Kimani v Attorney General (Civil Appeal 2 of 2019)
[2024] KECA 66 (KLR) (2 February 2024) (Judgment)

Neutral citation: [2024] KECA 66 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 2 OF 2019

MSA MAKHANDIA, FA OCHIENG & WK KORIR, JJA

FEBRUARY 2, 2024

BETWEEN

HENRY MWANGI KIMANI ..... APPELLANT

AND

ATTORNEY GENERAL ..... RESPONDENT

(Being an appeal arising from the Judgment of the High Court of Kenya at Nakuru (Anyara Emukule, J.) delivered and dated 18th September 2014 in HC PETITION No. 24 of 2011)

JUDGMENT

1. The appellant, Henry Mwangi Kimani, is before us on a first appeal to express his dissatisfaction with the dismissal of his constitutional petition by Anyara Emukule J. in Nakuru High Court Petition No. 24 of 2011. In the petition, the appellant had moved the High Court for a declaration that his rights under Articles 28, 29 and 31 of *the Constitution* had been violated hence he was entitled to compensation. He therefore sought general damages as well as the costs against the respondent, the Attorney General.

2. The applicant is dissatisfied with the judgment and decree of the High Court and has lodged this appeal raising the following 8 grounds of appeal which we reproduce verbatim as follows:

    i. That the learned Judge erred in law and in fact in holding that the Appellant had failed to prove a connection between the injuries he sustained and the inaction of the state when in fact an omission by the state to provide security to its citizenry was the direct cause of the attack on the Appellant.

    ii. That the learned Judge erred in law and in fact in finding that the Appellant failed to prove that he suffered injuries as a result of the inaction of the state when in fact the omission of the state to provide security and restore law and order in the country at the time of the 1997 political skirmishes was the direct cause of the Appellant's insecurity and resultant attack on his body.

iii. That the learned Judge erred in law and in fact in failing to appreciate that it is a Constitutional obligation of the state to provide security to its citizenry without discrimination as mandated by Article 29 (c) of *the Constitution* 2010 and Section 14 (a) of *the Constitution* of Kenya, 1963.

iv. That the learned Judge erred in law and in fact in drawing patently inferences before the court on the State's obligation in ensuring the safety of its citizens most especially during that time when state wide conflict was prevalent.

v. THAT the learned Judge erred in law and in fact in failing to consider the relevant pictorial evidence presented by the Appellant both in Affidavit accompanying the Petition and thereby misdirecting himself to state that the Appellant failed to furnish sufficient evidence to link failure of the state to provide security to its citizenry, and especially the Appellant.

vi. That the learned Judge erred in law and in fact by failing to consider the Appellant's submissions and Affidavit supporting the Petition in arriving at his decision.

vii. That the learned Judge erred in law and in fact in failing to appreciate the obligation placed on the state by international treaties and conventions, *the Constitution* and the supreme power of the People of Kenya, to provide and ensure adequate security to its citizenry without discrimination.

viii. That the learned Judge erred in law and in fact in failing to make a finding as to costs without considering the expenses incurred by the already adversely affected Appellant.

3. At the trial, the appellant's case was that on the night of 7th and 8th February 1998, while sleeping in his house within Njoro/Makutano area he was accosted by a group of assailants dressed in official administration police uniform. The said assailants proceeded to violently assault him causing severe injuries to his head, back, hands and legs. He suffered compound fracture of the maxillary bone, fractured left wrist with severed tendons of the hand, multiple deep cut wounds on the head and back. Arrow heads were also lodged in his buttocks. He was hospitalized from 8th to 28th February 1998. The appellant through his affidavit deposed that his attackers were police officers because they were dressed in official administration police uniform and that as at the time of his attack, the area was under curfew from 6.00pm to 6.00am hence the residents of the area were indoors. He further testified that had his assailants not been police officers, they would have been arrested for defying the curfew order. According to the appellant, the State was at fault for allowing its agents to attack him or failing to bring his attackers to book.

4. The respondent opposed the appellant's petition through grounds of opposition and a reply to the petition dated 9th September 2011 and 28th October 2011, respectively. In a nutshell, the respondent contended that the petition was fatally and incurably defective and was time-barred. The respondent also argued that the obligation of the State was to provide security to all citizenry and not individuals hence the State could not be blamed for the attack experienced by the appellant.

5. In its judgment, the High Court addressed two major issues. As to whether the petition was time-barred, the learned Judge observed that the filing of the petition 9 years after the event though inordinate and unexplained was not prejudicial to the respondent and he would determine the petition on its merits. He also rejected the respondent's claim that the Petition ought to have been brought by way of a plaint noting that the parties had entered into a consent that the matter be heard by way of written submissions. On the merits of the appellant's claim, the learned Judge found that even though the appellant's rights were violated, the State could not directly be blamed as there was no sufficient evidence to infer that the assailants were indeed administration police officers. The learned Judge

concluded that the appellant had failed to establish that the State was liable for his loss. Consequently, the petition was dismissed and each party ordered to shoulder the costs of the proceedings.

6. This appeal came up for hearing before us on the virtual platform on 4th October 2023. Mr. Karanja was present for the appellant while there was no representation for the respondent. Learned counsel for the appellant sought to rely on his written submissions dated 27th January 2023. The respondent did not file any submissions in this matter but we are nonetheless obligated to consider the appeal on its merit based on the Record of Appeal and the submissions of the appellant.

7. In addressing grounds 1, 2 and 5 of the appeal, Mr. Karanja submitted that the learned Judge erred in law and fact by finding that the appellant had failed to prove that the State's inaction led to his injuries. Counsel referred to the Report of the Judicial Commission of Inquiry into Tribal Clashes, commonly known as the Akiwumi Commission Report, and submitted that it was a finding of that Commission that the masterminds of the 1997 post- election clashes were the administration police officers. Counsel relied on section 4 of the *Government Proceedings Act* and faulted the learned Judge for failing to find that the State was liable considering that the appellant had made a blanket accusation against State agencies.

8. Learned counsel also contended that the learned Judge erred in holding that the contents of the Akiwumi Commission Report were not facts despite being invited to admit the Report as evidence. According to Mr. Karanja, the Akiwumi Commission Report was a public document as per the provisions of section 79(1) of the *Evidence Act* and the Report established that the security operatives had prior knowledge of the tensions in the appellant's area. Counsel reiterated that the Report was not only a public document but also a reliable source of information which elucidated the facts that related to the actual events that occurred in the area. Counsel additionally submitted that the appellant produced photographs as evidence of the injuries that he sustained. To buttress these submissions, counsel relied on the decision of the Inter-American Court of Human Rights in Velasquez Rodriguez vs. Honduras, Judgment of 29th July 1988.

9. In addressing grounds 3, 4, 6 and 7 of the appeal, Mr. Karanja submitted that the learned Judge erred in failing to make inference on State's obligation in ensuring safety of citizens. Counsel relied on the Akiwumi Commission Report to submit that there were serious security lapses leading to the clashes and that the State was aware of the tensions and the impending danger. Counsel referred to the European Court of Human Rights in Osman vs. The United Kingdom (87/1997/871/1083), Judgment of 28th October 1998 to urge that the Government was charged with the responsibility of taking the necessary measures to safeguard the lives of its citizens. To further buttress this point, counsel also relied on the UN Human Rights Committee Comment on Article 7 of the International Covenant on Civil and Political Rights (ICCPR).

10. Mr. Karanja also faulted the High Court for holding that there was need to balance individual rights against the community rights. According to counsel, the appellant's case was not appropriate for the invocation of such balance. Counsel further referred to the Report by REDRESS titled: Not Only the State: Torture by Non-State Actors of May 2006 to urge that the concept of due diligence imputed liability on the State for acts committed by non-state actors within its territory.

11. Finally, counsel urged that the High Court erred by failing to make a finding on costs without considering the expenses incurred by the appellant. According to counsel, the respondent should be condemned to meet the costs of this appeal and those of the proceedings before the High Court. In conclusion, counsel urged us to allow the appeal in its entirety.

12. As earlier mentioned, there was no appearance for the respondent at the hearing and neither did the respondent file any submissions.

13. We have given due consideration to the record of appeal and submissions by the appellant. This being a first appeal, we proceed by a way of re-hearing based on the evidence on record. In the circumstances the appellant is entitled to a reappraisal of the evidence on record and an independent decision by this Court. In carrying out the stated mandate the only caveat is that unlike the trial court, we have not heard and seen the appellant testify in order to gauge his demeanour. As such we must bear this disadvantage in mind as we proceed to determine the appeal. That is the import of Rule 31(1)(a) of the Court of Appeal Rules, 2022 and has been the tradition of this Court as established in various decisions including Attorney General & 2 others vs. Independent Policing Oversight Authority & another [2015] eKLR where it was stated that:

> "On our part, as a first appellate court, it is not lost on us that we have the duty, and responsibility to reevaluate the evidence adduced before the High Court and arrive at our own independent decision. This re-evaluation is not merely a rehashing of the evidence or findings of the trial court. It entails reconsidering the evidence afresh with a clear mind devoid of any influence from the findings of the trial court."

14. Alive to this mandate, this appeal turns on the determination of the question as to whether the appellant established State liability. As did the learned Judge of the High Court, we similarly hold the view that Articles 28, 29 and 31 of *the Constitution* that the appellant cited could not be applied retroactively to the complaints in the Petition which concerned events that occurred in 1998 prior to the promulgation of the current Constitution. This appeal, will therefore be examined in the context of section 70 of the former Constitution which was in place as at the time the cause of action arose. Our views are fortified by the decision of the Supreme Court in Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & 2 others [2012] eKLR in which it was held that:

> "At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting *the Constitution* to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of *the Constitution*. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the Court ought not to import it into the language of *the Constitution*. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately occurred before the commencement of *the Constitution*."

15. From the record, there is no doubt that the appellant sustained injuries and as a result was admitted in hospital from 8th to 28th February 1998. The only question therefore is whether the appellant sufficiently established that the State was indeed responsible for the acts that led to a violation of his rights. The appellant's rights allegedly infringed were under Articles 28, 29 and 31 of *the Constitution*, to wit, the right to human dignity, right to freedom and security of the person and the right to privacy.

Apart from the right to dignity, those other rights were protected under section 70 of the retired Constitution in the following terms:

> " Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely -
>
> a. life, liberty, security of the person and the protection of the law;
>
> b. freedom of conscience, of expression and of assembly and association; and
>
> c. protection for the privacy of his home and other property and from deprivation of property without compensation, the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

16. These rights are also provided for under Articles 3 and 12 of the Universal Declaration of Human Rights, Articles 6 and 9 of the International Convention on Civil and Political Rights (ICCPR) and Articles 4, 5, and 6 of the African Charter on Human and Peoples' Rights.

17. As observed by Privacy International and the National Coalition of Human Rights Defenders in Kenya in their 21st Session of the Universal Periodic Review Stakeholder Report on the Right to Privacy in Kenya, the right to privacy is central to the protection of human dignity and forms the basis of any democratic society. It embodies the presumption that individuals should have an area of autonomous development, interaction and liberty, a private sphere with or without interaction with others, free from arbitrary interference by the State and from excessive unsolicited intrusion by other uninvited individuals. It also supports and reinforces other rights, such as freedom and security of the person and the right to human dignity. In this case, the appellant's house, which is the ultimate sanctuary of an individual's privacy, was breached. He was then assaulted resulting in severe injuries. His case was that the State was responsible for infringement of rights by its agents and non-state actors. Further, that the State was under an obligation to guarantee his rights but failed to do so.

18. The State has an obligation to ensure, protect and promote human rights within its borders. Where the State fails to discharge this duty, it can be held liable for damages for the breach. In order for a claimant to succeed in a claim premised on the failure by the State to discharge its obligation, two elements must be proved. First, there must be conduct consisting of an act or omission, which is attributable to the State under the law. The second is that the conduct must constitute a breach of a legal obligation of the State. In other words, state obligation is dependent on the link between the State and the wrongful act. In this case, the appellant faults the State for failing in its duty to protect and fulfill his constitutional rights. The duty to protect enjoins the State to take positive action to protect citizens and other persons within its jurisdiction from violations that may be perpetrated by either state agents, private actors or other states.

19. Article 2 of the ICCPR enacts the principle of state obligation thus:

> " Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

    a. To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

    b. To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

    c. To ensure that the competent authorities shall enforce such remedies when granted."

20. The Human Rights Committee's General Comment No. 31 on the ICCPR at paragraph 8 expounds on this obligation as follows:

> " The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However, the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities."

21. The State therefore has an obligation to ensure the enjoyment of human rights. This duty requires the State to prevent violation of human rights by its agents as well as non-state actors and to remedy the situation where violations have occurred. The question therefore is whether the respondent took steps to prevent violation of the appellant's rights and whether it took any remedial action after the rights had been violated.

22. The only evidence that the appellant tendered linking the State directly to the infringement of his rights was that those who attacked him were dressed in official police uniform and that there was a

curfew in place hence his attackers could not have been marauding civilians. Just like the High Court, we find that this was not sufficient proof that the assailants were officers of the State thereby making the State culpable for his loss. Anyone, including criminals have access to clothes which are a replica to those donned by Kenyan police officers, more so, the jungle green attires. More evidence ought to have been adduced to, on a balance of probability, establish that the attackers were indeed officers from the administration police. In times of national distress, as was the case when the appellant was attacked, it is not out of the ordinary to find non-police officers attired in what looks like police uniform.

23. Another thread of the appellant's case was his contention that the State abdicated its duty on two fronts, first, by failing to protect him by preventing the attacks, and second, by not putting in place mechanisms for him to seek redress.

24. With regard to the right to security, the appellant contended that the State did not act to prevent the attacks despite having information that they were likely to happen. To establish whether the State discharged the duty of care owed to the appellant, it must be determined whether it did all it could, to prevent the violation of his rights by non-state actors. The appellant contended that the area was under curfew from dusk to dawn and therefore the government would have known or arrested anyone else who moved during that time and in the absence of any arrest, then the assailants were known to the State, if not its agents.

25. In Charles Murigu Muriithi & 2 others vs. Attorney General [2019] eKLR, this Court considered the rights under section 70 of the former Constitution and stated that:

> "Reading together section 70 of the former Constitution and section 14(1) of the Police Act and from the numerous judicial pronouncements drawn mainly from the United States of America, England, Canada, South Africa, Turkey, New Zealand and many other jurisdictions, there can be no doubt that every person has a right to security; right to protection of privacy of his home and of property. The State has a duty to maintain law and order including the protection of life and property. However, as a general rule, this duty is owed generally to the public at large and not specifically to any particular person within Kenya. For a person to succeed in a claim for alleged violation of constitutional rights as a result of damage to property, it must be demonstrated that there existed a special relationship between the victim and the police on the basis of which there was assurance of police protection, or where, for instance the police have prior information or warning of the likelihood of violence taking place in a particular area or against specific homes but fail to offer the required protection. In such cases, therefore the State may be held liable where violations of the rights protected and guaranteed in the Bill of Rights are proved even when those violations are occasioned by non-state actors provided that the duty of care is properly activated. Such a liability would however have to be determined on the facts and circumstances of each case."

26. The Court went ahead to state thus:

> "We think ourselves that the mere fact that an individual under section 70 of the former Constitution was guaranteed the right to life, liberty, security of the person and the protection of the law; the protection for the privacy of his home and other property and simply because the police under section 14 of the repealed Police Act are enjoined to ensure the maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and detection of crime, that per se does not impose liability on the Government for damages caused to a victim of mob violence or civil disorder. To hold

otherwise will be to introduce the concept of strict liability and raise the bar of Government responsibility to a utopian level. It will in effect impose on the Government responsibility for all types of criminal acts in which the victims are injured, lose lives or property."

27. In yet another instance, this Court in Agricultural Development Corporation vs. Harjit Pandhal Singh & another [2019] eKLR stated that:

> "(23) The general constitutional and statutory duty of the Government or police to provide security to an individual citizen or his property only crystalizes in special individualized circumstances such as where a citizen has made an individual arrangement with the police, or some form of privity exists or where from the known individual circumstances, it is reasonable for police to provide protection for the person or his property. Otherwise, imposing a limitless legal duty to the Government to provide security to every citizen and his property in every circumstance would not only open floodgates of litigation against the Government, but would also be detrimental to public interest and impracticable in the context of this country."

28. We concur with the above statements as they correctly capture the position of the law. It is apparent that for an applicant to succeed in engaging the concept of state liability on the right to security, it must either be shown that the applicant had a special relationship with the police giving rise to an assurance of police protection; or that the police had prior information of an imminent attack on an induvial or a group of persons but failed to act or offer security. In this case, there is evidence that the police had prior information of likely violence and responded by enforcing a curfew to curtail the free movement of people between dusk to dawn. There is, however, no evidence that the appellant had made any report of imminent attack specifically targeted at him so as to warrant special attention to his person and property. In our view, the efforts put in place by the government in an attempt to thwart any illegal activities in the area was sufficient in the circumstances of this case.

29. The second angle of the appellant's case requires us to address the question as to whether the State denied the appellant adequate channels to seek redress for the wrongs visited upon him by the unidentified persons. On this facet of the appellant's case, we find that he did not make any report to the police with regard to the events that led to his injuries. Had he made an official report and no action was taken, we would have likely reached a different conclusion. It is only after an actionable complaint has been made and no action has been taken that one can say that the State has failed to discharge its obligation.

30. Still unrelenting, the appellant urged that the High Court ought to have relied on the Akiwumi Commission Report to infer State inaction. In our view, reports alone cannot form a basis for such a finding. A party who seeks to rely on such a report should go an extra mile to establish the nexus of the findings of the report to his grievances. As we have already stated, had the appellant lodged an official report with the police or any other relevant government agency or even testified before the Commission, it would have been easier for him to link the findings in the Report to his circumstances.

31. Finally, there was the complaint by the appellant that "the learned Judge erred in law and in fact in failing to make a finding as to costs without considering the expenses incurred by the already adversely affected Appellant." At paragraph 46 of the judgment delivered on 18th September 2014, the learned Judge expressly dismissed "the Petition with no orders as to costs." Ordinarily, costs follow the event and had the learned Judge engaged this principle the appellant would have shouldered the costs of his

failed claim. The complaint by the appellant that the learned Judge ought to have made a finding on the issue of costs, presumably in his favour, is therefore unfounded and without merit.

32. In the end, we find this appeal to be without merit and dismiss it. There being no appearance on the part of the respondent, we make no order as to costs.

33. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 2ND DAY OF FEBRUARY, 2024 ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR