IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 56 OF 2016

BETWEEN

C O I...1ST APPELLANT

G M N...2ND APPELLANT

AND

CHIEF MAGISTRATE UKUNDA LAW COURTS.....................1ST RESPONDENT

DCIO, MSAMBWENI POLICE STATION..................................2ND RESPONDENT

MAKADARA GENERAL HOSPITAL, KWALE........................3RD RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.................................4TH RESPONDENT

CABINET SECRETARY MINISTRY OF HEALTH..................5TH RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Mombasa (Emukule, J.)

dated 16th June, 2016

in

***Constitutional & Human Rights Division Petition No. 51 of 2015*)**

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JUDGMENT OF THE COURT

1. The **Constitution of Kenya 2010,** unlike our previous one, enshrines a detailed, liberal and robust Bill of Rights. Additionally, the strictures on standing and remedies capable of being issued for violation and/or enforcement of the fundamental freedoms and rights thereunder, which were present in the former constitutional order, are no more. This constitutional milestone was aptly set out by this Court in ***Attorney General vs. Kituo Cha Sheria & 7 others*** ***[2017] eKLR*** as follows:-

> ***"On the application of the Bill of Rights, Article 20 is couched in wide and all-pervasive terms, declaring the Bill of Rights to apply to all law and to bind all state organs and all persons... It is provided for in expansive terms declaring that its rights and fundamental freedoms are to be enjoyed by every person to the greatest extent possible. The theme is maximization and not minimization; expansion, not constriction; when it comes to enjoyment and, concomitantly facilitation and interpretation. What is more, courts, all courts, are required to apply the provisions of the Bill of Rights in a bold and robust manner that speaks to the organic essence of them ever-speaking, ever-growing, invasive, throbbing, thrilling, thriving and disruptive to the end that no aspect of social, economic or political life should be an enclave insulated from the bold sweep of the Bill of Rights. Thus courts … are enjoined in their interpretative role to adopt a pro-rights realization and enforcement attitude and mind set calculated to the attainment as opposed to the curtailment of rights and fundamental freedoms. They must aim at promoting through their interpretations of the Bill of Rights the ethos and credo, the values and principles that underlie and therefore mark us out as an open and democratic society whose foundation and basis is human dignity, equality, equity and freedom."***

2. It is on that basis that the appellants filed a petition in the High Court agitating that some of their rights and freedoms under the Bill of Rights had been violated by the respondents. Their grievances arose substantially from the medical examinations that they had been subjected to, following a court order issued by the Resident Magistrate at Kwale Law Courts (subordinate court) in Criminal Case No. 207 of 2015 (criminal proceedings). The learned Judge (Emukule, J.), who presided over the matter, did not agree with the appellants culminating in the dismissal of their petition by a judgment dated 16th June, 2015. It is that decision that is the subject of the appeal before us.

3. A brief background will place the appeal in context. The appellants were arrested on 18th February, 2015 from a bar in Diani as they were ordering their drinks on suspicion of engaging in gay activities as well as distributing pornographic material. According to Salim Yunis, the investigating officer, about 10 compact discs containing pornographic material were retrieved from the 2nd appellant's house. An attempt by the police to have the appellants medically examined at a dispensary was thwarted by the appellants who declined to take part in the same.

4. As a result, the appellants were arraigned before the subordinate court on 20th February, 2015 to face several charges, namely, one count of committing an unnatural offence contrary to ***Section 162(a)*** as read with ***Section 162(c)*** of the ***Penal Code***; an alternative count of committing an indecent act with an adult contrary to ***Section 11(a)*** of the ***Sexual Offences Act***; and one count of trafficking in obscene publications contrary to ***Section 181(1) (a)*** of the ***Penal Code***. On that very day, the prosecution applied for the deferment of the appellants' plea taking to pave way for further investigations. An order compelling the appellants to undergo necessary medical tests was also sought. In response, Mr. Omuya who apparently was holding brief for Mr. Maundu, then appearing for the appellants, stated as per the subordinate court's record:

> ***"We do not oppose the prosecution's application and the same be done immediately to avoid holding the accused indefinitely… The accused are ready to undergo any test."***

5. What followed was that the appellants were presented at Makadara General Hospital where blood samples were taken for purposes of HIV and Hepatitis B testing. They were also subjected to anal examination in line with the subordinate court's orders. The appellants described the examination, more specifically, the anal examination, as inhuman and degrading, for the reason that first, they had not consented to such an intrusive examination. Second, they were forced to undress in the full glare of the police and medical personnel who witnessed the entire examination. To make matters worse the examination entailed the appellants lying down and the insertion of spatulas into their anal orifaces.

6. In addition, the appellant also took issue with the fact that the results derived from the examination, were admitted by the subordinate court, contrary to the rule against self-incrimination and the right to a fair hearing as enshrined under ***Articles 49(1) (d)*** and ***50*** of the ***Constitution***. All in all, the appellants claimed that not only was the anal examination of no probative value to prove the offences they were charged with but it was also unreasonable in the circumstances. The appellants also contended that their rights to dignity and privacy under ***Articles 28*** & ***31*** of the ***Constitution*** respectively were violated.

7. It is under those circumstances that the appellants filed the petition and sought the following orders:-

> ***i. a declaration that the manner in which the first Respondent acquired evidence from the Petitioners herein was unconstitutional and goes against the tenets of a fair trial and the right of an accused person not to incriminate themselves in line with the provisions of Articles 49 (d) and 50 of the Constitution;***
>
> ***ii. that upon granting prayer (a) above, a declaration that the criminal proceedings in the lower court are unconstitutional and be terminated;***
>
> ***iii. a declaration that the act of forced examination of the Petitioners by way of nonconsensual anal examination, HIV testing and Hepatitis B testing by the 3rd Respondent through the directive of the First and Second Respondents amounted to a violation of the human and constitutional rights of the Petitioners as outlined in the Petition;***
>
> ***iv. a declaration that forced anal examination amounts to degrading treatment as it violated human dignity and the violation therein has a disparate impact on members of sexual minorities;***
>
> ***v. a declaration that nonconsensual medical examination of the nature herein or of any form are a violation of the right to privacy and of the right to health as provided for under the Constitution.***
>
> ***vi. an order for general and exemplary damages on an aggravated scale to the Petitioners herein for the physical and psychological suffering occasioned by the unlawful acts of the Respondents.***
>
> ***vii. such other orders as the Court shall deem fit to make under the circumstances.***

8. In their defence, the respondents maintained that the order for medical examination was made in conformity with the court's power as donated by ***Section 36*** of the ***Sexual Offences Act***. Those orders were issued and implemented in good faith and as such, cannot be a basis of any suit against the respondents by dint of the immunity under ***Section 36(7)*** of the ***Sexual Offences Act***. Moreover, the appellants had consented to the examination through their counsel and also by signing the Post Rape Care (PRC) forms before undergoing the same.

9. After weighing the submissions which were put forth on behalf of the parties and the law, the learned Judge in the impugned judgment, held that firstly, the consent of a person suspected of committing a sexual offence, is not required where the court directs collection of appropriate samples from such a person under the ***Sexual Offences Act*** and the Regulations thereunder. To that extent the court, medical personnel and concerned officers were immune from any action resulting from such examination. Secondly, that the appellants consented to the examination and thirdly, the right to fair trial and against self-incrimination does not extend to prohibiting necessary medical examination, such as in this case.

10. The appellants challenge this decision on grounds that the learned Judge erred in law by:

> ***(1) Finding that the appellants had consented to the medical examination in issue.***
>
> ***(2) Finding that such consent can justify the infringement of the appellants' rights.***
>
> ***(3) Failing to address himself on the scope of the constitutional rights claimed to have been violated.***
>
> ***(4) Misconstruing the meaning and application of the phrase 'appropriate samples' within Section 36 of the Sexual Offences Act.***
>
> ***(5) Finding that the question of whether the use of anal examination was reasonable was a question of fact which could only be resolved by the trial court and thereafter an appellate court.***
>
> ***(6) Failing to have regard to the appellants' complaints regarding their treatment in Kwale Prison.***

11. Mrs. Ligunya, learned counsel for the appellants, faulted the learned Judge for relying on the provisions of ***Section 26*** & ***36*** of the ***Sexual Offences Act*** to justify the examinations in issue. She argued that the appellants were not suspected or charged with spreading HIV so as to require blood samples to be taken and examined as contemplated under ***Section 26*** of the ***Sexual Offences Act***. Similarly, whilst ***Section 36*** of the ***Sexual Offences Act*** may permit such examination, it could only do so with regard to offences committed under that Act. The only offence the appellants were charged with under the said Act is committing an indecent act with an adult contrary to ***Section 11A.*** Evidence of penetration is not required to establish that offence hence there was no basis for the anal examination.

12. Mrs. Ligunya also took issue with the learned Judge's finding that the appellants had consented to the examination. As far as she was concerned, this was a misdirection on his part. In support of that line of argument, she referred to the definition of consent under the ***Blacks Law Dictionary*** as-

> ***"a concurrence of informed and freely given will which is not obtained by coercion or undue influence."***

The prevailing circumstances were such that the appellants were incapable of giving an informed and voluntary consent. Mr. Omuya's indication that they were ready to undergo any test, should have been considered in the context it was made. The record indicated that he had begun by informing the subordinate court that his instructions were limited to applying for bail. Equally, the appellants had signed the PRC forms through coercion.

13. Emphasizing the need for an informed consent, counsel relied on the ***Kenya National Guidelines on the Management of Sexual Violence*** and in particular, the following extract:-

> ***"…explaining all aspects of the consultation to the survivor. It is crucial that patients understand the options open to them and are given sufficient information to enable them make informed choices about their care."***

It followed, therefore, that the subordinate court had an obligation under ***Article 50(1)*** of the ***Constitution*** to inform the appellants of their rights. Putting it another way, she argued that the subordinate court should have inquired whether the appellants had been informed of the nature of the examination they were to undergo.

14. She added that the examination and testing was done in bad faith for the sole purpose of proving an offence under ***Section 162*** of the ***Penal Code***. Further, the examination was not commensurate with the charges against the appellants. In any event, anal examination could not establish whether a person had engaged in an unnatural offence, or as she put it, was a homosexual. In point of fact, it had been condemned under Public International Law to which Kenya is a party. By way of illustration, she made reference to a 2016 report by the ***United Nations Special Rapporteur on torture and other cruel, inhuman or degrading punishment to the Human Rights Council of the United Nations (A/HR/31/57)*** wherein it was reported:

> ***"In States where homosexuality is criminalized, men suspected of same sex conduct are subject to non-consensual anal examination intended to obtain physical evidence of homosexuality, a practice that is medically worthless and mounts to torture or ill-treatment."***

15. It was urged that the learned Judge failed to construe the phrase 'appropriate samples' within the ***Sexual Offences Act*** in a manner consistent with fundamental freedoms and rights protected by the ***Constitution***, as well as Kenya's obligations under International Law.

16. On self-incrimination, Mrs. Ligunya faulted the learned Judge for relying on the High Court decisions in ***<u>Richard Dickson Ogendo & 2 others vs. Attorney General & 5 others</u> [2014] eKLR*** and ***<u>Republic vs. John Kithyulu</u> [2013] eKLR*** which related to the use of the breathalyzer test and blood samples, which are worlds apart with forced anal examination. To her, those tests could be administered with the accused's dignity being left intact. Also drawing a distinction between vaginal examination on rape victims and the case at hand, she contended that rape victims undergo such examination for purposes of incriminating their assailants and not themselves.

17. Nonetheless, the admission of evidence obtained through unlawful means, as in the appellants' case, violated the rule against self-incrimination. To that end, she relied on a United State's Supreme Court decision in ***<u>Rochin vs. California</u> 342 US 165 (1952)*** where the Court expressed:

"To attempt in this case to distinguish what lawyers call 'real evidence' from verbal evidence is to ignore the reasons for excluding coerced confessions. Use of involuntary verbal confessions in state criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the due process clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law."

18. In her concluding remarks, Mrs. Ligunya asserted that the learned Judge shirked from his duty by failing to make a determination on whether the anal examination was reasonable and in respect of the appellants' treatment at Kwale prison.

19. On their part, Mr. Ngari, learned counsel for the 1st, 3rd & 5th respondents, and Mr. Ayodo, learned counsel for the 2nd and 4th respondents, opposed the appeal. They argued that Mr. Omuya's representation to the effect that the appellants were not opposed to any test was akin to a contract between the appellants and the prosecution. Therefore, the subordinate court could not interfere with the same and issue an order contrary to that agreement. Besides, the order was granted on 20th February, 2015 and the examination was conducted on 24th February, 2015. There was ample time for the appellants to raise an objection which they did not. In their view, the examination could not be unlawful since it was pursuant to a court order.

20. In supporting the learned Judge's decision, counsel submitted that the rule against self-incrimination applied only in relation to verbal and documentary evidence. According to them, there was no specific prayer made by the appellants for declaration of the ***Sexual Offences Act*** as unconstitutional. Thus, the learned Judge could not declare the examination which was conducted under that Act unconstitutional. Moreover, the right to a fair trial does not extend to excluding an accused person from undergoing medical examination where necessary. By the very nature of the charges against the appellants appropriate samples for examination could only be obtained by the means which were employed. Finally, that the learned Judge was right in not addressing the issue of the appellants' treatment at the Kwale prison because it had not been pleaded in the petition.

21. We have considered the record, submissions by counsel and the law. In a nutshell, the appellants allege that their rights, as set out herein above, were violated on three fronts, that is, through what they deemed as forced medical examination; the admission of those results in the criminal proceedings; and their treatment in Kwale prison during the duration of their incarceration. With that in mind, we believe that the appeal turns on the following issues:-

a) Were the examinations and tests conducted on the appellant lawful and/or reasonable in the circumstances?

b) Could the results obtained from those examinations be properly admitted as evidence in the criminal proceedings?

c) Were the appellants' rights violated at Kwale Prison?

d) What orders should issue?

22. In determining whether the examination in question was lawful and/or reasonable, we have to give regard to the centrality of human dignity in recognition and protection of fundamental freedoms and rights. The same is underscored under ***Article 19 (2)*** of the ***Constitution*** which provides that:-

"The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings." [*Emphasis added****]***

23. That position is also echoed in the International Treaties, human rights instruments and jurisprudence in other jurisdictions. Both the ***International Covenant on Civil and Political Rights (ICCPR)*** and the ***International Covenant on Economic, Social and Cultural Rights (ICESCR)*** recognise that human beings have inherent dignity. The preambles of these covenants are similar and read in part:-

"Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Recognizing that these rights derive from the inherent dignity of the human person…" [*Emphasis added*]

24. Closer home, the ***African Charter on Human and People's Rights*** recognizes and guarantees human dignity. ***Article 5*** of the Charter provides that:

"Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman of degrading punishment and treatment shall be prohibited."

25. Likewise, the Constitutional Court of South Africa in ***Dawood and Another vs. Minister of Home Affairs and Others (CCT35/99) [2000] ZACC 8*** stated that:-

"Human dignity informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. Human dignity is also a constitutional value that is of central significance in the limitations analysis." [Emphasis added]

26. It is thus apparent, regardless of one's status or position or mental or physical condition, one is, by virtue of being human, worthy of having his or her dignity or worth respected. In addition, the South African Constitutional Court in ***Mayelane vs. Ngwenyama and Another*** ***(CCT 57/12) [2013] ZACC 14*** stated that:-

> ***"…the right to dignity includes the right-bearer's entitlement to make choices and to take decisions that affect his or her life – the more significant the decision, the greater the entitlement. Autonomy and control over one's personal circumstances is a fundamental aspect of human dignity."***

27. The right to privacy particularly, not to have one's privacy invaded by an unlawful search of the person, is closely linked to the right to dignity. Those rights, in our view, extend to a person not being compelled to undergo a medical examination.

28. Did the examination of the appellants infringe on their rights? It is common ground that the rights and freedoms under the Bill of Rights, subject to ***Article 25***, can be limited under ***Article 24***. Of course, by written law and to the extent that is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

29. Such a limitation, at least to the extent of compelled medical examination, is evident from the provisions of ***Section 36 (1)*** of the ***Sexual Offences Act*** which stipulates:

> ***"Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."***

30.***Sub-section (6) (a)*** thereof describes an appropriate sample or to include

> ***"blood, urine or other tissue or substance as may be determined by the medical practitioner or designated person concerned, in such quantity as is reasonably necessary for the purpose of gathering evidence in ascertaining whether or not the accused person committed an offence or not; …"***

It is important to note that the constitutionality or otherwise of the above provision was not an issue before the learned Judge.

31. Our understanding of ***Section 36*** of the ***Sexual Offences Act*** is that whereas a court is empowered thereunder to direct examination of an accused person to establish his involvement in a sexual offence, such discretion is subject to limitation. In that, the court can only issue such an order with respect to an offence committed under that Act and not any other. Further, in exercising that discretion, like any other discretion, the court is required to act judiciously within the confines of the law.

32. From the record it is clear that the purpose of the medical tests and examination were geared towards establishing the offence under ***Section 162(a)*** of the ***Penal Code***. We note further that the appellants were not arrested in the act; there was no complainant; there was actually no reasonable explanation as to why they were suspected of having committed the offence. There was, in our view, no proper basis laid before the court to necessitate the impugned order being made. Thus, our finding is that the subordinate court acted beyond its mandate in granting the order in issue contrary to ***Article 24*** of the ***Constitution***. Whether or not the appellants, by themselves or through their counsel, consented to the examination is neither here nor there. This is simply because such consent cannot validate an otherwise illegal order. In the circumstances, we find that the examination was not only unconstitutional but unreasonable, and totally unnecessary. Even so, we are not satisfied that the alleged consent could qualify as one which was given voluntarily by the appellants taking into account the pertaining circumstances.

33. Having expressed that the examinations and tests were illegally ordered and conducted, the admission of the results in question by the subordinate court, went against the appellants' right against self-incrimination. To that extent, we are persuaded by the sentiments of Nyamu, J. (as he then was) in ***Francis Mburu Mungai vs the Director of CID & Another*** ***-High Court Misc App. No 615 of 2005 (unreported)***, though made under the former Constitution, we believe applies under the current ***Constitution*** with equal force. He stated:-

> ***"Under our Constitution pre-hearing investigations cannot be unconstitutional unless they purport to obtain evidence in an unlawful manner or they infringe on the rule against self-incrimination or violate the right of silence or because of the manner they have been conducted they seriously erode the presumption of innocence if and when the suspect is charged."***

Consequently, such evidence should be expunged from the criminal proceedings.

34. On the issue of the appellants' treatment at the Kwale prison, it is clear that save for the 1st appellant making depositions of the same in his affidavit, the appellants neither pleaded nor sought any declaratory orders or damages in respect of the alleged violations in the petition. The primary purpose of pleadings is to communicate with an appreciable degree of certainty and clarity the complaints that a pleader brings before the court and to serve as sufficient notice to the party impleaded to enable him to know what case to answer. Jessel, M.R in the case of ***Thorp vs. Holdsworth*** ***(1876) 3 Ch. D. 637 at 639*** in his own words held:-

> ***"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."***

See also ***Mohamed Fugicha vs. Methodist church in Kenya (suing through its registered trustees) & 3 others*** ***[2016] eKLR***. Accordingly, the learned Judge cannot be faulted for not making a determination on the same.

35. On the quantum of damages, the Constitutional Court of South Africa in ***Dendy vs. University of Witwatersrand, Johannesburg & Others*** ***- [2006] 1 LRC 291*** held:-

> ***"The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.***
>
> **…**
>
> ***The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy."***

36. Also, the Supreme Court of Canada established a consideration on when a remedy in a Constitutional violation case is "*just and appropriate*" in ***Doucet-Boudreau vs. Nova Scotia*** ***(Minister of Education), 2003 SCC 62*** to include, a remedy that will:

> ***i. meaningfully vindicate the rights and freedoms of the claimants;***
>
> ***ii. employ means that are legitimate within the framework of our constitutional democracy;***
>
> ***iii. be a judicial remedy which vindicates the right while invoking the function and powers of a court; and***
>
> ***iv. be fair to the party against whom the order is made***.

37. The upshot of the foregoing is that the appeal is hereby allowed for the reasons outlined above. We grant the following orders as prayed in the appellants' memorandum of appeal.

> **a) The judgment and decree given on 16th June 2016 is hereby set aside.**
>
> **b) An order that the Respondents conduct in subjecting the petitioners to anal examinations violated the Petitioners' rights under Articles 25,27,28 and 29 of the Constitution.**
>
> **c) An order that the use of evidence obtained through anal examinations of the petitioners in criminal proceedings against them violates their rights under Article 50 of the Constitution.**
>
> **d) An order that the appellants are awarded costs of the appeal as against the 4th respondent.**

Dated and delivered at Mombasa this 22nd day of March, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR