



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), OKWENGU & SICHALE, JJ.A.)

CIVIL APPEAL NO. 258 OF 2015

BETWEEN

CHARLES MURIGU MURIITHI.....1ST APPELLANT

NEWTON MBUGUA.....2ND APPELLANT

PAUL MWANGI NGUGI.....3RD APPELLANT

AND

ATTORNEY GENERAL.....RESPONDENT

(An appeal against the Judgment of the High Court at Nairobi (Isaac Lenaola,

Mumbi Nguji and Cecilia Githua, JJ) dated 24th April, 2015

in

Constitutional Petition No. 113 of 2009 Consolidated with Constitutional

Petition No. 44 of 2009 and Constitutional Petition No. 48 of 2012)

JUDGMENT OF THE COURT

This is one of those matters that came about as a result of the 2007 post election violence in Kenya where many lives were lost and properties destroyed.

Following that crisis, many individuals whose properties were destroyed have brought claims for compensation, especially against the Government. Instance of such claims include **Ukwala Supermarket (Kisumu) Limited V. Kenindia Assurance Company Limited** [2017] eKLR, **Florence Amunga Omukanda & another v Attorney General & 2 others** [2016] eKLR, **Intraspeed Logistics Ltd & 15 Others vs. Commission of Police & Ano.** (2018) eKLR and recently **Agricultural Development Corporation V. Harjit Pandhal Singh & Another** (2019) eKLR delivered at Eldoret on 25th July, 2019.

In the instant case, the three appellants, who were residents of Eldoret separately petitioned the High Court for general and special damages for losses arising from violations to their constitutional rights and fundamental freedoms during the 2007 political violence. The petitions were anchored specifically on the provisions of **sections 70 and 75** of the former Constitution and **Articles 27(5), 29, 31, 39 and 40** of the Constitution, 2010. It was their contention that the State, through the Police Service and officers failed in its obligation to protect their property against invasion by gangs of armed men who set their properties on fire, vandalized and destroyed their properties only because they were from the Kikuyu community; that they had no right to settle in Eldoret; that they ought to return to their ancestral domicile in the former Central Province; that as their properties were being looted and torched the police simply stood by and watched; that telephone calls to Eldoret Police Station for assistance did not elicit any action to safeguard life and property even though a report was made and recorded as OB Entry No. 45 of 1st January, 2008.

For the loss and damage suffered, the appellants submitted that the State was liable for neglecting to take appropriate steps to prevent the eruption of post-election violence despite having information that it would occur; for failure of State agencies to respond when called upon or

to take measures against individuals who were rioting; for failure to arrest the individuals involved in the contravention of the appellants' rights to property and for failure to investigate the alleged violation of their rights and fundamental freedoms.

Consequently, they urged the court below to find that they were entitled to a declaration that their rights and fundamental freedoms under **Sections 70 and 75** of the Repealed Constitution and **Articles 27(5), 29, 31, 39 and 40** of the Constitution of Kenya 2010 had been violated. They also asked for compensation by way of damages in the sums of Kshs. 8,075, 900, Kshs. 14,725,000 and Kshs. 8,335,000, respectively for the 1st, 2nd and 3rd appellants being the value assigned to the damaged properties by M/s Prime Valuers who were engaged to conduct the valuation three years after the attack.

To persuade the court the appellants cited the cases of **Rumba Kinuthia V. Attorney General**, Misc. Appl. No.1408 of 2004, **Pradhan V. Attorney General & Another** (2002) 1 KLR, **Marete V. Attorney General** (1987) KLR 692, among others.

For the respondent, it was argued that while the State, and the police service in particular owed a general duty to the public, it did not owe a specific duty to the appellants with regard to the allegations made in their petitions; that it could not be liable for violations for which it was not responsible; that the appellants had neither demonstrated that any of their constitutional rights had been infringed nor specified the manner in which they were infringed. They denied ever receiving any distress call at Eldoret Police Station or that the police had failed or declined to respond to that call.

The respondent, for their part maintained that the police discharged its duties during the post-election violence of 2007/2008 diligently, professionally and in accordance with their mandate of maintaining law and order, providing security to Kenyans and their property round the clock; that they did this by dispatching police officers to post election violence hot spots countrywide to disperse and arrest those who were committing criminal acts; and that they did so despite their limited personnel and resources. Regarding the so-called extract from the Police Occurrence Book (OB) annexed to one of the appellant's affidavit to prove that a report was made of the attack, it was the respondent's contention that the extract did not emanate from the police station as it was not in the format of OB entries which are traditionally, not typed but handwritten. Similarly, the respondent contended that there was no proof that the properties in the photographs produced as exhibits actually belonged to the appellants; that without documentary evidence there was no proof that the properties existed or belonged to the appellants; that for that reason the valuation reports served no purpose; and that in any case, damages sought by the appellants were in the nature of special damages which were not specifically pleaded and proved.

For the above submissions and drawing a parallel with the decisions of American Courts in the cases of **De Shaney V. Winnnebago County Department of Social Services** 109 S. Ct. 998(1989), **Johnson V. City of Seattle** 474 F. 3d 634, 639 (9th Cir. 2007), **West Minster Investing Corp V. G.C Murphy Co.** 434 F. 2d 521, 526, and the following English cases, **Ancell V. McDermott** (1993) 4 ALL ER 355, **Alexandrou V. Oxford** (1993) 4 ALL ER 328, **Hill V. Chief Constable of West Yorkshire** (1988) 2 WLR 1049 and **Osman V. Ferguson** (1993) 4 ALL ER 344, the respondent posited that **section 75** of the former Constitution did not impose an affirmative obligation on the State to protect the life, liberty and property of its citizens against invasion by private actors, or violence from a riotous crowd, but only prohibited the State itself from depriving individuals of life, liberty or property without due process of the law.

Further, the respondent argued that the only time the Government can be liable is when its action or inaction is shown to have affirmatively placed an individual in a position of danger which the individual would otherwise not have faced and where it is demonstrated that there existed a special relationship between the State and the individual, for example, in cases of persons in custody or where the Government or police have given a person special assurance of protection of their property and person.

In conclusion, the respondent explained that, though the phenomenon of post-election violence presented a great challenge to the police in the areas of capacity, the police did their best to discharge their duty of law enforcement and maintenance of law and order during the post-election violence by effectively suppressing the riots and protecting property in all parts of the country where the violence was experienced; that this fact was acknowledged in the Report of the Commission on Post-Election Violence (the Waki Commission) Report; that through the police, many cases relating to the violence were investigated and prosecuted; that some 258 suspects were convicted, 87 acquitted, 138 cases withdrawn and 50 cases were pending hearing at the time of hearing of the petition.

In their assessment of these arguments the learned Judges, (Lenaola – as he then was, M. Ngugi and Githua, JJ) in a 47-page judgment identified the following three issues for their consideration;

- (i) Whether the State owed the appellants a specific duty under Sections 70 and 75 of the former Constitution as well as Articles 27(5), 29, 31, 39 and 40 of the Constitution, 2010 to protect their individual lives and property.**
- (ii) If the answer to the first issue is in the affirmative, whether the appellants' constitutional rights were violated as alleged; and finally,**
- (iii) Whether the appellants were entitled to the reliefs sought.**

The Judges were in no doubt that in so far as **section 14(1)** of the repealed Police Act was concerned, the police were expected, in fact required to maintain law and order, preserve peace, protect life and property, prevent and detect crime and apprehend offenders. They added, however, that that role did not impose a general duty on the Government or its security agencies to provide protection to any particular individual citizen; that a police service constitutes a basic governmental service provided to benefit the community at large by generally promoting public peace, safety and good order.

On the facts before them, the learned Judges agreed that the appellants were, like all persons within the Kenyan territory entitled to the protection of their privacy, personal security and to their property as guaranteed by **Section 70** of the repealed Constitution. They however found no proof in the appellants' claim that the State had prior information that post-election violence would occur after the conduct of the 2007 general elections; that it failed to act on such information to prevent the violence; and that the appellants telephoned Eldoret Police

Station to seek assistance. In their observation, what was produced as an OB extract to prove that a report was made to Eldoret Police Station was not infact an O.B extract in the format it is known but appeared to them to be a document made by the appellants themselves documenting how the attacks to their homes were executed.

It bore no date or any endorsement from any police station and its authenticity was therefore in doubt; that **section 75** protected individual citizens against State arbitrary deprivation of private property without adequate compensation; and that the section, therefore had no application in the matter in their hands. Regarding the relevance of the 2010 Constitution, the Judges were of the opinion that the events of the post-election violence occurred in December 2007, way before the promulgation of the Constitution, 2010. Consequently, the rights created under the new Constitution, unless those rights were recognized and protected under the previous Constitution, were inapplicable to the appellant; that there were no parallels between the facts in the petition and those in **Rumba Kinuthia V. Attorney General** (supra), **Pradhan V Attorney General** (supra) **Marete V. Attorney General** (supra) as these other case involved claims of torture perpetrated by agents of the State; and that in the present case, State agents were not responsible for the tragedy that befell the appellants. In the end, the Judges expressed the following view on the appellant's petition;

“On our part, we find that the State’s duty through its various security agencies, including the Police, to protect its citizens and their properties from violence is owed generally to the public at large and not specifically to each and every individual resident within Kenya as the Petitioners were in December 2007.... 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.

58. We make this finding conscious of the fact that due to the poor ratio of police officers against the population in Kenya (a matter we take judicial notice given its common notoriety), the police cannot be expected to be everywhere at all times or to be guarding individual person’s homes or property on a 24-hour basis. The police can only be reasonably expected to offer protection if they have prior information that acts of violence are expected to be perpetrated in a certain area or against specific persons, homes or property so that they can organize to offer the required protection..... We have come to the inevitable conclusion that the State would in appropriate cases be held liable in cases where violations of the rights enshrined 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.....

We are inclined to find that the Petitioners have failed to demonstrate that the State in this case negligently or deliberately failed to protect them and their property from violence which led to destruction of their property. They have therefore, regrettably, failed to prove that the State was liable for their losses, painful as that decision may be. Consequently, we are satisfied that the Petitioners are not entitled to the grant of any of the reliefs sought in the consolidated Petitions.”

This determination aggrieved the appellants who have brought this appeal on ten grounds which were subsequently reduced to four in their submissions. They claim that the Judges disregarded the appellants’ rights as envisaged under **section 70** of the former Constitution; that **section 14 (1)** of the Police Act imposes a duty on the State to maintain law and order; that the petitioners were entitled to be accorded protection from the State but the security agencies of the State failed to do so; and that the appellants suffered loss for which the State was liable to compensate them.

Submitting before us on these grounds, counsel stated that the violated rights were inalienable; that there was a special duty activated by information of the impending attack and a report made to the State; that the State ignored predictions by the former National Security Intelligence Service (NSIS) that chaos would erupt in various parts of the country after the elections; that the State was bound to take reasonable measures and steps to protect the lives and properties of those individuals in the targeted areas; and that the State failed to use all the means at its disposal to carry out investigation of the violations committed, to identify those responsible for those violations, to impose appropriate punishment and to ensure that the victims were adequately compensated.

In opposition to the appeal, learned counsel for the respondent submitted that the State had no constitutional duty to protect the appellants against violence from a riotous crowd; that though the police owe a duty to the public to ensure their safety and security, the duty is not owed to specific individuals but rather, to the public generally; that the appellants failed to demonstrate the existence of any special relationship between themselves and the State that obligated the State to specifically provide security to them; that, contrary to a common position enunciated in **Anarita Karimi Njeru V. AG** (No.1) 1979 KLR 154, the petition was not precise on the constitutional issues the court was being asked to determine; that the petition did not set out with reasonable degree of precision that which had aggrieved the appellants, the provision of the former Constitution that were being alleged to have been infringed and the manner in which they were infringed.

A first appeal always proceeds by way of re-hearing based on the evidence on record and an appellant is, for that reason entitled to expect that the first appellate court will go beyond a mere rehashing of what is on record or a repetition of the findings of the trial court. See **Attorney General & 2 Others Vs. Independent Policing Oversight Authority & Another** Civil Appeal No. 324 of 2014.

Like the learned Judge, and with respect, we hold the view that **Articles 27(5), 29, 31, 39 and 40** of the 2010 Constitution that the 3rd appellant cited did not apply retroactively to the complaints in the petition and therefore this appeal will be examined from the context of **sections 70 and 75** of the former Constitution which was in place and upon which all the petitions were expressed to have been brought. Due to their importance and relevance, it is apposite to lay them out here. They provided as follows;

“70. 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 other 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;

.....and

(b) Protection for the privacy of his home and other property and from deprivation of property without compensation". (Emphasis added)

Section 75, on the other hand guaranteed that;

"75 (1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired"

(Our emphasis)

This Court has been moved under **section 84 (7)** of the former Constitution which permitted any person aggrieved by the determination of the High Court on alleged contravention of rights and fundamental freedoms to appeal to the Court of Appeal as of right.

From our own independent evaluation of the record and evidence, we identify two issues to be determined in this appeal; whether the appellants' rights to liberty, security and the protection of the law guaranteed by the former Constitution were violated by the respondents following the election violence. The second question, whose consideration and answer will only become necessary if the first question is in the affirmative is, what was the measure of damages the appellants were entitled as a result of their losses?

The function of what was then called the Kenya Police Force was stated in **section 14 (1)** of the repealed Police Act to include;

"14. (1) the maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and detection of crime, the apprehension of offenders, and the enforcement of all laws and regulations with which it is charged".

Apart from the general duty to maintain law and order and to protect life and property, the police could privately be engaged, at a fee to provide safety to a private citizen or his property where;

"..... the Commissioner considers that the employment of additional police officers in any place is necessary for the safety of the private property of some person, or in the interests of some person, or that there is a reasonable apprehension of a breach of the peace in connexion with any such private property,and such person shall reimburse to the Commissioner the expenses incurred thereby".

See **section 46**.

In addition, under **section 47**;

"47. (1) The Minister may, by notice in the Gazette, and in such other manner (if any) as he may direct, declare that any area of Kenya is in a disturbed or dangerous state, or that, by reason of the conduct of the inhabitants of such area or any class or section of such inhabitants, it is expedient to increase the number of police officers stationed in such area.

(2) Upon publication of a notice under subsection (1) the Commissioner may—

(a) by notice in the Gazette or in such other manner as he may consider necessary to bring it to the notice of the persons affected thereby prohibit the possession of arms in the area and order the surrender of all or such arms, by all or such of the inhabitants of the area, as may be specified;

(b) station an additional number of police officers in the area, and, subject to subsection (5), the cost of such additional police officers shall be borne by the inhabitants of the area." See section 46

It is public knowledge that within hours of the results announcement of December, 2007 presidential election, Kenya was engulfed in a deluge of violence, looting, and arson in an unprecedented occurrence that shocked, not only Kenyans, but the world at large. The violence in turn spawned a series of ethnic-based reprisal attacks in some parts of the country. At the end of it, it is said that over 1,000 people were believed to have died and up to 500,000 left internally displaced.

Although the cause of the violence has been traced to the long pent-up social, economic and political grievances that had been simmering over the years, according to the final report of the Commission of Inquiry into the Post Election Violence (CIPEV), the 2007 post-election violence was spontaneous in many areas and that what started as a spontaneous violent reaction to the perceived rigging of elections later evolved into well organized and coordinated revenge attacks along ethnic lines. The report also noted that in general, the police were overwhelmed by the massive numbers of the attackers in many parts of the country.

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.

In the circumstances of this case and bearing in mind the ratio of the police to the population in this country, it would be unreasonable and unrealistic to expect the police to be in every corner and in every home, providing security and protection to everyone and their properties on a 24-hour basis. That can only exist in Sir Thomas More's Utopian idealistic and fictional island society. No nation, the world over has been able to achieve this. That is why, for the Government to be liable for civil disorder the victim must prove that the Government owed him a specific duty of care; that the police ignored impeccable information of an impending attack against specific person(s); that the police negligently or deliberately failed to offer protection to the victims and their property; that the police or other Government agencies played a part in the creation of state of insecurity or did some acts that rendered the victims more vulnerable or increased their danger.

We have seen that due to paucity of local judicial authorities to the point in review in this dispute, the court below relied heavily on foreign decisions. However in a decision rendered by this Court (Githinji, Okwengu and J. Mohammed, JJ) sitting at Eldoret in **Agricultural Development Corporation V. Harjit Pandhal Singh & another** [2019] eKLR, the 1st respondent in that appeal claimed from Agricultural Development Corporation (ADC) a total of Kshs. 532,000,000 being the total value of sugarcane crop and assets destroyed by squatters during the 2007/2008 post-election violence as well as for loss of profit and income. They attributed the losses to breach of a contract of a lease by ADC. The Attorney General (the 2nd respondent) was later joined in the proceedings on behalf of the Government on account of its alleged negligence of duty and failure to accord the 1st respondent peace and security. The Environment and Land Court at Eldoret (A. Ombwayo, J.) found ADC and the Government jointly liable, and awarded to the 1st respondent Kshs. 100,000,000 lost income and profit with costs and interest and against the Government the court awarded Ksh.150,000,000 for breach of statutory duty. ADC appealed and the Attorney General cross-appealed.

In setting aside, the decision of the learned Judge the Court 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. There was no evidence that the 1st respondent or the police anticipated that post-election violence would erupt. There was no evidence that the 1st respondent had reported to police that there was likelihood of his farm being invaded by riotous mob or that he sought police protection. On the contrary, there was evidence that the violence was widespread, spontaneous and unplanned and that the police did all what was reasonably practicable to restore peace. In the circumstances, the 1st respondent did not prove liability in tort against the Government and the judgment of the trial court fixing the Government with liability was erroneous.”

Those views, we agree entirely reflect the law in this area to which we may only add the following. Because there is no common law right of recovery for damages caused by mob violence, the Government will be liable only where it is demonstrated that the resulting damage could have been prevented through exercise of reasonable diligence by the police or where it is shown that there was implicit official acquiescence in the volatility of the situation, or where there is, like in some jurisdictions, statutory basis for holding the Government liable, or where the police are altogether indifferent. In some situations the Government may also consider *gratis* payment to victims out of benevolence.

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.

In this dispute the police were accused of failure to prevent the attacks before they occurred or to stop them. No doubt the best and most useful activity that the police can carry out is crime prevention. If crimes are successfully prevented before they occur, the costs and suffering associated with the effects of crime can be avoided or significantly reduced. But the reality the world over, even in the most developed nations, crime prevention is a mirage. That is why we have on the rise terrorist attacks, robberies and sexual offenses against children, among many other criminal acts.

The Government, in the context of the case before us did take proactive steps under **section 14** aforesaid through the stages of investigation, apprehension and prosecution of the perpetrators of some of those involved in the post- election violence as detailed in the respondent's evidence and submissions.

We reiterate that the attacks were spontaneous and sporadic. Though there had previously been violence in nearly every election cycle, there have never been one in the magnitude witnessed in 2007.

Like the learned Judges, we find no evidence that the appellants made a report to Eldoret Police Station. The judges, who unlike us, saw and heard the appellants' evidence were not persuaded that there was any report made to the police or that the OB extract produced emanated from the police. It is highly unlikely, as the first appellant claimed that the police would respond to distress call, drive to the scene, see people being attacked, watch, do nothing and drive away. Again, in view of the magnitude of the attack and considering the police capacity, the police did their best, in the circumstances. This is confirmed by the testimony of the 3rd respondent himself that on the day his property was descended upon he saw a gang of over 400 men while there were only 4 police officers.

The appellants also submitted that **section 75** of the former Constitution was violated. That section dealt with issues of compulsory acquisition of private property and so, in our view, did not apply to the appellants' situation.

There were no parallels between the facts in this appeal and those in **Rumba Kinuthia V. Attorney General** (supra), **Pradhan V Attorney General** (supra) **Marete V. Attorney General** (supra). In these cases, the allegations of torture were made against Government agents.

The courts found that indeed they were tortured and were for that reason entitled to be compensated by the Government. The appellants, on the other hand were attacked by a riotous gang.

We come to the ultimate conclusion from the facts on record and the law that this appeal lacks merit. It is accordingly dismissed with no orders as to costs.

Dated and delivered at Nairobi this 25th day of October, 2019.

W. OUKO, (P)

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HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR