



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

PETITION NO 323 OF 2012

ROBERT NJERU MWATHIPETITIONER

VERSUS

KENYA WILDLIFE SERVICE1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

1. In the petition dated 26th July 2012, the petitioner seeks the following orders:

1. *An order of permanent injunction restraining the respondents either in themselves or through officers working under them or their agents from arbitrary killing and or injuring the petitioner and or interfering with petitioner's personal liberty in any manner whatsoever save executing a lawful order.*
2. *Compensation general and special damages (Ksh3,400) as assessed by the Court.*
3. *Costs of the suit and a refund of the filing fees.*
4. *Such other orders as this Honourable Court shall deem just.*

2. In the affidavit sworn in support of the petition on 26th July 2014, the petitioner describes himself as an offender who had been charged in **Kibera Principal Magistrate's Court Criminal Case No. 858 of 2010 Republic vs John Lucintu & 2 Others** with the offence of being in possession of game trophies. He states that he pleaded guilty as charged. It is his contention that since then, he has reformed and has never been involved in any offence.

3. He alleges that on or about May 2012, he received information that the 1st respondent had commenced a campaign of extra judicial killings of persons it suspected of being involved in poaching of wild animals. He claims that several persons known and unknown to him were killed under mysterious circumstances.

4. He further alleges that on or about 30th June 2012, at a place called Kulamawe in Isiolo, at around 7.30

p.m. while he was driving to his home, his car was sprayed with bullets by officers of the 1st respondent. He states that he survived the incident but was seriously injured and was taken to hospital by well-wishers. He has annexed a copy of the referral note, medical receipt, medical notes and medical report.

5. He complains that despite having made a report to the police at Isiolo Police Station though OB No, 41/30/6/2012, no action was taken and there was no investigation or arrests in connection with the incident.

6. The petitioner contends that the respondents are vicariously liable for the actions of officers working under them and they are therefore jointly and severally guilty of breaching his rights.

The Response

7. The 1st respondent terms this petition as misconceived, fatally defective, a total abuse of the court process and the law, and asks that it be dismissed with costs. It has filed Grounds of Opposition dated 9th September 2013. In the said Grounds, it states that the petition does not raise any constitutional issue or violation of the petitioner's fundamental rights; that the petitioner is guilty of material non-disclosure; that the orders he seeks, if available at all, would be available in a civil suit; and that the petitioner has not disclosed any evidence in support of the alleged occurrence of the incident of 30th June 2012.

8. The 1st respondent has also filed a replying affidavit sworn by Mr. Thomas Ogola, the head of the 1st respondent's legal department, on 14th September 2013. In the said affidavit, Mr. Ogola confirms that the petitioner was indeed charged in Kibera PMCR No 858 of 2010, pleaded guilty and was punished accordingly; that his prosecution was thus not malicious, and that the 1st respondent at that point discharged his claim against the petitioner as justice had been served.

9. The 1st respondent denies any knowledge of the petitioner having reformed; denies carrying out any extra judicial killings, observing that the petitioner has not disclosed the source of his information with regard to the allegation that it is officers of the 1st respondent who carried out the alleged attack against him or the identities of those who allegedly carried out the attacks. Further, no connection has been made between the charges in Nairobi against the petitioner and the alleged attack in Isiolo. The 1st respondent also observe that the treatment notes relied on by the petitioner do not disclose treatment for bullet wounds, and his statement to the police indicates that he was attacked by a 'group of thugs'.

10. The parties to this matter filed written submissions which they asked the Court to rely on in rendering its decision. In his submissions dated 20th August 2013, the petitioner reiterates the contents of his affidavit and alleges violation of his rights under Article 26(3) and 29 of the Constitution. He also relies on, among others, the decision of the Court in **Margaret Wairimu Njuguna vs Commissioner of Police & 2 Others (2013)KLR** in which the Court took the view that the issues raised in the petition merited investigation by the respondents.

Determination

11. The petitioner has an obligation in law to demonstrate the provisions of the Constitution violated by the respondents and the manner of violation with regard to him-see **Anarita Karimi Njeru (1976-80) 1 KLR 1272 and Trusted Society of Human Rights Alliance -vs- Attorney General & Others High Court Petition No. 229 of 2012**. In the present case, and with the greatest respect to both the petitioner and his Counsel, it is difficult to see any serious consideration of the issues that the petitioner has brought before the Court, or of the legal burden that he has to discharge to be successful.

12. The 1st and 2nd respondents have filed submissions dated 20th November 2013 and 9th September 2013 respectively. In these submissions, the respondents point out the glaring weaknesses of the petitioner's claim: none of his allegations is supported by any evidence whatsoever. He alleges that he received information that the respondents have embarked on extra judicial killing of those involved in

poaching; and that he was shot at by officers of the respondents. He has not provided any evidence in support of this contention, or a basis for arriving at this conclusion.

13. Indeed, this latter allegation is contradicted by his own evidence. Annexure RN1, the medical treatment notes, shows that he reported that he was attacked by a group of thugs. Further, his treatment notes do not show treatment for bullet wounds but for blunt trauma.

14. It is beyond dispute that every citizen has a right to bring a claim alleging violation of constitutional rights. However, it is to dishonour the important place of constitutional protection of fundamental rights to bring petitions such as this which have absolutely no basis in law or fact. It is true that every citizen, including the petitioner, has the constitutional guarantee against arbitrary deprivation of life and from any form of violence from either public or private sources. This is expressly guaranteed under articles 26 and 29 of the Constitution. However, a claim alleging violation of these rights must have a foundation in fact and must also be supported by clear and incontrovertible evidence. It cannot, as in this case, be based on conjecture, rumour and hearsay.

15. For the above reasons, the petition is dismissed as one which has absolutely no merit.

16. The petitioner shall bear the respondents' costs.

Dated Delivered and Signed at Nairobi this 8th day of July 2014

MUMBI NGUGI

JUDGE

Mr. Njenga instructed by the firm of Muchoki, Kangatta, Njenga & Co. Advocates for the Petitioner

Mr. Owuor instructed by the firm of Mithega & Kariuki & Co. Advocates for the 1st Respondent

Ms. Muchiri instructed by the State Law Office for the 2nd Respondent