



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.31 OF 2013

BETWEEN

NATIONAL CONSERVATIVE FORUM.....PETITIONER

AND

**THE MINISTER OF STATE FOR PROVINCIAL
ADMINISTRATION AND INTERNAL SECURITY.....1st RESPONDENT**

NATIONAL POLICE SERVICE.....2nd RESPONDENT

ATTORNEY GENERAL.....3rd RESPONDENT

JUDGMENT

Introduction

1. The Petitioner, **National Conservative Forum**, is an organization which allegedly fosters substantive dialogue on political, economic and cultural issues in Kenya and also creates awareness on those issues. It has filed this Petition challenging the alleged failure of Government authorities to act decisively to combat the spread and use of small arms such as pangas (machetes), bows, arrows and specifically, firearms illegally in the hands of civilians. It contends that there are an estimated 530,000-680,000 firearms in the wrong hands in Kenya and that their< illegal use has arisen to alarmingly high levels during the past decade, a trend blamed on the easy availability of mostly pistols and assault rifles and also the armed conflicts in the Horn of Africa especially in Somalia, Ethiopia and the Great Lakes Region. It claims further that there are only 6,481 registered firearms in Kenya, which represents a small fraction of the total number of firearms in circulation and held by civilians. It is thus its position that easy availability of small arms, both nationally and regionally, has made crime extremely violent and has exacerbated conflicts between communities in border areas which continues to pose a threat to peace in Kenya and in the Region at large.
2. The Petitioner also states that Kenya faces safety and security challenges on many aspects, including from the violent activities of organized gangs. That in that regard, there are many challenges related to prevention, mitigation and management of armed violence that contributes especially to murder, armed burglary, carjacking and other fatal criminal tendencies due to illicit possession of small arms. That these trends permeate both rural and urban areas as well as areas inhabited by pastoral communities and the Court ought to step in and grant relief to the wider public affected by the said trends.

The Petitioner's Case

3. It is the Petitioner's contention that Kenyans are paying a heavy security price from proliferation of small arms and light weapons and that there is need for the Government to arrest the horrific developments being witnessed and specifically conduct an urgent and thorough mop-up of guns and other related weapons found in the wrong hands in the Country. That as a result of the Government's laxity in that regard, thousands of people have been killed and many maimed. It contends therefore that the State has the responsibility of ensuring that its citizens are protected since the law does not allow citizens to bear arms as a fundamental right for their defence.
4. It is also its contention that the panga has become one of the unconventional arms used as tools of mass intimidation and violence and argues that there is need to consider a case for regulating the sale of pangas and other big knives in Kenya, in particular the retail sale of large numbers of such weapons in times of conflict or national crisis. It claims that such controls would be important in limiting public access to tools of violence.
5. The Petitioner further submits that **Article 21(1)** of the **Constitution** provides that the State has the obligation to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights. That **Article 238 (2)(b)** of the **Constitution** in addition states that national security shall be pursued in compliance with the law and respect for the rule of law and democracy.
6. It is also its contention that when women are kidnapped at gun point and gang raped for days on end then their dignity is grossly violated. That freedom from fear is intertwined with the right to dignity and the ultimate right to life which is the basis of all human rights without which all rights are meaningless.
7. It claims that poor governance is one of the main reasons why some Kenyans have chosen to arm themselves to ward off insecurity. For instance it claims that among Pastoralists who are predominantly livestock keepers, people have had to acquire illegal arms to protect themselves and their livestock from violent attacks by their neighbours. It thus contends that the Government must take drastic measures to curb the influx of small arms and light weapons and that it must also disarm Pastoral Communities holding illegal guns.
8. It claims that while the Judiciary is charged with the duty of administration of justice, it also must, in accordance with the doctrine of separation of powers provide safeguards against abuse of power by the Executive and in certain circumstances, the Legislature. That it is also charged with the role of protection of fundamental rights and freedoms and that the availability and use of illegal arms against other persons erodes the constitutionally provided for and protected rights accorded to all citizens, in particular the right to life, right to own property, right to human dignity and equity and freedom. It thus claims that where a State fails to provide and protect these rights, individuals must be allowed to bear arms for their own protection.
9. It is therefore the Petitioner's case that fundamental rights and freedoms as enshrined in the Constitution can only be guaranteed in a safe and secure State and in its Petition dated 28th January 2013, it seeks the following orders;

"(a) A declaration that the Petitioner's Fundamental Right to equal protection of the law as enshrined under the Bill of rights in the Constitution has been, and/or continues to be violated and infringed and the same continues to be denied, violated and infringed through failure by government authorities to act decisively to combat the spread and use of small arms illegally in the arms of civilians and/or criminal elements.

(b) A declaration that the police have the right to take all necessary measures to ensure that the sale, distribution and/or proliferation of illegal guns, large

quantities of pangas, bows and arrows and other related weapons are tightly controlled and/or eliminated.

(c) A declaration that a curfew may be imposed in any area where security agents carry out disarmament exercises and that restrictions on the right to movement may be imposed on all persons found in possession of illicit and or illegal firearms, and other dangerous weapons.

(d) A declaration that all persons dealing with and/or supplying and/or retailing pangas (machetes), arrows, bows and other potentially dangerous weapons should obtain special licence from the Government and their names be gazetted.

(e) A declaration that all persons found in possession of large quantities of illegal firearms be compelled to declare their source of wealth and that all persons found in possession of such large quantities of illicit weapons be issued travel bans and asset freeze.

(f) A declaration that measures be taken to block all porous borders used to import small arms and other illegal materials to Kenya.

(g) An order that the names of all persons found in possession of large consignments of illicit and unlicensed arms be made public.

(h) An order to the security authorities in the Country through the Respondents to act immediately and conduct an extensive and effective mopping up exercise to remove all arms held illegally across the Country and this exercise to be conducted under the direct authority of a senior police officer above the rank of Superintendent or by order of a judicial officer AND that the Inspector- General of the National Police Service to submit to this Court weekly comprehensive reports on the progress of the exercise.

(i) In the alternative, a declaration that in the event that there is massive insecurity endangering the lives and property, every individual should be permitted to bear arms within their domicile and without the cumbersome procedure as provided by the Firearms Act, for their safety and legitimate defence.

(j) Costs of the Petition."

10. The Petitioner relies on the provisions of **Articles 3-11** of the **Universal Declaration of Human Rights** and the **Arms Trade Treaty** adopted by the United Nations and opened for signature on 3rd June 2013 (which Kenya is yet to sign]. This Treaty regulates the international trade of conventional arms, small arms to battle tanks, combat aircraft and warships. For the above reasons, it seeks orders elsewhere set out above.

The Respondents' Case

11. The Respondents, in opposing the Petition, filed Grounds of Opposition dated 25th July 2013, and which read as follows;

"(1) The Petition does not raise any constitutional issue or (show) how specific provisions of the Constitution have been infringed by the Respondents.

(2) The police are already mandated to provide and maintain security which includes the control of the proliferation of small arms within the Country. The technical and the operational aspects of maintaining security are outside the province of this Court and therefore the Court

cannot issue orders it cannot enforce

.(3) As appreciated in the Report produced by the Petitioner, the issue of proliferation of small arms is wider and requires regional co-operation rather than the simplistic suggestions given by the Petitioner.

(4) The declaration of wealth by persons found in possession of firearms is an infringement on the individual's right to privacy and not justifiable under Article 24 of the Constitution.

(5) The suggestion that citizens should be allowed to possess firearms without following the procedure laid down in the Firearms Act is self defeating as it is the very reason we have proliferation of small firearms in the Great Lakes Region."

12. It is the Respondents' submission therefore that the Petitioner has not raised any constitutional issues in its Petition and that it has not demonstrated how the provisions of the Constitution have been infringed, by whom and who has been affected. That the Petitioners have merely generalized the complaint about the bad security situation in the country without any particulars thereof as required by Law. They rely on the decisions in Annarita Karimi Njeru (1976-19801 1 KLR 1272 and Trusted Society of Human Rights Alliance v Attorney General & Others Petition No. 229 of 2012 which set out the test to be met in Constitutional Petitions.

13. It is the Respondents' further contention that the Declarations sought by the Petitioner cannot issue for reasons that under the provisions of **Section 24** of the **National Police Service Act No. 11A of 2011** and **Section 2** and **3** of the **Preservation of Public Security Act**, the Police have powers to take all necessary measures to prevent criminal activities including the planning of the same. Further, that Police have the statutory powers to prevent crime and they do not require an order of the Court for them to carry out their statutory duties.

14. As to the issue whether this Court can issue a declaration that every individual should be permitted to bear arms without following the cumbersome procedure established under the **Fire Arms Act**, it is the Respondents' submission that if guns were easily acquired as proposed by the Petitioner, then the insecurity situation in the Country would be aggravated. That in any event, ease of accessibility of guns has never been the solution to bad security situations.

15. It is the Respondents' submission in addition that the Kenya Defence Forces have done a lot in the past to make the Country secure as they have gone beyond the securing of the porous Somali border by entering into Somalia to fight and disarm the A1 Shabaab Terrorist Group.

16. They further contend that disarmament and peace initiatives by the Government have been taking place in North Eastern Kenya and between the Turkana and Pokot communities and that in any event, the maintenance of law and order is a continuous exercise by the Government and cannot be a one-off exercise to be ordered by the Court. They urge therefore that the Government should be left to continue undertaking that duty without interference.

17. It is for the foregoing reasons that the Respondents pray that the Petition be dismissed with costs.

Determination

18. The Petitioner's case as I understand it is straight forward; that there is now grave insecurity in the Country due to the availability of small firearms and other weapons that have been used to commit crimes. They claim that in that regard that the State has failed in its obligation of providing security to its citizens and accordingly, the Judiciary has powers to issue the orders sought so as to protect the fundamental rights and freedoms of citizens and ensure that the Constitution has been complied with. On their part the Respondents state that the Government has taken sufficient measures to provide security to its citizens and that even if it had not, it is not the place of this Court to direct the Executive on what measures to adopt in ensuring that security is achieved.

19. To my mind and having considered the rival positions before me, there is no doubt that **Article 29** of the **Constitution** has enshrined the fundamental right to security of the person which includes

the right not to be subjected to any form of violence from either public or private resources. **Article 238** of the **Constitution** has also set out the principles of national security as follows;

"(1) National security is the protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests.

(2) The national security of Kenya shall be promoted and guaranteed in accordance with the following principle-

(a) national security is subject to the authority of this Constitution and Parliament;

(b) national security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms;

(c) in performing their functions and exercising their powers, national security organs shall respect the

diverse culture of the communities within Kenya; and

(d) recruitment by the national security organs shall reflect the diversity of the Kenyan people in equitable proportions."

20. As to who is responsible for the maintenance of security in the Country, the **Constitution** at **Article 239(1)** has established the Kenya Defence Force (hereinafter '**KDF**'), the National Intelligence Service (hereinafter '**NSIS**') and the National Police Service (hereinafter '**NPS**') as the organs responsible for the provision, promotion and guarantee of national security. **Article 241** has set out the functions of the KDF as follows;

"(1) ...

(2) ...

The Defence Forces—

(a) are responsible for the defence and protection of the sovereignty and territorial integrity of the Republic;

(b) shall assist and cooperate with other authorities in situations of emergency or disaster, and report to the National Assembly whenever deployed in such circumstances; and

(c) may be deployed to restore peace in any part of Kenya affected by unrest or instability only with the approval of the National Assembly."

Article 242(2) has set out the functions of NSIS as follows;

"(1) ...

(2) The National Intelligence Service—

(a) is responsible for security intelligence and counterintelligence to enhance national security in accordance with this Constitution; and

(b) performs any other functions prescribed by national legislation."

Article 244 sets out the functions of NPS as follows;

"The National Police Service shall—

(a) strive for the highest standards of professionalism and discipline among its members;

(b) prevent corruption and promote and practice transparency and accountability;

(c) comply with constitutional standards of human rights and fundamental freedoms;

(d) train staff to the highest possible standards of competence and to respect human rights and fundamental freedoms and dignity; and

(e) foster and promote relationships with the broader society."

21. It is the Petitioner's contention that all the above State organs have failed to provide security to Kenyans and as can be seen from the Petition and the Supporting Affidavit sworn by one Jennifer Shamalla, and with tremendous respect, the Petitioner has made heavily generalized statements. For instance Jennifer Shamalla claims at paragraph 4 to 15 of her Affidavit as follows;

"(4) That there has been a significant surge in violent activities in the Country by criminal elements and which has resulted in the untimely {loss} of numerous lives, the maiming of hundreds more and the shattering of thousands of families.

(5) That this violence has largely been aided and orchestrated by an abundant availability of firearms in the country which are in the illegal possession of these criminal elements.

(6) That the use of firearms has risen to alarmingly high levels in Kenya during the past decade, a trend blamed on the easy availability of small arms, mostly pistols and assault rifles.

(7) That armed conflicts in the Horn of African, especially in Somalia, some parts of Ethiopia and the Great Lakes region, have been cited as one way through which illegal guns have fallen in the hands of gangsters and livestock thieves.

(8) That there are an estimated 530,000-680,000 firearms in the wrong hands in Kenya. The number of illegal arms has grown over the years and is said to fuel the conflicts witnessed within Kenya and the Region.

(9) That Kenyans are paying a heavy security price from proliferation of small arms and light weapons; from Mandera, Wajir, Turkana to villages in Tana River to the Coastal City of Mombasa and Nairobi, deaths have been reported.

(10) That small arms' availability and misuse have been a problem in Kenya for many years, but the post 2007 election violence increased the urgency of small arms' reduction efforts.

(11) That easy availability of small arms, both nationally and regionally, has made crime so violent, and this is deterring investment and exacerbating conflicts between communities in border areas.

12) That in the rural areas, small arms have replaced traditional weapons in ethnic war over land, water and livestock. In the past few months, death has returned to Tana River County where more than 200 people have been killed in vicious attacks since August 2012. Scores have been wounded and thousands displaced. The attacks underline the volatility or relationships between communities in arid areas, where pasture and water sources are often limited and rivalry between pastoralists - who are often armed with illegally acquired weapons - is intense.

(13) That even in urban towns like Nairobi and Kisumu, the residents live in constant fear of carjacking and other related evils in the hands of these criminals.

(14) That business people have been attacked and many have lost their lives through these small arms, which has the effect of scaring away potential investors in the County.

(15) That poor governance is one of the main factors why some Kenyans arm themselves. People arm themselves because of insecurity. In pastoralist communities, for example, these people are still keeping animals and to protect their animals from being raided by their neighbours who are equally armed, they have to get illicit arms. The remedial action is for the government to provide them with security."

22. As can clearly be seen and with respect, she has made general statements without caring to provide details as to how the Constitution or how Security organs stated elsewhere above have violated the Petitioner's rights. The closest she came to stating how the security organs are to blame for the insecurity situation in the Country is at paragraph 23, 24 and 25 of her Affidavit when she deponed;

"(23) That the security agents are not doing much to eradicate and stem this influx of illegal arms in the Country given that there are numerous roadblocks from the aforesaid countries of origin of these small arms, yet the smugglers always make it through with their booty. There have also been reports of police officers renting out their guns to criminals.

(24) That we believe that the Kenyan security forces have the capability of mopping up these illegal arms in the hands of civilians and must be compelled to do so to protect the lives of thousands at risk.

(25) That if the police feel incapable of their duty in mopping up these arms, the armed forces should be brought in as we believe they are more than capable of combating this scourge of small arms in the County."

23. Even with the above statements having been made, I am unable to see the constitutional issues that I am called upon to determine. None of the alleged complaints disclose in any way the manner in which the Constitution has been violated or the jurisdictional basis of the action before me. This Court has over and over again held that a Petitioner alleging a violation of his rights must cite the provisions of the Constitution which have been violated, and the manner in which they have been violated. The principle that constitutional petitions must be pleaded with some reasonable precision was set in the case of **Annarita Karimi Njeru v Republic (supra)** and recently, the Court of Appeal has also restated that principle on the importance of having the claims of violation of the Constitution drafted with some reasonable precision.

That is why in **Mumo Matemu v Trusted Society of Human Rights Alliance (supra)**. The Court expressed itself as follows;

"We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not conterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point."

The Court went on to express itself as follows;

"Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party. The Principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues unconstitutional petitions is an extension of this principle."

24. I am in agreement with the above reasoning and I will only add that even if this Court was to find in favour of the Petitioners, the orders sought for the Petitioner cannot issue and for good reason; that the Court does not have sufficient material upon which to make a determination on how Security Organs have failed to provide security to Kenyans. Even if it had, it is not the place of this Court to make such a determination and for the simple reason that the Court is not the maker of policies on security and the Court is not the best judge of policies that have been undertaken to curb insecurity. I say so because the Court has no expertise, resources or criteria to use in making such a determination and more so in a petition such as the one before me where little effort has been made to authenticate the general claims made.

25. That would have been enough to dispose of the Petition but also the Petitioner to be contending that the Government must disarm pastoralist communities holding illegal guns and other dangerous weapons and further, that as a result of the inadequacies in security, every individual must be allowed to legally own firearms for his/her safety and legitimate defense.

26. My finding on both issues above is that the law regulating possession of firearms is found in the **Firearms Act Chapter 114 Laws of Kenya**. The preamble to that Act reads as follows;

"An Act of Parliament for regulating, licensing and controlling the manufacture, importation, exportation, transportation, sale, repair, storage, possession and use of firearms, ammunition, air guns and destructive devices and for connected purposes"

27. As can be seen from the above, the Act has set out provisions in relation to regulating of firearms, their use, licensing, manufacture, possession and use. The Legislature in its wisdom did enact that law for a good reason. It would thus be absurd and unconstitutional for the Petitioner to request this court to ignore that Act and issue orders sought and to enable every citizen to obtain firearms to allegedly protect themselves. To my mind, such an order would amount to usurping the powers of the Legislature to enact laws and powers of the Executive on policies for use of fire arms because the Legislative Authority of the State is vested in Parliament and that is why **Article 94(1)** and **(5)** of the Constitution provides as follows;

"94. (1) The legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament.

(5) No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this

Constitution or by legislation."

28.The meaning of **Article 94(5)** of the **Constitution** is that only other persons or bodies authorised by the Constitution or by legislation may enact provisions that have the force of law in Kenya. This Court has no such powers and as long as the **Fire Arms Act** is in force, this Court and the Petitioners must be guided by its provisions. Had the Petitioners claimed that the said Act is unconstitutional, then the situation would have been different and I would have addressed the matter from.

29.Having found as above, and looking at the Petition again, I am clear in my mind that there is nothing else left of me to determine. Having said so, the general issues raised by the Petition are not pedestrian. Security is an important matter for the individual, the community and the state. The lessons of the past in Kenya on insecurity cannot be ignored nor can they be swept under the carpet. However, for any court to intervene in such a matter, the Petitioner ought to place before it such material as would warrant appropriate reliefs within the confines of the law. Mere lamentations are not a firm foundation for such an intervention. The Petition before me, with respect, falls in that category. It is accordingly dismissed.

30.As for the costs, even if it was not pleaded, it is obvious that this is one of those Petitions filed in public interest. Accordingly, it would pain the Court to impose costs on the Petitioners. The best order in the circumstances is one necessitating that each party to bear its own costs.

31.Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 10TH DAY OF OCTOBER 2014.

ISAAC LENAOLA

JUDGE

In the presence of:

Dr. Khaminwa for Petitioner

No appearance for Respondents