



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

PETITION NO. 108 OF 2015

BETWEEN

JAMES OMWOYO MEROKA.....1ST
PETITIONER

PAMELA NYABONYI MEROKA.....2ND
PETITIONER

VENTURE TECHNOLOGIES LIMITED.....3RD
PETITIONER

AND

ATTORNEY GENERAL.....1ST
RESPONDENT

THE INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE.....2ND
RESPONDENT

**THE CABINET SECRETARY MINISTRY OF INTERIOR AND COORDINATION OF
 NATIONAL**

GOVERNMENT.....3RD RESPONDENT

THE CABINET SECRETARY MINISTRY OF DEVOLUTION AND PLANNING....4TH
RESPONDENT

JUDGMENT

Introduction

1. This Petition brings to the fore the extent and duty of the State to protect lives and property of the citizens during riot and violence. The Petition deals with the applicability of Section 70 and 75 of the retired Constitution during the post-election violence that engulfed various parts of the country in December 2007 and January 2008.

2. The Petitioners have filed this Petition claiming that between 30 December 2007 and 30 January 2008,

the State failed to discharge its constitutional and legal duty of maintaining law and order through out the Republic of Kenya. They claim that as a result of the aforesaid failure, unknown parties looted, vandalized and torched down their property.

The Petitioners' case

3. Petitioner's case is contained in its Petition dated 18 March 2015, affidavit sworn by the 1st Petitioner on the same date and his further affidavit sworn on 7 December 2015. Their case is straightforward. It is as follows:

4. The 1st and 2nd Petitioners are shareholders of the 3rd Petitioner, a limited liability company incorporated under the Companies Act (Chapter 486 Laws Kenya). They established Sotik High School and Sotik Boarding Primary School, both situated in Manaret Location of the then Sotik District. They allege that as at 30 December 2007, they had invested heavily in physical and other infrastructure at the two schools. In particular, they contend they had invested in and put up various buildings, equipment, stores, supplies and assorted assets at the two schools and a five-bedroom residential house at Chepilat, all allegedly valued at Ksh. 331, 155, 000. 00 as at 30 December 2007.

5. The Petitioners claim that they took loans with various financial institutions in order to finance the construction, development and provision of the aforesaid assets at the two schools. They claim that the total indebtedness under these loans stood at Ksh. 130,000,000 as at 30 December 2007.

6. They further claim that the two schools had thrived and flourished greatly as at 30 December 2007. Allegedly the two schools had a combined student enrolment of 1,200 students drawn from all over East and Central Africa. They had a combined average net annual income of Ksh. 86,000,000.00 and had employed 106 staff, comprising 86 teachers and 20 support and administrative staff.

7. The Petitioners' submit that the Respondents had a duty to maintain law and order through out the country during the post election violence. In their view the duty to maintain law and order ensures that the Petitioners fundamental rights and freedoms are protected by preventing interference by third parties, creating an enabling environment and adopting appropriate measures to attain the full realization of the rights.

8. According to the Petitioners', the government omitted, neglected and abdicated its duty by failing to discharge its duty of maintaining law and order through out Kenya. The failure to provide security created the opportunity and enabled unknown third parties to unlawfully destroy the Petitioners' properties at Sotik High School, Sotik Boarding Primary School and the residential home at Chepilat. It also made the 1st and 2nd Petitioners be forcibly ejected from their property and investments and destroyed their source of livelihood.

9. The Petitioners submit that the vandalism, looting, torching and destruction of their property and investments grossly violated their right to life and in particular the right to the protection of the Petitioner's sources of livelihood as set out under Section 71 of the Repealed Constitution. It also violated their right to acquire, own, possess, use and enjoy property as stipulated under Section 75 of the Repealed Constitution. They contend that as a result of the destruction they have suffered enormous loss and damage as follows;

a. Loss and or destruction of multiple buildings, equipment, stores, supplies and assorted assets at Sotik High School and Sotik boarding Primary School all valued at an estimated cumulative sum of Ksh. 290,000,000.00

b. Loss and destruction of;

i. 1,200 student desks

iii. 500 computers

- iii. 400 sacks of maize
- iv. 300 sacks of beans
- v. 250 dining tables
- vi. 60 double decker beds (read 1,200 beds)
- vii. 50 staff chairs and desks
- viii. 50 steal benches
- ix. 20 sacks of rice
- x. 4 plastic water tanks
- xi. I library and all the books therein
- xii. I power generator
- xiii. I lister engine water pump
- xiv. 3 duplicating machines
- xv. 2 buses
- xvi. 3 type writers

c. Closure of the two schools from January 2008 to date, with the attendant loss and income

d. Loss of income and livelihood following the closure of the two schools since January 2008, currently estimated at the cumulative sum of Ksh. 480,000,000.00

e. The loss and destruction of the 1st Petitioner's 5 bedroomed house and residential home at Chepilat, valued at the estimated sum of Ksh. 41, 155,000.00 as at 30th December 2007; and

f. Liability to various third parties (especially financial institutions) for failure to service loans, overdrafts and other credit facilities, arising directly from the destruction and loss of the Petitioner's businesses, investments and sources of income and livelihood, currently estimated at the sum of Ksh. 130,000,000.00

10. It is their contention that they were targeted primarily because of their ethnicity and their perceived political affiliation in relation to the 2007 general election.

11. In response to the Respondents contention that, the State did not owe the Petitioners any specific duty during the post election violence, the Petitioners submits that the decision of this Court in ***Charles Murigu Murithii & 2 Others vs. Attorney General Petition No. 113 of 2009 [2015]eKLR (Charles Murithii Case)*** can be distinguished. It is their contention that the ***Charles Murithii case*** did not create any way an absolute rule exempting the State from liability in regard to cases of human rights violations by state actors. In their view, their case falls within the exceptions made by the ***Charles Murithii case*** in the following ways.

12. Firstly, the State had prior information that non-kalenjin persons residing within Sotik District, and their property was at the risk of being exposed to violence. They therefore claim that the alleged prior knowledge on the part of the Respondent activated a special duty of care owed by the Respondents to the Petitioners. Secondly, there were police officers just a stone's throw from the Petitioners' properties at the

time of the relevant attacks at the permanent road block along the Ndanai-Sotik Road at the time of the invasion of the Petitioners' property. Allegedly, the road was about 100 metres from the Petitioners' properties. It is their position that the police officers ignored, failed and omitted to intervene even as the attackers vandalized, looted and razed down the Petitioners' properties. Thirdly, the Petitioners' properties were within close proximity (about 2 kilometers) to Sotik Police Station. The alleged proximity of the Police Station to the Petitioner's properties in their view brings their case within the exception set out in the *Charles Murithii Case*.

13. In any event, the Petitioners' have urged the Court not to follow the decision in the *Charles Murithii Case*. In their view, that decision is informed by decisions from foreign countries whose history and experiences are very different from Kenya's. In particular, they contend that the decision failed to take into account the history of politically instigated violence, ethnically oriented violence and history of institutional failures as described in the Waki Report.

14. It is therefore their submission that the state is liable for human rights violations by non-state actors. Indeed, they claim that the State has previously assumed responsibility for the post-election violence, repeatedly budgeted and set aside funds for the compensation of victims of the post-election violence. They allege that the State acknowledged the Petitioner's entitlement to compensation from the funds set aside for compensation. It is thus their case that the State is responsible for their losses and damage and should be ordered to compensate them.

15. In their Petition, the Petitioners seek the following orders;

a. Declarations to the effect that:

i. The government of the Republic of Kenya (and in particular against the Respondents and/or their predecessors in office) was constitutionally and legally obliged to maintain law and order through out the Republic of Kenya between 30 December 2007 and 30 January 2008;

ii. The Government of the Republic of Kenya Kenya (and in particular against the Respondents and/or their predecessors in office) failed in its constitutional and legal duty of maintaining law and order throughout the country between 30 December 2007 and 30 January 2008; and

iii. The Government of the Republic of Kenya's failure to maintain law and order throughout the Republic of Kenya between 30 December 2007 and 30 January 2008 infringed and/or enabled third parties to infringe the Petitioners' fundamental rights and freedoms under (inter alia) sections 70,71,74,75,81 and 82 of the Constitution of Kenya in force between 30 December 2007 and 26 August 2010.

b. An order directing the Respondents to immediately and unconditionally pay the Petitioners the sum of Ksh. 941,155,000.00 being damages and or compensation for the estimated loss (including loss of income), harm and damage arising from the infringement of the Petitioners' fundamental rights and freedoms under sections 70,71,74,75, 81 and 82 of the Constitution of Kenya in force between 30 December 2007 and 26 August 2010;

c. The costs of and incidental to these proceedings;

d. Interest on items (b) and(c) above at court rates with effect from 30 December 2007 till the date of full and final settlement; and

e. Such other, further, additional, incidental and or alternative reliefs or remedies as the Honourable Court shall deem just and expedient.

The 1st and 2nd Respondents' case

16. In response to the Petition, the 1st and 2nd Respondents filed an affidavit sworn on 16 October 2015 by Leah Kithei Ngutu, Senior Superintendent of Police and the County Commander of Police in Bomet County.

17. She deponed that the law places on the Kenya Police a general duty to maintain law and order and to provide security to the Kenyan public and not specific individuals. In her view, there is no police service in the world that can provide absolute protection to all individuals and their property. Further, the Kenya Police Service functions within very limited financial, human and equipment resource. It is therefore her position that the responsibilities of the police service must be viewed within the context of limited resource.

18. It is further her position that the Kenya police service has not occasioned the Petitioners any of the alleged loss. That the Kenya police force, discharged its duties during the post-election violence diligently and professionally in accordance with their mandate of maintaining law and order, providing security to Kenyans and their property round the clock to the best of their ability and capability.

19. She claimed that despite the limited number of police officers' country wide, officers were dispatched to post election violence hot spots countrywide to maintain law and order. They claim that the fact that the Petitioner did not suffer any personal or physical harm to his body and that of his workers, is proof that the Kenya Police Service had discharged its statutory obligation.

20. In any event, she stated that the Petitioners' did not make any distress call to the police and the police failed to respond to the call. She states that the Kenya police undertook investigations in relations to crimes perpetrated during post-election violence and where probable evidence was found, prosecution of alleged perpetrators was initiated.

21. It is Ms Ngutu's further position that the Kenya Police Service ought not to be held liable for actions of unnamed third parties. She disputes the Petitioners claim in regard to income claimed to have been earned. In her view, the Petitioners ought to have availed the filed tax returns.

22. Finally, she contends that the Petitioners have failed to demonstrate that there was a violation of their rights. She thus urged the Court to dismiss the Petition with costs.

23. The 3rd and 4th Respondents did not file any response to the Petition.

Determination

24. The facts as set out in the Petition and the affidavit in support thereof are not contested.

25. The Petitioners' case is straight-forward. It is to the effect that the Respondents have an obligation to facilitate and create a peaceful environment in which the Petitioners' rights as enshrined in the Bill of Rights are to be realized. That obligation is owed generally to the public and the Petitioners in specific. Their claim is that the Respondents failed to fulfil that obligation, hence violation of the Petitioners' rights. On their part, the 1st and 2nd Respondents deny that their owed the Petitioners a specific duty and claim that the duty to maintain law and order is a duty owed generally to every citizen in the country. They contend that they cannot and must not be held accountable for actions committed by third parties.

26. To determine the petition therefore, I am of the view that the core issue is whether the Respondents have a constitutional and legal duty to maintain law and order through out the Republic of Kenya, and if the Respondents failed to discharge that duty. If I do find in the affirmative, I will have to determine whether the alleged breach infringed on the Petitioners' fundamental right to life, property, inhuman and degrading treatment, movement and protection against discrimination as alleged.

Whether the Respondents have a constitutional and legal duty to maintain law and order through out the Republic of Kenya

27. The starting point is the law as set out in ***Charles Murithii's case***. In this case, a three judge bench of this Court after analyzing the provisions of Section 14 of the Police Act (Cap 84 Laws of Kenya, now repealed) and Section 24 of the National Police Service Act of 2012 found that the national police service was the State organ responsible for maintaining law and order, preventing crime, preserving peace and protecting the citizens' lives and properties. More recently, the High Court adopted the finding made in the ***Charles Murithii case*** in yet another case ***Florence Amunga Omukanda and Francis Kashiya Ivayo Petition No. 132 of 2011***.

28. Notably this two cases are similar to the case before me. They all dealt with claims arising out of State's failure to protect the lives and properties of the citizens from destruction by non-state actors during the infamous post-election violence.

29. In the ***Charles Murithii's case***, the Court dealt with the nature and extent of that duty. The Court concluded that the State's duty to maintain law and order through its various security agencies is owed generally to the public at large and not specifically to each and every individual resident in Kenya. The Court was however quick to state that there could be exceptions to this general rule where the State would be held liable. In the Court's view, for the State to be liable, there must have been a special duty of care activated by information made available to the State or the police that some members of the public were in danger and the police failed to act on that information. The State would also be responsible where the acts complained of were directly perpetrated against him by the police. Lastly, the State would be liable if the applicant could demonstrate that the police had placed the applicant in danger he would otherwise not have faced.

30. In addition to the above, the court in the later ***Florence Amunga case*** stated as follows;

"We must however add that the said special relationship or the assurance by the police need not be express. It may in fact be inferred from the circumstances of the case so that where for example a report is made to the police of an attack and the police without any justifiable reason refuse to act, it may be deemed that they have abdicated their duty to protect a victim whose report ought to have given rise to a special relationship."

31. I am in agreement with the learned judges. However, the Petitioners have criticized the approach adopted by the High court in the afore said case. In their view, the Court was wrong in relying extensively on western jurisprudence that did not reflect what they termed as peculiar circumstances to Kenya. They identified the political violence, ethnic violence and history of institutional failures as some of the eccentric factors in the Kenyan context.

32. I have read the ***Charles Murithii case***. I am still persuaded by the approach and determination thereof. I do not find any reason to depart from the principle set therein. In any event, the learned judges were properly guided in reaching the decision they did. Some of the cases they relied on in arriving at their decision are the cases of; ***West Minister Investing Corporation v G. C Murphy Co 434 F 2d 521, 526*** and ***Roshanali Karmali Khimji Pradhan v Attorney General Civil Case No. 276 of 1998***.

33. In the ***West Minister Investing Corporation***, the case dealt with the extent of the State's obligation to protect Mr. Murphy's properties against destruction by rioters. The United States Court of Appeals for the District of Columbia Circuit held that the District of Columbia had no direct obligation to Mr. Murphy and that he could not recover damages for the alleged failure by the government and its officers to keep peace. The Court also considered the Kenyan cases of ***Roshanali Karmali Khimji*** where the court found that the State was liable for the applicant's losses and damages because he had made several reports to the security authorities and requested action be taken to arrest the thugs. However, no action was taken by the government. Because of the failure to take actions, his property was vandalized. As can be seen, the applicant in this case had brought himself with the special relationship discussed in the ***Charles Murithii's case***. He had reported to the police severally and they failed to act quickly to control the situation.

34. The Petitioners' urged the court to be guided by the holding in the case of ***Van Eeden vs. Minister of***

Safety and Security Case No. 176 of 2001 where the South African Supreme Court of Appeal found the police liable for having failed to take steps to prevent unknown dangerous criminal from escaping from police custody. This case is distinguishable from the instant one. The South African case dealt with the right to be free from violence and imposition of liability in delict on public authorities for negligent performance of duties. The case in particular was concerned solely with the control that the police are required to exercise over a known dangerous criminal in police custody. The police were found to have owed the appellant a legal duty to prevent the escape of the criminal. Unlike in the instant case, there was evidence that the police were aware of the dangerous criminal and the appurtenant dangers he posed.

35. To conclude this aspect of the petition, it is clear to me that there are instances where the State would be held responsible for the acts of non-state actors for its failure to maintain law and order. Liability is however not to be imposed in a blanket manner for the reason that it would not be in the public interest.

36. I now to must determine whether the State violated its duty and if it can be held liable in the circumstances of the case before me.

Whether the state violated its constitutional duty

37. If I understood the Petitioners' case well, they allege that it is because of the failure of the State to discharge its constitutional duty that created an enabling opportunity for third parties to unlawfully loot, torch, vandalise and destroy their Petitioners' properties. They contend that the looting, torching and destruction of their property violated their right to life, to property, protection against inhuman and degrading treatment, freedom of movement and protection against discrimination. In their view, the state is directly liable for the infringement of the Petitioners' aforesaid rights.

38. The Petitioners' claim against the Respondents is that they abdicated their constitutional duty to maintain law and order. They contend that had the Respondents maintained law and order and offered protection of their property – Sotik High School and Sotik Boarding Primary school, and their residential house at Chepilat, their aforesaid properties would not have been burnt by the assailants, hence violation of the alleged fundamental rights and freedoms.

39. The Petitioner's claim that they had brought themselves within the exceptions set out in **Charles Murithii's case** so that the State's responsibility was activated. In that regard, they claim that the State had prior information that non-kalenjin persons residing within Sotik District, and the property of such persons were at the risk of being exposed to acts of violence. In their view therefore, the State's prior knowledge of the risk of violence posed to the Petitioner and their property activated a special duty to the Petitioners'.

40. In the **Charles Murithii's case**, the Court held as follows;

“We have also determined that the State’s duty to protect those rights would only be activated if it is demonstrated that the police or other State agencies had prior information that a section of the members of the public in a certain area, or specific individuals, were in danger of being subjected to acts of violence against their person or property and that the police, negligently or deliberately, failed to act on such information leading to a violation of the rights protected under the Constitution.”

41. I am in agreement with the learned judges.

42. It is clear that the State through police, would only be liable for the acts of third parties only if the Petitioners can bring themselves into the special category as discussed above and prove that the police had information on the likelihood of violence occurred. To prove their allegation that the police were aware and had information on the likelihood of occurrence of violence, they relied on the Waki Report which they produced as evidence.

43. The probative value of the Waki Report in addressing the issue of knowledge of violence of attack

was discussed in the *Florence Amunga's case*. The Court observed thus;

“ The Waki Report was submitted as evidence by the petitioners. The respondents did not object or challenge the findings therein as regards the warning made by NSIS on possible violence. In any event, the issue as to whether the police had reports of the impending violence was confirmed by the respondents through their only witness DW1 Mr. Herbert Wafula Khaemba, a superintendent of police No. 216103, who prior to this was the Officer Commanding Police Division Kilimani Police Station between 2005 and 2008 during the post-election violence. He testified that he had received from the NSIS intelligence that ‘if results were announced and were not in favour of one group, there would be chaos’. On cross examination he stated that 10 days before the elections he had taken measures to counter the possible violence by deploying officers of General Service Unit (GSU) platoon, Administration Police (APs) and regular police to Laini Saba area in Kibera area. Given this testimony, it is clear to us that the police had done their best in the obtaining circumstances to contain the situation.”

44. In *Florence Amunga's case*, the Court found that the National Security Intelligence Service (NSIS) had prior information of the possible attacks. Witness testimony explained the steps the police had taken to mitigate and contain any possible violence. The Court then made the following observation;

However, we must state that it is not always the case that the Respondents would be liable whenever they fail to act on reports made to them. In our view, liability in such instances would have to be determined on a case by case basis given the facts and circumstances appertaining.

45. I am once again in agreement with the Court. The reasoning behind that is not far to find. The Court in the *Charles Murigu Murithii case*, recognized the poor ratio of police officers against the population in Kenya. It then stated that it would be unreasonable to expect the police to guard individual homes or property on a 24hour basis. In the Court's view, what was required was to demonstrate that the police had organized to offer the required protection.

46. I have read the Waki Report in relation to the prior information related to possible violence. It is true that there were warnings made by NSIS over possible violence during the 2007 elections. However, I am unable to bring the Petitioners' into the special relationship category. I say so because the information on the possible violence as contained in the Waki Report is general in nature, it does not relate specifically to the Petitioners. The Petitioners ought to have established how they fell within the special relationship which in my view they failed to do.

47. Notwithstanding, I also took note of the Petitioners' testimony that their properties were in close proximity to the police officers. That there were police officers a stone's throw, about 100 meters, from the destroyed property. They alleged that there was a permanent road block long the Ndanai-Sotik Road at the time of the invasion of the Petitioner's property. They also claimed that their properties were about 2 kilometers from Sotik Police Station. In the *Charles Murithii case* the court stated that;

It may however be important to state at this juncture that had it been evident that the Petitioner's homes were in the same neighbourhood and that any of their homes was a short distance away from the Eldoret police Station or any police station for that matter, we may have been able to hold that it would not have been necessary to call the police for assistance as the police, exercising due diligence in those circumstances, would have become aware of the said attacks and rushed to the Petitioner's respective compounds to protect their properties. “

48. I agree with the learned judges.

49. Despite the serious averments made by the petitioners on the approximate distance between their homes and that of the police station, they failed to substantiate these allegations. It is trite law that whoever alleges even in constitutional must prove: see **Githunguri Dairy Farmers Cooperative Society Ltd vs. The Attorney General & 2 Others**[2016]eKLR and also **Catholic Commission for Justice & Peace in Zimbabwe vs. Attorney General** [1993] 2 LRC 279. The Petitioners alleged that

there was a road block a 100 meters away from their properties. It was however not clear which property the Petitioners were referring to. It could have been Sotik High School, Sotik Primary School or the Chepilat house. It could have been none. Such proof would have helped the court determine any nonchalance on the part of the security agencies of the State. Additionally, the court was not convinced further on the existence of the road-block given the lack of a gazette notice. That, in my view, would have helped prove the Petitioner's allegations. Similarly, they failed to provide any tangible evidence on the alleged proximity to Sotik Police Station. I am therefore unable to believe the Petitioners on that issue.

50. Thus far, it is clear that the Petitioners have failed on the facts as pleaded to bring themselves within the exceptions of the general rule. Even if I am to assume for a moment that they have succeeded to bring themselves within the exceptional rule, I am still unable to find in their favour on the allegation that the police abdicated their constitutional duty. I say so because;

51. Firstly, the Petitioners produced photographs of buildings as annexure marked 'JOM 3'. The probative value of the evidence of these photographs is wanting. The court was unfortunately not told with any sense of conviction whose building they were and neither was the court told who was in charge of the photography or who actually took the photographs.

52. Secondly, I have seen annexure marked 'JOM 5'. This annexure provides a list of teachers, administrative and support staff at Sotik High School and Sotik Boarding Primary School. There are also produced letters of appointment for some of those teachers. I have also seen admission letters for pupils to the respective school. The Petitioners should have at the very minimal called any of these teachers, support staff or pupil to testify and corroborate their testimony. That they used to teach, work or study at the school which was burnt during post-election violence. The burden was not discharged by the Petitioner and additionally, in my view, the failure by the Petitioners to call any of the Petitioners' then neighbours the Chepilat house to testify on the circumstances in which the house was burnt weakened their case. What they produced did not amount to sufficient evidence that would substantiate their allegation that their property was destroyed during post election violence.

Conclusion

53. Having found that the Petitioners failed to bring themselves within the exception of the general rule, the more palpable conclusion is that the State did not fail to protect the Petitioners fundamental rights and obligations. It follows that the State cannot therefore be found liable for their losses as claimed in the Petition. Consequently, I am satisfied that they are not entitled to the grant of the reliefs sought in the Petition.

54. I accordingly dismiss the Petition but with no order as to costs.

Dated signed and delivered this 7th day of December 2016

J.L.ONGUTO

JUDGE