IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KOOME & KANTAI, JJ.A)

CIVIL APPEAL NO. 227 OF 2017

BETWEEN

JOSEPHAT MAILU NDOLO

(*Suing on behalf of the Estate of* Anthony Ndolo Mailu).....APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

(An appeal from the judgment and order of the High Court of Kenya At Milimani Law Courts Nairobi,

Constitutional and Human Rights Division (Mwita, J.) dated 12th April, 2017

in Const. Pet. No. 293 of 2016)

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JUDGMENT OF THE COURT

[1] This appeal raises a question of the yardstick to use in determining whether a police station bore the responsibility of providing information regarding investigations over the death of a deceased person who was allegedly killed or murdered by unknown people. By a petition dated 12th July, 2016, ***Josephat Mailu Ndolo*** (appellant) filed suit before the High Court, Constitutional and Human Rights Division, at Nairobi against the 1st and 2nd respondents. The petition was brought on behalf of the estate of his late son, ***Anthony Ndolo Mailu*** (deceased) who was allegedly killed on the night of 11th October, 2005 while on duty as a petrol pump attendant at B.P Petrol Station on Forest Road, Nairobi which was owned and managed by one ***Oliver Ndeti Thiga*** of P. O. Box 53472 Nairobi. The appellant was seeking orders that: -

> ***"(i) a declaration that the appellant's rights to information and fair administrative action had been violated; and***
>
> ***(ii) for an order of mandamus to be issued compelling the respondents to provide the appellant with information on the investigations carried out regarding the death of Anthony Ndolo Mailu (the deceased)."***

[2] According to the appellant, the death of the deceased was reported at Parklands Police Station within whose jurisdiction the incident occurred. The appellant contended that he tried to follow the investigations over the killing of his son with Parklands Police Station without success. He therefore instructed the firm of ***Kilonzo & Co. Advocates*** to act for him and in this regard the Advocates issued a demand letter dated 14th May, 2014 requesting the Officer-in-Charge of Parklands Police Station to provide the appellant with: -

> ***(a) an extract of the occurrence book in which the incident was recorded;***
>
> ***(b) copies of witness statements;***
>
> ***(c) a police report regarding the death of the deceased; and***

(d) a report of any action taken since the incident was reported.

It was the appellant's contention that other correspondences were ignored and the respondents failed to act for close to ten (10) years prompting him to file a petition on grounds that, by reason of the respondents' inaction, his Constitutional right under ***Articles 35, 40*** and ***47*** had been violated.

[3] The petition was against the Director of Public Prosecution (DPP) and the Inspector General of Police (IP), the 1st and 2nd respondents respectively. As regards the 1st respondent, a replying affidavit was sworn on 27th January, 2017 in response to the petition by ***Mr. Edwin Okello***, a Senior Assistant Director of Public Prosecutions (SADPP). As far as the DPP was concerned, it was stated that the OCS Parklands Police Station wrote to the 1st respondent on 23rd November, 2016 indicating that the Occurrence Book (OB) of the date of the alleged incident could not be traced in their archives; that the inquest register did not have the particulars of the deceased; and they had no information on the death of the deceased. Thus, in their view, the respondents could not be called upon to give information which was not in their possession as no report of the death had been made, or if it was, the records could not be traced after ten (10) years.

[4] The matter fell for hearing before **Mwita, J.** who after considering the material before court and the parties' submissions, found that issuing an order of *mandamus* to compel the 2nd respondent to carry out investigations on the death of the deceased after twelve (12) years would be an exercise in vain as the police station that was supposed to carry out the investigation stated that it did not have the record of the incident and that there was no information available in form of OB records, witness statements or inquest file, and so it was meaningless to issue orders of *mandamus*. The petition was declined and dismissed and each party was ordered to bear their own costs.

[5] This is the judgment that aggrieved the appellant prompting him to file a memorandum of appeal dated 13th July, 2017 in which ten (10) grounds of appeal are raised. In brief the appellant faulted the trial judge for erring in law and fact by:-

"(a) failing to acknowledge that the issues before the court touched on constitutional violations which are not subject to time limitations;

(b) failing to consider that the appellant was left without an effective remedy;

(c) in not holding that the failure by the respondents to undertake prompt and effective investigations was a breach of the deceased's right to life;

(d) failing to appreciate that an inquest must be conducted whenever a life is lost in unclear circumstances as was the case herein;

(e) by placing the burden of carrying out investigations on the appellant rather than on the respondents;

(f) in holding that the appellant did not provide sufficient details or particulars of the incident;

(g) in not holding that the burden of proving or disproving the existence of the records lay with the respondents;

(h) in holding that there was no information to be produced despite the OCS informing the appellant that they were looking for the information in the archives;

(i) in relying on inadmissible evidence by the respondents; and

(j) in not declaring that the appellant's rights under Articles 26, 35 and 47 had been violated."

[6] In support of the appeal, **Ms. Kethi D. Kilonzo,** learned counsel for the appellant, relied on her client's written submissions dated 11th July, 2018 as well as supplementary submissions and supporting bundle of authorities dated 3rd October, 2019. Counsel highlighted the said submissions during the plenary hearing by emphasizing that the trial Judge misapprehended the prayer requesting information which is a right that is protected under the Constitution. According to counsel, the appellant had made several requests for information regarding the death of the deceased from the OCS Parklands Police Station, the DPP and the Attorney General (AG) but they were ignored until the petition was filed; that failure to provide the appellant with the information was a violation of his constitutional right and therefore this Court should grant the order of *mandamus*.

[7] Opposing the appeal was ***Mr. Ruto***, holding brief for ***Mr. Edwin Okello***, learned counsel for the 1st & 2nd respondents. He relied on the written submissions dated 31st August, 2018 in which the respondents submitted that the appellant had failed to prove that the State was in possession of the information he was seeking. To buttress their arguments, the respondents relied on a persuasive authority by the High Court in **Katiba Institute vs. Presidents Delivery Unit & 3 others [2017] eKLR** where it was held that a party seeking information, has a duty to demonstrate that the information sought was in possession of the State. It was further argued that the appellant was indolent by filing the petition many years after the incident had occurred and that it was impossible for the trial court to grant the declarations and remedies sought by the appellant, when the appellant had not offered any evidence to show how the respondents had refused to provide the information. Further, it was argued that the appellant did not meet the threshold of claiming redress for violation of constitutional rights, for failing to articulate the particulars of violations as per the principles established in **Anarita Karimi Njeru vs. Republc [1979] eKLR** and later affirmed by this Court in **Mumo Matemu vs. Trusted Society Alliance & 5 others [2013] eKLR**. For the aforesaid arguments, the respondents prayed that the appeal be dismissed in its entirety.

[8] We have considered the grounds of appeal, the record and deliberated on the written submissions as well as the authorities cited and the law. This appeal is against a decision of the trial Judge wherein the appellant sought a declaratory order as well as an order of *mandamus* which were all denied. Essentially, the appellant is asking this Court to interfere with the exercise of the trial Judge's discretion. Generally, the Court ought not to interfere with the exercise of such discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice. See **Coffee Board of Kenya vs. Thika Coffee Mills Limited & 2 Others [2014] eKLR**. It is also trite that the High Court is given jurisdiction to issue an order compelling a public body to do an act which the court finds was not done due to irrationality, unreasonableness or simply failing to take action or to follow due process.

[9] That said, we discern two issues for determination being: -

> ***(a) Whether the appellant was entitled to an order of mandamus to compel the respondents as prayed.***
>
> ***(b) Whether, the respondents neglected/ failed to provide information on investigations surrounding the death of the deceased thereby infringing on the appellant's right to information.***

[10] This Court has set out the parameters under which a judicial review order of *mandamus* can issue in **Republic vs. Kenya National Examinations Council *ex parte* Gathenji & 8 Others Civil Appeal No 234 of 1996**, where the Court cited, with approval, ***Halsbury's Laws of England, 4th Edn. Vol. 7 p. 111 para 89*** thus:

> **"The order of mandamus is of most extensive remedial nature and is in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right and it may issue in cases where although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed."**

[11] Was the appellant entitled to an order of *mandamus* and the declarations sought? Counsel for the appellant was categorical that the trial Judge erred in *'failing to acknowledge that the issues before the court touched on violations of the constitution and which are not subject to time limitations'*. It is common ground as per the pleadings, that the deceased was killed on the 10th October, 2005 and the only documented request for information regarding investigations that were carried out by the police was made vide a letter written by counsel for the appellant on 14th May, 2014. This was after a delay of almost ten (10) years. In this letter counsel for the appellant requested the OCS, Parklands Police Station to furnish them with information regarding the investigations on the death of the deceased. It is instructive to note that neither counsel, nor the appellant offered any explanation why it took them so long to seek the information. It is documented that counsel for the appellant followed-up this letter with visits to the police station. Nonetheless, the information was still not forthcoming, prompting the petition to be filed on 12th July, 2016.

[12] This leads us to a pertinent question whether the appellant, or his counsel supplied the respondents with sufficient particulars to enable the police supply the information requested. Or put the other way to support the appellant's claim that the police willfully neglected to perform their duty to entitle the appellant to be granted the orders sought. The averments by **Mr. Okello** for the respondents that the information could not be traced; that Parklands police station did not have any information regarding the incident as the OB for the date of the incident could not be traced, and that the inquest register did not have the particulars of the deceased was not at all controverted by the appellant. This therefore lends credence to the respondent's submission that the appellant had failed to provide particulars to support their claim that the police neglected to provide information.

[13] On our part, apart from the delay of almost ten (10) years which we find inordinate, regrettably we also find the appellant did not attach any documents such as burial permit, a report of death of his son from the petrol station or any evidence of postmortem to show the cause or place of death so as to place the responsibility of investigation upon Parklands Police Station. In the absence of any or any kind of documentation to show death of the deceased, we find it difficult to fault the Judge when he stated as follows in a pertinent paragraph of the impugned judgment:-

> ***"The petitioner does not say that the incident was reported on that material day or night at Parklands Police Station, and if so, at what time and by whom. He does not also specifically state that he himself went to Parklands police station on a particular day to report or seek information about the incident immediately after its occurrence. The petitioner does not even say whether, as father to the deceased, he ever recorded a statement at the station or whether the body was ever taken to mortuary or hospital by police officers from Parklands Police Station, and if so, on which date."***

[14] On whether there was a breach of the appellant's right to information; as a general rule, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmation of the issue. *Section 107 (1)* of the

Evidence Act provides that: -

> **"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."**

What is clear to us is that the appellant did not seem to have evidence of information which he sought to convince the trial court was in the respondents' possession. The evidential burden lay on the appellant to establish that his rights as provided under ***Articles 26*** and ***47*** of the constitution were violated. As matters stood, the appellant did not produce a copy of the deceased's death certificate to substantiate a claim under ***Article 26*** or a postmortem report indicating that the death of his son was a matter falling under the respondents' mandate to investigate. We are cognizant of the **Access to Information Act 2016** which was enacted for purposes of actualizing ***Article 35*** of the Constitution, which deals with rights to information. Granted that the Act was enacted after the complaints raised herein, even if it were to be applied, ***Section 8*** of the Act requires a citizen who wants to access information to make such a request in writing with sufficient details and particulars to enable the public officer understand what information is being requested. This request was made in writing after 10 years, and even so, there were no documents attached to enable the police provide the information or know whether it was within their mandate.

[15] On the issue of whether the appellant's petition disclose a cause of action with sufficient clarity and precision for the trial court to make declaratory orders sought, it is always a cardinal rule in pleadings that a party should plead their cases with sufficient particulars. Also going by **t**he principle in ***Anarita Karimi Njeru*** (supra) underscores the importance of defining with precision the dispute to be decided by the court to enable parties appreciate the issues in controversy. This was what **Jessel, M.R** said in 1876 in the case that has been cited with approval by this Court in **Mumo Matemu case** (supra) in ***Thorp vs. Holdsworth (1876) 3 Ch. D. 637*** at 639:-

> ***"The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules…was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."***

It is clear to us that the petition together with the affidavits and written submissions by the appellant's counsel did not disclose how the respondent's actions or inaction violated the appellant's rights under ***Articles 26, 35*** and ***47***.

[16] For all the above reasons, we cannot fault the learned Judge in his conclusion that the petition had no merit. In the circumstances the appeal herein is hereby ordered dismissed. We however make no order as to costs considering the fact that the appellant is a private citizen who finds himself against the State. We therefore order each party to bear their own costs.

Dated and delivered at Nairobi this 6th day of March, 2020.

R. N. NAMBUYE

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR