



**Miriti v Assistant Chief Njaina Sub-Location & 2 others (Civil Appeal
249 of 2019) [2025] KECA 126 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KECA 126 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 249 OF 2019
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA
FEBRUARY 7, 2025**

BETWEEN

EUGENIA KATHOMI MIRITI APPELLANT

AND

ASSISTANT CHIEF NJAINA SUB-LOCATION 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

**PS MINISTRY OF INTERIOR & CO-ORDINATION OF THE NATIONAL
GOVERNMENT 3RD RESPONDENT**

*(Being an Appeal from the judgment of the High Court of Kenya at Chuka
(R.K. Limo, J.) dated 3rd December 2018 in HC Petition No. 1 of 2016)*

JUDGMENT

Background

1. Eugenia Kathomi Miriti, (the appellant), filed a Constitutional Petition dated 24th May, 2016 before the High Court at Chuka against the Assistant Chief Njaina Sub-location (the 1st respondent), P.S Ministry of Interior and Co-ordination of the National Government (the 2nd respondent) and the Hon. Attorney General (the 3rd respondent) seeking orders that:-
 - i. A declaration that the appellant's rights under Section 72, 74, 77 and 81 of the Constitution of Kenya (repealed) were breached by the respondents;
 - ii. An award of damages for the breach of the Petitioner's fundamental rights and freedom under Section 72, 74, 76, 77 and 84 of the Constitution of Kenya as repealed;
 - iii. An order of compensation of the Petitioner for injuries she sustained due to the breach of her fundamental rights and freedom; and



- iv. Costs and interest.
2. The appellant's contention before the High Court was that on or about 20th February, 2009, she was beaten by members of the public and set ablaze in full view of the 1st respondent, as a result of which she suffered burns over her body. Her claim was that the 1st respondent abdicated her statutory duties as provided by the Chief's Act, Cap 18 in particular Sections 6, 8, 10(e) and 20(1)(b)(i) of the Chief's Act thus infringing her fundamental rights and freedoms and held the respondents accountable for the breach of the rights under section 72, 74, 76, 77 and 81 of the Constitution (repealed), that is, deprivation of her personal liberty, subjection to torture, inhuman and degrading punishment, subjection to search of her person and property without her consent, deprivation of right to secure protection of the law and freedom of movement respectively.
 3. As a consequence, thereof, the appellant alleged that she suffered psychological stress, loss and damage which could have been avoided had the 1st respondent acted reasonably and hence prayed for compensation. The 2nd respondent, P.S Ministry of Interior & Co-ordination, was sued as an employer of the 1st respondent and held vicariously liable for the acts/omissions of the 1st respondent.
 4. The appellant pleaded that some of her attackers were arrested and charged vide Chuka PMCC Criminal Case No. 221 of 2009, being Republic vs Charles Ndwiga Njeru & Joseph Kithinji Gakwiro. The appellant further pleaded that the accused persons were convicted but justice had not been served on her.
 5. From the affidavit in support of the Petition, the appellant alleged that she was informed by a village elder of a meeting called by the 1st respondent and on her way there, she met about 30 people on the road side who seemed to be waiting for her and immediately they began to beat her and then handed her over to the 1st respondent's husband. The 1st respondent also arrived at the scene.
 6. The appellant's main complaint was that the 1st respondent left her in the hands of the public as she stood afar. That the 1st respondent's acts were choreographed to ensure that the appellant was beaten, burnt and left for dead. That while the 1st respondent stood there aloof, the members of the public set her ablaze. That the 1st respondent then came back with police and rushed her to hospital. Her claim was that she was subjected to torture, inhuman and degrading punishment in the hands of the 1st respondent.
 7. The 1st respondent filed an affidavit sworn on 14th September, 2016 in response to the appellant's Petition. The 1st respondent averred that she was called by her husband and informed that the appellant would be burnt by a mob on allegation that she was a witch. That she went to the scene but as she was approaching, she saw a blaze of fire. That the 1st respondent called the OCS who came and together they took the appellant to hospital for treatment. Further, that with the assistance of the security officer, she managed to arrest 2 people who had a jerrican of petrol and took them to the police station where they were charged and one of them was convicted.
 8. The 1st respondent denied the appellant's allegation and maintained that she was called and heeded the call by rushing to the scene, stopped the violence and took the necessary step to take the appellant to hospital. The 1st respondent maintained that the appellant would have been killed had it not been for her intervention; that she played her role as provided for under the law in maintenance of law and order.
 9. After hearing the parties and on analysis of the evidence presented, the High Court (R.K. Limo, J.) delivered its judgement on the 3rd December, 2018 dismissing the Petition. The High Court found that the appellant failed to establish a nexus between what happened to her and the acts of commissions or omissions by the 1st respondent. The trial Court held that the 1st respondent acted fast and wisely



by calling the police and later apprehending the suspects. It is this finding that provoked the appellant into filing the instant appeal.

10. Dissatisfied by the judgment, the appellant filed her notice of appeal against the said judgment delivered on the 3rd December 2018.
11. The appellant filed a Memorandum of Appeal seeking, inter alia, that the appeal be allowed. The appellant cites the following grounds of appeal:-
 - i. The learned Judge erred in law and fact in the manner he analyzed the evidence on record and therefore arrived at an erroneous decision;
 - ii. The learned Judge erred in law and fact by misconstruing the evidence on record and therefore entered a wrong finding;
 - iii. The learned Judge erred in law and fact in the manner he treated the Petition as an ordinary suit without regard to the provisions of the previous Constitution of Kenya (as repealed) and the position of the High Court as a protector of fundamental rights and freedoms of all individuals, the appellant being not an exception;
 - iv. The learned Judge erred in law and fact in finding that there was no nexus between the respondent and appellant's rights and freedoms under the repealed Constitution; and
 - v. The decision of the superior court was against the law and the weight of the evidence adduced.

Submissions by Counsel

12. The appeal was heard and parties were directed to file written submissions.
Messrs. Muia Mwanzia & Co. Advocates for the the appellant has filed written submissions. Counsel for the respondent had not filed written submissions.
13. The submissions by counsel for the appellant are that it was erroneous that the trial court failed to see that the 1st respondent abdicated her duties. That the appellant had a choice to elect who to sue on the infringement of her rights and it was casual for the trial court to ask why the culprits of the crime were not sued. That it is notable that the perpetrators were the subjects of the 1st respondent and the 1st respondent was at the scene immediately before execution of the offence showing the nexus between the 1st respondent and the perpetrators which the trial court failed to note.
14. Counsel further submitted that the 1st respondent admitted that she was at the scene of crime. That as an agent of the State she had a duty to ensure a peaceful environment in which rights enshrined in the repealed Constitution such as right to security of persons and to property would be enjoyed freely by the citizens such as the appellant. Reliance was placed on the case of Paul Waweru & 4 Others vs Attorney General & 2 others [2016] eKLR that :-

“... The state through its security agencies including the Police, has a positive obligation and duty to facilitate and create a peaceful environment in which rights enshrined in the Constitution including the right to security of the person and to property, would be freely and fully enjoyed by person within its jurisdiction.”

Determination

15. This is a first Appeal. The Court reminds itself of its mandate as the first appellate Court to re-evaluate the evidence, assess it and reach a conclusion bearing in mind that it neither saw nor heard the witnesses



and make due allowance for that. Reliance is put on Rule 31 (1) of the Court of Appeal Rules, 2022 and this Court's decision in *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR.

16. To begin with, it is unfortunate that such a heinous act would happen despite the several calls for peaceful coexistence in the Country. The appellant was indeed subjected to torture and inhuman treatment. She suffered grievous harm as a result of the beating and being set ablaze on mere suspicion of being a witch.
17. The 1st appellant heaped blame on the 1st respondent for the misfortune that happened to her. The issue for determination then is whether the 1st respondent had a special duty of care towards the appellant and if so, whether the said duty was breached resulting into the pain, suffering, loss and damage occasioned to the appellant. Reliance was placed in the High Court Petition of *Charles Murigu Muriithi & 2 others v Attorney General* [2015] eKLR where the court held:-

... we hasten to add that for the State to be liable for its failure to protect the lives and properties of its citizens, there must be a special duty activated by information made available to the State or the Police; that certain individuals or some members of the public were at the risk of being exposed to acts of violence so that the State could in turn take necessary measures to protect the lives and properties of those individuals in question.”

18. The appellant's claim was grounded on Section 6, 8, 10 (e) and 20 (1)(b)(i) of the Chief's Act Cap128. Section 6 of the Chief's Act provides that:-

“It shall be the duty of every chief or assistant chief to maintain order in the area in respect of which he is appointed, and for such purpose he shall have and exercise the jurisdiction and powers by this Act conferred upon him over persons residing or being within such area.”

Section 8 (1) & (2) of the Chief's Act provides:-

“Any chief or assistant chief may interpose for the purpose of preventing, and shall to the best of his ability prevent, the commission of any offence by any person within the local limits of his jurisdiction.

Any chief or assistant chief knowing of a design by any person to commit an offence within the local limits of his jurisdiction may, if it appears to such chief or assistant chief that the commission of the offence cannot be otherwise prevented, arrest or direct the arrest of such person; and any person arrested under the powers conferred by this subsection shall, without delay, be taken to the nearest police station.”

Section 10 (e) of the Chief's Act

“Any chief may from time to time issue orders to be obeyed by the persons residing or being within the local limits of his jurisdiction for any of the following purposes—

Prohibiting any act or conduct which in the opinion of the chief might cause a riot or a disturbance or a breach of the peace;”

Section 20(1)(b)(i) of the Chief's Act (now repealed) provided that:-

- “(1) No chief shall—
 - b. in the performance of his functions or the exercise of his powers under this Act—



- i. subject any person to torture or to any other cruel, inhuman or degrading treatment;”

19. We appreciate the general legal duties of the 1st respondent as outlined in the above provisions of the law. Evidence given by the appellant and as confirmed by the 1st respondent was that the 1st respondent was called and informed that the appellant was being attacked. The information given to the 1st respondent created a special duty of care requiring the 1st respondent to save the appellant’s life. It is no doubt that the 1st respondent had a special legal duty of care to the appellant by virtue of the information shared to her.

However, our view is that the duty arose on the day and time the information about the appellant’s attack was shared to the 1st respondent and not earlier than that. No evidence was tabled to prove the allegation of choreography of the attack as alleged by the appellant. Nothing demonstrated that the 1st respondent had prior information about the attack.

20. Having established the special legal duty of care on the 1st respondent, the issue is whether the appellant demonstrated breach of the 1st respondent’s duty entitling her to an award of damages as alleged in the Petition. The burden of proof lay upon the appellant.

21. From the evidence adduced by appellant, she was informed of a meeting with the 1st respondent by a sub-area in charge named Joseph Githinji which information happened to be untrue as the 1st respondent denied calling a meeting on the subject day. No evidence was produced to support the alleged call for a meeting by the 1st respondent. Page 49 of the record is part of the evidence taken during hearing of the PMC Criminal Case No. 221 of 2009 at Chuka Republic vs. Charles Ndwiga Njeru & Joseph Kithinji where the appellant testified that:-

“We had been called by the assistant chief but I came to know that it was summoned by accused No. 2”.

From the above, it clear that the meeting was not called by the 1st respondent.

22. The appellant averred in the affidavit in support of the Petition that:-

“By the road side near the 1st respondent’s home, I met about 30 people who seemed to have been waiting for me. Then the people began to beat me up in quick succession and tied my hands together- I saw a petrol jerrican and a tyre.

In her testimony before the court, the appellant stated as follows:-

“Njeru called the Assistant Chief informing her that the crowd wanted to lynch me in her field. The Assistant Chief came and asked me why people were complaining. The Assistant chief asked the captors to untie me which they did but one hand remained with a rope. The Assistant chief told me to remain seated and wait for the police. When the Assistant Chief made 2 steps away, petrol was poured on me by Charles Ndwiga and set ablaze by Jennifer Wamutegi.”

23. From this testimony, the appellant clearly knew the persons who attacked her. The heinous act begun at the road side and ended at the place where public meetings were held. The 1st respondent was called and informed of what was happening and she acted by going to the scene and upon arrival she asked the attackers to untie the appellant and called the police for intervention. The 1st respondent and the



police took the appellant to the hospital. Thereafter, the attackers were arrested with the help of the 1st respondent.

24. As a result of the 1st respondent's action, two of the attackers were charged in a court of law for attempted murder and incitement to violence in the PMC Criminal Case No. 221 of 2009 at Chuka, 1st respondent testified as one of the prosecution witnesses and one of the attackers was found guilty and convicted. The evidence of the appellant in the said criminal proceedings did not contain any claim of breach of duty or any wrong done by the 1st respondent. The evidence clearly blamed the crowd consisting of people well known to the appellant and in particular the accused persons as the wrong doers.
25. In view of the foregoing, the appellant's allegation that the 1st respondent abdicated her duty as a state officer causing the appellant's constitutional rights to be infringed and that the 1st respondent's acts were choreographed to ensure that the appellant was beaten, burnt and left for dead are unfounded.
26. Like the trial court, we find that the actions taken by the 1st respondent in the circumstances were reasonable, the 1st respondent discharged her statutory duties in preventing further harm on the appellant by swiftly going to the scene, ordering the attackers to untie the appellant and calling the police. The persons who attacked the appellant were known, arrested and charged in a court of law and later on convicted. Had the 1st respondent not taken the action that she took, the appellant probably would have lost her life.
27. The appellant did not demonstrate any action done or omission by the 1st respondent that amounted to breach of her statutory duty of maintaining peace and order within her area of jurisdiction. The appellant's allegation that the incident appeared choreographed and that the 1st respondent remained aloof at the scene of crime as the appellant was being attacked were not proved. In fact, the appellant's evidence confirmed the 1st respondent's efforts done at the scene by ordering the attacker to untie her and calling the police. Together with the police, the 1st respondent took the appellant to hospital for treatment.
28. We find that the trial court did not err when it found that there was no nexus between the appellant's suffering and the commissions or omissions of the 1st respondent. We find that the 1st respondent was not in any way responsible for the violation of the appellant's constitutional rights and freedoms of subjecting her to torture and inhuman treatment.
29. The upshot of this appeal after careful re-evaluation of the entire evidence is that the appeal is not merited. It is hereby dismissed with no orders as to costs.

DATED AND DELIVERED AT NYERI THIS 7TH DAY OF FEBRUARY, 2025.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

