a violation of their right to fair administrative action as guaranteed under **Article 47** of the **Constitution**. Further, that the findings and recommendations contained in the 1st Respondent’s report are untrue and they lowered her right to dignity as is provided under **Article 28** of the **Constitution**.
7. She has therefore sought the following orders;

“(a) A declaration that the 1st Defendant’s findings and recommendations in respect of Benjamin Monye Ogol (deceased) contained on pages 31 and 129 of Volume IV of the report is incorrect and untrue and the same infringe on the Petitioner’s constitutional rights under Articles 28 and 47 of the Constitution.

(b) An order that the said incorrect information be deleted from the report pursuant to Article 35(2) of the Constitution.

c. Compensation for violation of constitutional rights.

d. Costs of this Petition be borne by the Respondents.”

8. Mr. Mwangi, learned Counsel presented the Petitioner’s case and it was his submission that while TJRC was dissolved on 21st August, 2013 the Attorney General has been enjoined on its behalf as 2nd Respondent. He claimed in that context that under **Section 2** of the **TJRC Act**, the Minister

- mentioned therein includes the Attorney General and therefore the Petition cannot fail for the reason only that the Commission has since been dissolved. That even if the Commission had remained in place, it had no power under the Act to alter its own report after it had submitted it to the President hence the necessity to sue the Attorney General as the legal adviser to Government.
9. On the issue of *locus standi*, he claimed that the Petitioner is the legal representative of the deceased's estate and she is entitled to represent the estate as well as members of the deceased's family who were directly affected by the adverse mention of the deceased in the TRJC report. It was her position therefore that she has *locus standi* under **Articles 22(2) and 258 of the Constitution** to institute the Petition.
 10. It was Mr. Mwangi's other submission that the Petitioner had sought audience with TJRC without success hence this Petition. He relied on the case of **R vs Judicial Commission of Inquiry into the Goldenberg Affair ex parte George Saitoti (2006) e KLR** where the Court quashed the paragraphs which had adversely mentioned in the Applicant in the Report of the Commission of Inquiry into the Goldenberg Affair and that this Court was the right forum for the Petitioner to pursue her remedies.
 11. Further, that **Section 48 of the TJRC Act** empowered the 2nd Respondent to table the TJRC Report before the National Assembly within 21 days of its publication and after tabling the Report, he was required to set the process of implementation as provided for under **Section 49 of the TJRC Act**. **Section 50** of the same Act then requires him to give regular reports to the National Assembly on the implementation of the said report. He relied on the case of **Kiroo wa Ngugi & 6 Others vs Truth Justice and reconciliation Commission & 6 Others (2013) e KLR** where this Court observed that the role of the National Assembly was limited to receiving periodic reports in the implementation of the Report and in that context, she has no avenue to raise her complaints.
 12. Secondly, that the **TJRC Act** does not generally provide a procedure or mechanism for an aggrieved person to challenge specific parts of the report or even raise issues of mere dissatisfaction with it.
 13. Thirdly, that the National Assembly does not have the powers to delete nor alter any recommendations on the report given that its duty was only to consider the report before it was implemented and later receive periodic reports on the status of its implementation from the 2nd Respondent.
 14. It was therefore Mr. Mwangi's contention that the 2nd Respondent is the best person to deal with this issue as he is capable of implementing any orders granted by this Honourable Court and report to the National Assembly as to the nature and effect of such an order on the implementation of the report. He lastly urged the Court to allow the Petition with costs.

The Respondents' case

15. The 1st Respondent, TRJC did not file any response to the Petition for obvious reasons; it no longer exists.
16. The 2nd Respondent however opposed the Petition through Grounds of Opposition dated 27th October, 2014, and which read as follows;

“(a) That the Petition is incompetent, misconceived, misplaced and an abuse of the Court process.

(b) That the Petition does not disclose any cause of action against the 2nd Respondent.

(c) That the Petition does not disclose any constitutional violations or breaches by the 2nd Respondent.

(d) That the Petition is unmeritorious as the threshold for the grant of the orders sought has not been met.”

17. Miss Wawira on behalf of the 2nd Respondent submitted in addition to the above that the Petition is incompetent and misconceived as it does not have legs to stand on because the 1st Respondent is incapable of being sued having been dissolved in 2013. She further submitted that under **Section 48** of the **TJRC Act**, the 1st Respondent's report is to be submitted to the President at the end of its operations and under **Section 52** of the **Act**, it was dissolved three months thereafter and therefore at the time of filing the Petition, the Commission had been dissolved and no orders against it are capable of being implemented and on that submission she relied on the case of **Dr. Njoya & 6 Others vs The Attorney General & 3 Others (2004) e KLR** where it was held that Courts do not act in vain.
18. It was Miss Wawira's further position that the Petitioner's claim does not fall within the ambit of **Article 22** as her deceased husband does not have any legal right recognized under the Bill of Rights and which is capable of protection by the Court.
19. It was also her submission that the Petitioner had failed to demonstrate how her rights under **Articles 28** and **47** of the **Constitution** had been infringed to warrant the intervention of this Court under **Article 35(2)** of the **Constitution**. She added that constitutional violations ought to be pleaded with due particularity and on that submission, she relied on the case of **Peter Muneria Ole Muiya & Others vs Principal Magistrate Petition No.48 of 2012** and **Annarita Karimi Njeru vs Republic (1979) KLR 154** where it was held that a Petitioner must plead with a measure of precision how the Constitution has been violated and the manner in which it has been violated.
20. It was her further submission that the Petitioner had failed to demonstrate breach of **Article 35(2)** of the **Constitution** and the said **Article** is not self-propelling and it crystallizes after a request had been made to the relevant body and where such a body had declined to grant the request. She relied on the case of **Kenya Society for the Mentally Handicapped vs Attorney General and Others Nrb Petition No.155A of 2011** where the Court held that coercive orders are only issued to enforce **Article 35** of the **Constitution** where a request has been made to the State or its agency and such request had been denied. That, since the Petitioner in this case has not discharged the onus of proof that she made an effort to the 1st Respondent in respect to enforcement of **Article 35(2)** and the same was denied, then her Petition ought to fail.
21. It was also her contention that the mere fact that the Petitioner's late husband did not defend himself before the TJRC was not a ground enough to warrant a decision not to be reached against that person. In any event, that the only person who would have submitted any defence before the TJRC was the deceased and not his relatives and therefore the prayers sought are theoretical and not justiciable and ought not to be granted.
22. It was lastly the 2nd Respondent's contention that the Petitioner has no cause of action and is not entitled to any of the remedies sought and that the Petition ought instead to be dismissed with costs.

Determination

23. From the pleadings and submissions before me, I am of the view that the only issue for determination in this matter is whether based on the facts above and which are largely uncontested, any of the Petitioner's rights under **Articles 28, 35** and **47** of the **Constitution** have been violated. If the answer is in the affirmative, then I shall determine what remedies are available to the Petitioner.

24. However, before I address the above issue, I heard the 2nd Respondent to contend that the Petitioner does not have the *locus standi* to institute the Petition on behalf of her deceased husband.
25. Looking again at the Petition before me, it is clear that the Petitioner has at one level instituted the Petition on behalf of her deceased husband, Mr. Benjamin Monye Ogol, who was allegedly adversely mentioned in the TJRC report and on another level, she has done so on her own behalf and on behalf of unnamed members of her family claiming violation of certain basic rights and freedoms.
26. In that context, the Constitution under **Article 22** grants “**any person**” the right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of rights has been denied, violated or infringed or is threatened with violation or infringement. **Article 258(1)** is even more expansive; Any person may move the Court claiming that the Constitution has been contravened or is threatened with contravention. While interpreting the import of **Articles 22** and **258(1)**, Onguto J in **Kevin Turunga Ithagi vs Hon. Justice Fred Ochieng Petition No.442 of 2015** stated as follows;

“Even with a textualized and restricted reading of those two Articles of the Constitution, it is apparent that the avenues for litigants to come to Court were made wider in 2010. A party need not necessarily be personally affected by the alleged violation of any Constitutional provision. The idea, in my view, is to ensure that any person is in a position to protect and defend the Constitution by all means, including litigation. A restricted reading of both Articles 22 and 258 of the Constitution ought, consequently, to be discouraged.”

27. I am in agreement with the learned judge and while I am aware that **Articles 22(1)** and **258(2)** of the **Constitution** grant the Petitioner the rights to institute a claim on behalf of another person, the instant Petition raises the fundamental issue whether the Petitioner can institute a Petition on behalf of her deceased husband.
28. In that regard, **Article 19(2)** of the **Constitution** provides that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of an individual. **Article 20(2)** of the **Constitution** is to the effect that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right. All these provisions therefore reaffirm the basic fact that human dignity is at the core of enjoyment of all other fundamental rights and freedoms in the Bill of Rights - See **Francis Coralie Mullin vs Administrator, Union Territory of Delhi (1981) SCR (2) 516**. Further, the High Court in the case of **Charles Marigu Murithii & 3 Others vs Attorney General Petition No.113 of 2009**, stated thus;

“We are alive to the fact that the right to human dignity is the foundation of all other rights and together with the right to life, forms the basis for the enjoyment of all other rights. Put differently therefore, if a person enjoys the other rights in the Bill of Rights, the right to human dignity will automatically be promoted and protected and it will be violated if the other rights are violated.”

29. Reading all the above Articles together, it becomes evident that fundamental rights and freedoms as stipulated under the Bill of Rights are to be enjoyed by all persons. Does that fact therefore include the enjoyment of rights by a deceased person? I think not. **Article 260** of the **Constitution** has defined a person as to “**include a company, association or other body of person whether incorporated or unincorporated**”. Put differently rights are enjoyed only by a natural person as well as a juristic person. It cannot have been the intention of the drafters of the Constitution that even a deceased person can enjoy fundamental rights and freedoms as contained in the Bill of Rights and I say so because it is obvious that a deceased cannot have any real and live grievances and concerns that would entitle a living person to come to Court as a party on his behalf. Further,

the Petitioner in her Petition at paragraph 12 stated as follows;

“The Petitioner further seeks to clear the Estate of her late husband of wrong doing with a view to according to her late husband peaceful rest in his grave.”

She is in essence seeking to enforce her deceased husband’s fundamental rights posthumously, which I have found to be a violation of the spirit and tenor of **Articles 19(2), 20(2), 22 and 158(2)** of the **Constitution**.

30. The above finding would have been enough to dispose of the Petition. However, I also heard the Petitioner to contend that her constitutional rights together with those of her family members are likely to be infringed if the erroneous information regarding her late husband is not deleted and or corrected in accordance with **Article 35(2)** of the **Constitution**. It was her case in that regard that the 1st Respondent’s report has exposed her and her family to ridicule by members of the public and therefore lowered her dignity as well as that of her family members. From what I stated above, she has *locus standi* to bring forth such a complaint under **Articles 22(1)** of the **Constitution** and the issues to resolve are whether there exists untrue and misleading information in regard to the deceased which would lead to an order under **Article 35(2)** of the **Constitution** and whether the Petitioner is entitled to any other remedy under the Constitution.

31. **Article 35(2) (b)** of the **Constitution** states that;

“Every person has the right to the correction or deletion of untrue or misleading information that affects the person.”

32. The normative content of the above right is clear and requires no more than a literal interpretation. It comprises two elements; firstly, for one to enforce the above right, there must be untrue or misleading information and secondly, the untrue or misleading information affects that person in a prejudicial manner - See **Linus Simiyu Wamalwa vs University of Nairobi Petition No.139 of 2014**.

33. In addition to the above, as I understand the jurisprudence on the subject, for a person to enforce the provisions of **Article 35(2)** of the **Constitution**, he must have requested for the deletion of the untrue and misleading information and the same had been denied. Further, where the request has been denied, the Court will have to interrogate any reasons given by the holder of the information and evaluate whether the reasons accord with the Constitution - See **Andrew Omtatah Okoiti vs Attorney General & 2 others (2012) e KLR and Kenya Society for the Mentally Handicapped (KSMH) vs Attorney General and Others Nairobi Petition No.155A of 2011**.

34. With that background in mind, it was the Petitioner’s case that her family’s attempt at reaching the 1st Respondent with a view of inquiring into the allegations as contained in the TJRC report was either declined or ignored. On its part, in its report, the Commission wrote that the deceased was summoned on 20th May, 2013 but failed to attend the Commission’s hearings on 24th June 2011 at 9.00am at the Kenyatta International Conference Center. The Petitioner answered that contention by stating that it was not possible for the Commission to have served summons on the deceased as he had long died i.e. on 16th August, 2008.

35. On my part, my mind is clear that the issue whether or not the deceased was adversely mentioned and erroneously so by the TJRC in its report is not for this Court to determine as it has no material evidence to make that determination. I do not know who lodged a complaint against him, on what basis and the reason why the TJRC decided to name him as one of those to be prosecuted for certain offences. Further, under **Section 48** of the **TJRC Act**, the Commission stood dissolved three months after submitting its report to the President. Under **Section 48(4)** of the **TJRC Act**, the Minister in charge of constitutional affairs was obligated to table the report in Parliament within 21 days of its publication. Under **Section 50** of the **Act**, the Attorney General as such Minister was to submit a report on the implementation of the report to the National Assembly

every three months.

36. In the above context, undoubtedly, **Article 35(2)** of the **Constitution** grants the Petitioner the right to have any untrue or misleading information affecting her husband's estate to be deleted. Elsewhere above, I have stated the normative content of that fundamental right but sadly, I do not have any evidence to demonstrate that the Petitioner applied to the TJRC to have any adverse information deleted (before it was dissolved) even if in fact she could do so on his behalf or even on her own behalf and on behalf of her family. Neither is there evidence that she protested to the 2nd Respondent even if he could act and my view is that he could not act in any way to amend the report by TJRC. In other words, I see no way in which **Article 35(2)** can properly be applied to the circumstances of this Petition.

37. I now turn to consider the issue regarding violation of the right to fair administrative action and in that regard it is the Petitioner's contention that the Respondents failed to give her reasons as to why they could not address her complaints and therefore contravening her right to fair administrative action.

38. **Article 47** of the **Constitution** provides for the right to fair administrative action in the following terms;

“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

39. In this case, the 1st Respondent submitted its report to the President on 21st May, 2013 and in accordance with the provisions of **Section 48** of the **TJRC Act**, the Commission stood dissolved on 21st August, 2013. The Petitioner averred that she learnt through Citizen Television that her deceased husband was adversely mentioned in the Commission's report on or about the 20th May, 2013. By that time, the Report of the Commission had been prepared and was handed over to the President the following day. She nonetheless claimed that she requested the Commission to delete the adverse information but it failed to do so but where is the evidence that she did request the Commission to delete the said information? How would the Commission have deleted the information after 21st May 2013 while it had already handed over its report to the President? Without any clear answers to the above questions it is very difficult to find that any rights under **Article 47** of the **Constitution** were violated.

40. Looking back at the prayers in the Petition, neither prayers (a) and (b) premised on **Articles 28, 35(2)** and **47** can be granted and I have said why. Prayers (c) and (d) could only be granted as a consequence of (a) and (b) and it is obvious that they too cannot be granted.

Disposition

41. Having held as above, it follows that I see no merit in the Petition and the same is dismissed.

42. As for costs, let each Party bear its own costs as I see no need to tax the Petitioner with costs in the present circumstances.

43. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 5TH DAY OF FEBRUARY, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Mr. Sifuna holding brief for Mr. Mwangi for Petitioner

Mr. Kuria for 2nd Respondent

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE

5/2/2016