



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT GARISSA
CONSTITUTION PETITION NO. 11 OF 2013
(Formerly Nairobi Petition No. 504 of 2013)

IDRISS ALI KUROW.....1ST PETITIONER
PAUL CHEGE.....2ND PETITIONER
GENYA HASSAN.....3RD PETITIONER

V E R S U S

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT
MINISTRY OF STATE FOR DEFENCE.....2ND RESPONDENT
MINISTRY OF STATE FOR INTERIOR
GOVERNMENT & NATIONAL COORDINATION....3RD RESPONDENT

JUDGMENT

This petition was filed on 17th October 2013 by Idriss Ali Kurow as 1st petitioner, Paul Chege 2nd petitioner and Genya Hassan as 3rd Petitioner as chairman, secretary and treasurer respectively of Garissa Market Development Group suing on their behalf and on behalf of all traders/members of Garissa market. The respondents were named as Hon. Attorney General 1st respondent, the Minister of State for Defence 2nd respondent, and the Ministry of State for Interior and National Coordination as 3rd respondent.

Filed with a petition was an affidavit sworn by Idriss Ali Kurow on 14th of October 2013 annexing a certificate of registration No. 556 of the Garissa Market Development Group issued by the Department of Social Services on 9th of October 2006 due to expire on 25th May 2010, and which was due for renewal on 26th May 2010. The said affidavit also annexed a list of 1,030 members of the group and also has a schedule of the list of losses incurred by each of them. It annexed a report and recommendations from Parliament on the alleged attack by the KDF in Garissa town.

The petitioners contended that on 19th and 20th November 2012 the Kenya Defence forces (KDF) were illegally deployed to Garissa County following the killing of 3 KDF soldiers without the approval of the National Assembly and committed illegal actions which were covered by national and international media to the utter shock of Kenyans. They stated that the petitioners' properties and source of livelihood were

destroyed making many members destitute and that as a result the inherent rights to dignity of the petitioners were violated.

Several orders have been requested from this court. Firstly a declaration that the KDF is bound by the Constitution and is under duty to respect, uphold and defend the Constitution. Secondly, a declaration that the decision to send the KDF was illegal and contrary to Article 241 (3) so as to prevent any other future violations of this provision and protect the sanctity of the Constitution. Thirdly, a declaration that the members of the Garissa market Development Authority Group right to protection of property has been violated contrary to Article 40 of the Constitution. Fourthly, a declaration that members of the Garissa Market Development Group had been treated or punished in a cruel and degrading manner in contravention of Article 29 of the Constitution. Fifth, a declaration that members of the Garissa Market Development Authority Group inherent right to dignity had been infringed contrary to Article 28 of the Constitution. Sixth an order for compensation for the 1035 traders represented by Garissa Market Development Group who jointly suffered losses of over 170,000,000/= on account of loss of stock and cash at the hand by the Government of Kenya after the market and their wares were deliberately torched by members of the Kenya Defence Forces during the illegal operation conducted on the 19th of November 2012 following the killing of three KDF soldiers in Garissa. Seventh an order for compensation in the cost of construction and construction of stalls for each of the members of the petitioner at a rate of Kshs. 200,000/= per stall at a total sum of Kshs. 207,000,000/=. Eight, an order for compensation for loss of earnings to each trader for every day the market had not been operational from 19th November 2012 at a rate to be determined by the court. Nine, an order for general and exemplary damages for the violation by the State officers of the rights of Kenyan citizens. Ten, an order for compensation for the Garissa Market Development Group of the loss of earnings during the period the market was not in operation on 19th November 2012 to date of compensation. Eleven, costs of and incidental to the petition be awarded to the petitioners. Twelve, such other orders as the Honourable court may deem fit to grant.

Further supporting affidavits were filed. These were the affidavits of Abdi Wahab Mohamed Ibrahim, Benjamin Kimanzi, Saadia Dahir Bare, Habiba Dahir Bare, Haretho Halad Barak Adle and Asli Ali Hassan.

The petition proceeded to hearing through the tendering of oral evidence. Pw1 was Paul Chege Mwangi the 2nd petitioner. It was his evidence that he was a businessman and member of the Garissa Market Development Group as the secretary. He stated that on 19th November 2012 at 1pm, he was at the market doing his business when he saw people running to hide. There was fire and he realized that people were surrounded by the military and were being beaten. He was also beaten and suffered. He relied on his affidavit. He said the KDF officers were in uniform and he witnessed the market burning. He relied on video clip, newspapers and radio broadcasts as well as Parliamentary discussions and recommendations. He stated that so far, no compensation had been paid to him though he suffered physically and lost business due to the beatings and burning of the market by the military. He stated that the organization had 135 members, but he did not know how many had gone back to business.

In cross examination, he stated that at one time he was the chairman but currently Idriss the 1st petitioner was chairman. He stated that he did not find it necessary to bring the list of members of the group which according to him was compiled by Idriss, who listed 800 stores which were burnt. He stated that traders built their own stalls.

Pw2 was Haretho Abdi Farah a trader at the Garissa market for 25 years. He stated that he had a family consisting of 15 members who depended on him and operated a kiosk at the Garissa market in which he earned between 2,000/= and 3,000/= daily. On a date he did not mention at 11am, KDF officers attacked them at the market, and beat them and forced them to lie in sewerage water and drink the said water. The KDF officers then locked the premises and he did not salvage anything from the shop. He said that three people were shot dead and as for him he was shot on the upper leg. The injury suffered changed his life as he could not go back to his business and could not fend for his family. He asked for compensation for harm and loss of business.

In cross examination, he stated that he sold farm products like vegetables and that he left his store open when the KDF officers arrived. He saw two people who were shot dead. He said that he was shot from behind on 20th November and was hospitalized. He stated that he was involved in preparing the list of claimants in this case as well as the amounts of claim.

Pw3 was Asli Ali Hassan, a business woman married with 10 children. She testified that she was conducting business at Garissa market when unexpectedly KDF officers attacked them. She tried to run away but was ordered to lie down and was beaten. She however crawled away and later saw fire burning at the market. She did not recover anything from her business premises and was not able to find capital afterwards to re-start a business. According to her, her shop was worth 1.5million shillings. She earned between 5,000 - 10,000/= per day. She relied on her affidavit.

In cross examination, she stated that she owned two shops under one roof. In one she sold groceries and the other, she sold clothes. She stated that if in the list her stock was said to have 300,000/- she did not agree with that figure. In re-examination she stated that that figure might have been a mistake from the committee.

Pw4 was Saadia Dahir Bare. It was her evidence that she was a small clothes businesswoman at the market which she had operated for 23 years. That on 12th of November 2012 at 11am, she was attacked by KDF officers who rounded up everybody and beat them. They also beat her in her shop and forced her to lie down. She lay down until 5pm when she managed to go home. In the morning, she found that her shop was reduced to ashes and that nobody was at the market except the military people. She stated that a storeyed building was burnt. She went to hospital for treatment and had not opened up her business to date. She asked for compensation for physical harm and the loss suffered in the shop business. She relied on her affidavit.

Pw5 was David Warira Miriti, a business man selling cereals at Gaissa market for 14 years. It was his evidence that on 12th November 2012 between 12.30pm and 1pm he was at the Garissa market when he saw people running. His customers fled his shop without paying. KDF officers then entered with guns and sticks and assaulted him and others, and ordered him to lie down and crawl. They took his money and phone. At 5pm, he heard explosions and went back to find that all shops had been burnt down. He stated that members of Garissa market group prepared a list of members and losses incurred. He asked for compensation as the Government did not appear to value Kenyans. He also felt that the Government should organize reconciliation between residents and the KDF.

In cross examination, he stated that he had gone back to do business at the market but in a small way. He stated that his stock was about 110,000/= but he did not bring an inventory of the stock. He said he reported the incident to the market committee. In re-examination, he said that the burning of the market was widely publicized even on BBC and Aljazeera television stations.

At this point the petitioners counsel closed this case, and asked for leave to file affidavits which was accepted by the defence counsel, but from the file no such further affidavits were filed.

The defence called one witness Major Kennedy Kibet Kirui. It was his evidence that on 19th November 2012 he was at Garissa military camp as a Captain and 2nd in command. At around 12 noon, an incident was reported at the camp by private Karanja that soldiers who had gone to repair punctures in a group of five had been shot near Cooperative Bank in Garissa.

On receipt of the report, Major Muriithi the in charge of the camp directed him to move to the scene with medical personnel. He moved there with a total of nine soldiers and on arrival at about 12.20pm, he found that 3 soldiers were already dead. Police were already at the scene and together with them he organized and removed the bodies to the Garissa General Hospital.

He received reports that the assailants had been sighted at Bula Muzuri about 3kms away from the scene and on request by the police he called for another section of nine soldiers and a vehicle to accompany the police and cordon the area for the police to conduct a search. He remained at the scene of shooting with

nine soldiers.

He stated that the Garissa market was about 900metres away from the scene and that after sometime, rowdy youths started burning structures near the market and also burnt tyres on the road. The soldiers returned at 1530pm from Bula Muzuri and were not able to arrest any suspects. Later, he was commanded by Deputy Army Commander in Nairobi by the name Oyugi and Rono to move to the camp. He stated that the soldiers who were killed were on transit to Hulugho and were not officers stationed at Garissa military camp.

He and other KDF officers had to walk to the camp on the sides of vehicles escorted by the police, as youths were rowdy and there was uncoordinated shooting from the police. He maintained that the military did not shoot as they were instructed to shoot only when in danger. They reached the main gate of the camp at 1610hours and he conducted a quick parade and found that his soldiers were not injured nor did they use any bullets.

The next day there was no activity except a group of soldiers in three tracks who left the camp for Wajir. In the process of these soldiers leaving, youths blockaded the area in Garissa town and police again had to shoot in the air. He was aware of the Parliamentary Committee report as well as the report of the District Security and Intelligence Committee which stated that the KDF were to blame. He said however that the reports were unfairly fabricated against the military for gain.

In cross examination, he said that he was in Garissa military camp for 3 years and had now been transferred. He said that there was an unusual situation in Garissa where the public gathered and cheered when the military or police were killed. He admitted that there were attacks on the military in places like Mombasa such as Navy on 17th October 2011. He maintained that it was not illegal for the military to assist the police in an operation and denied giving orders to soldiers to move to Bula Muzuri. He denied violation of Article 241 (1) of the Constitution by the KDF and stated there was no joint operation conducted between the military and the police. He said however that the soldiers were attacked and were perfectly entitled to act on self defence without getting Parliamentary permission. He admitted that they experienced the blockade from the youth only when they were going back to camp, not when they were getting into town from the camp. He said that if anybody suffered injuries, same were caused by the police.

In re-examination, he stated that he had given evidence on behalf of the KDF and that whatever action they took on that day, did not require Parliamentary approval.

After the close of the respondents case, parties counsel filed written submissions. Mr. Hassan for the petitioners also highlighted the written submissions. He particularly emphasized the case of ***Osman Vs. Minister of Internal Security [2011] eKLR.***

I have considered the matter, and also the submissions on both sides.

The petitioners have come to this court through a Constitutional petition on behalf of themselves and on behalf of other members of a registered institution, the Garissa Market Development Group. A person can come to court in Constitutional proceedings to enforce the Bill of Rights either for himself or on behalf of others.

Article 22 (1) and (2) of the Constitution is clear on this. It provides as follows:-

22 (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Right has been denied, violated or infringed, or it threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by –

(a.) a person acting on behalf of another person who cannot act their own name.

(b.) a person acting as a member of, or in the interest, a group or class of persons;

(c.) a person acting in the public interest; or

(d.) an association acting in the interest of one or more members.

I observe that the certificate of registration of the Garissa Market Development Group does not indicate who can be a member of that group. It lists the activities of the registered institution (group) as poverty eradication, market management and supervision, promoting members welfare, garbage management, conflict management and peace building.

The certificate No. 556 was first issued on 9th of October 2006, and was again issued on 25th May 2009, with a specific expiry date of 25th May 2010. It was for renewal on 26th May 2010.

No explanation has been given by the petitioners on whether the certificate of registration was renewed after 25th May 2010, as this petition was filed on 17th October 2013.

If the registered group did not exist after 25th May 2010 – then there can be no Chairman, Secretary, Treasurer and members on 17th October 2013 when the petition was filed.

Therefore the basis on which the petitioners claim to come to this court on behalf of members of the Garissa Market Development Group cannot stand.

The above is a serious technical fault that goes to the substance of the Constitutional petition herein. It has given me a lot of anxiety because in my view the case as it is cannot stand. I am mindful of the fact that this is a matter of public interest, and that only one of the three petitioners testified in court.

I am reluctant to shut out litigants because of this technicality though the case cannot stand as it is.

In order not to shut out possible litigants under the constitution due to this technical mistake, instead of dismissing the petition, I will strike it out. In my view, such striking out will respond to the spirit of Article 159 (2) (a) and (d) and (e) which state as follows –

159 (2) (a) justice shall be done to all irrespective of status.

(d) justice shall be administered without undue regard to technicalities

(e) the purposes and principles of this Constitution shall be protected and promoted.

Such striking out will in my view be in line with the provisions of Article 20 (3) (b) of the Constitution.

I thus strike out the petition herein, with no order as to costs.

Dated and delivered at Garissa this 6th day of September 2016

GEORGE DULU

JUDGE