



**Ndambuki v Nungu & 6 others (Petition 209 of 2019) [2024] KEHC 4008 (KLR)
(Constitutional and Human Rights) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4008 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION 209 OF 2019

LN MUGAMBI, J

APRIL 25, 2024

**REPUBLIC OF KENYA IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION PETITION NO. 209 OF 2019**

BETWEEN

SYOLO MUTHAMA NDAMBUKI..... PETITIONER

VERSUS

NDAVI NUNGU.....1ST RESPONDENT

COSMAS MUKOSI KISILU.....2ND RESPONDENT

SHADRACK KIOKO KISILU.....3RD RESPONDENT

BENEDICT MUTUA KISILU.....4TH RESPONDENT

TITUS MBOLU MUTHAMA.....5TH RESPONDENT

NGOME MULEI.....6TH RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....7TH RESPONDENT

BETWEEN

SYOLO MUTHAMA NDAMBUKI PETITIONER

AND

NDAVI NUNGU 1ST RESPONDENT

COSMAS MUKOSI KISILU 2ND RESPONDENT

SHADRACK KIOKO KISILU 3RD RESPONDENT

BENEDICT MUTUA KISILU 4TH RESPONDENT

TITUS MBOLU MUTHAMA 5TH RESPONDENT



JUDGMENT

Introduction

1. The petition is dated 24th May 2018 and supported by the petitioner’s affidavit in support of even date. The petitioner seeks the following reliefs against the respondents:
 - a. An order of compensation.
 - b. Costs of the petition.

The Petitioner’s Case

2. The petitioner swore that he is an elderly 80-year-old leading a solitary life as a result of what he was subjected to by the Respondents on 4th August, 2005. He deponed that on 4th August 2005, the 1st, 2nd, 3rd, 4th, 5th and 6th respondents organized a family meeting at Kako Village for the “MbaaNdambuki” clan, in which he was invited.
3. He states that at the said meeting, the 1st respondent instigated other family members to believe that the Petitioner was a witch and had been the cause of the family’s misfortunes. As a result of he was forcefully blindfolded and bound with ropes then transported at night in a pick-up truck to Kitui to one Mr. Kilungya for administration of an oath known as ‘ngata’ ostensibly to neutralize his witchcraft powers and ensure he was deprived the ability to bewitch anyone else.
4. The 2nd to 6th respondents took him to Mbitini, Kitui where he was forced to take the illegal oath known as “ngata”, an ordeal that frightened him and caused him profound psychological torture.
5. After the incident he was shunned and deserted by members of the community including his own children that has made him lead a life of despair and distress ever since.
6. On 4th January 2019, the petitioner wrote to the 7th respondent requesting for an investigation into the matter no investigations were commenced.
7. The petitioner thus instituted this petition against the respondents for violating his constitutional rights under Articles 27, 28, 29(f), 30(1) and 32(1) of *the Constitution*.

Respondents’ Case

1st, 2nd, 3rd, 5th and 6th Respondents’ Case

8. The 1st to 6th Respondents filed their responses through the 2nd respondent by way of a replying affidavit sworn on 16th October 2019.
9. The 2nd Respondent deposed that at the burial of one of his uncles in 1992, his grandfather (the petitioner’s father) informed the mourners that the petitioner had killed the deceased through witchcraft. The grandfather then asked the petitioner to leave the premises immediately and never return. After the grandfather made the said remarks, he went and retrieved a bow and arrow and shot at the petitioner, who managed to escape. The grandfather then declared the petitioner an outcast. For this reason, the petitioner went away and never returned not even during grandfather’s burial in 1998.



10. Following his grandfather's death, the family called for a meeting on 7th September 2002, where the petitioner was also invited. The primary agenda was a call for unity within the family. The family however was not at ease associating with the petitioner before removing the curse that had been placed on him by his father. This is because the family was afraid that the curse would also affect them.
11. He deposes that at this juncture, the ritual referred to as 'ngata' was proposed to protect the family from witchcraft. He avers that the family including the petitioner, agreed that ritual would be undertaken by all persons in the family above 18 years. The petitioner however requested for some time so as to resolve some issues with his neighbor before undertaking the ritual, which the family agreed to.
12. Later on, in 2005, following the passing of another family member, the family met again and discussed the ritual. The petitioner at that time indicated that he was ready to proceed with the ritual. The petitioner additionally requested that he be accompanied by some family members to confirm that he had indeed undertaken the ritual. He states that the family proceeded to raise the transport and ritual money on his behalf to assist him. The petitioner's ritual took place on or about 4th August 2005. He further notes that all 41 members in the family above the age of 18 also undertook the ritual.
13. Owing to these averments, he makes known that the petitioner's allegations are false as he undertook the ritual voluntarily. In fact, as per his request the petitioner's brother, Kisilu Muthama and one Kioko Ngome volunteered to go with him to undertake the ritual. He notes that contrary to the petitioner's allegation the three went to Mbitini, Kitui where the ritual was performed, using public transport. He adds that the petitioner was not shunned as alleged. He points out that the petitioner has been attending all the family's meetings since he undertook the ritual. Equally that the petitioner's children informed that they did not have any issue with him.
14. He as well avers that when he inquired about this matter from the petitioner, he informed him that he was not aware about it. Instead the petitioner informed him that his brother, Muia Kisilu, had issued him with some forms to sign prior to this matter. He is convinced for this reason that the allegations in the petition are Muia Kisilu's not the petitioner. Accordingly, he argues that the petition is an abuse of the court process and so should be dismissed with costs.

4th Respondent's case

15. In a like manner, the 4th respondent filed his replying affidavit sworn on 16th October 2019. He asserts that he is a stranger to the petition as he did not attend the family meeting alluded to.
16. He states that on 29th June 2005, his mother passed away on 29th June 2005. He avers that after her funeral on 7th July 2005 he returned to his work place at Nairobi. He states that this is where he was when the family meeting was held.
17. He further asserts even if he were available, as a Pastor (with Redeemed Gospel Church), he could not have attended such a meeting as since does not subscribe to such practices. Despite being aware that he was not present at the meeting, the petitioner proceeded to sue him as one of the respondents. He urges that the petition be dismissed with costs to him.

7th Respondent's Case

18. This respondent's response and submissions is not in the file.



Petitioner's Submissions

19. On 4th May 2022, Masaviru and Ketoo Advocates filed submissions for the petitioner. Counsel submitted that the respondents had violated the petitioner's constitutional rights under Articles 29 (f), 30(1) and 32(1). Counsel submitted that as a result of the respondents' actions, the petitioner had suffered great psychological and mental harm. Counsel thus submitted that the petitioner was entitled to compensation for the injury suffered.

1st to 6th Respondents' Submissions

20. M. N. Oonge and Company Advocates filed submissions dated 29th June 2023 where he identified the key issue for determination as, whether the petitioner is entitled to the reliefs sought.
21. Relying on the averments in the respondents' affidavits, counsel submitted that the petitioner had voluntarily participated in the 'ngata' ritual. That this was evident from the payment receipt attached to the petitioner's affidavit, which bore his name signifying that he paid for it. He likewise stressed that it was the petitioner who chose the time he would undertake the ritual. Accordingly, the allegation of being forced was unfounded. Likewise, Counsel stated that at the time, 1st to 6th respondent were young and could not have participated in the said ritual or in the abduction as alleged.
22. Counsel therefore submitted that the issues of discrimination, cruel, inhuman and degrading treatment and slavery were groundless. In light of this, counsel argued that the respondents had not violated the petitioner's constitutional rights.
23. Further counsel stressed that the petitioner had not adduced any evidence to support his case. According to the respondents, the petition was filed 17 years later hence is an afterthought meant to sow discord in the family. It was argued thus that the petitioner is not entitled to any relief and so the petition should be dismissed with costs.

Analysis and Determination

24. The following are the issues for determination, namely:
- i. Whether the petitioner's rights under Articles 27, 28, 29(f), 30(1) and 32(1) of *the Constitution* were violated by the respondents.
 - ii. Whether the petitioner is entitled to the reliefs sought.
25. A constitutional petition must meet the threshold of specificity and precision. It must precisely state the Constitutional provisions that were violated and the manner the violation was carried out. This test was affirmed by the Supreme Court in *Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others* (2014) eKLR when it stated as follows:

“(349) ... Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru vs Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement.



Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement...”

26. In the instant Petition, it is crystal clear that the petition was framed well. It sets out the Constitutional provisions that the Petitioner alleges were infringed and also the manner of infringement. He in particular points out that his right to inherent human dignity and to have that dignity respected under Article 28 of *the Constitution* was violated through the forceful administration of an oath ostensibly to remove the power of witchcraft. That the freedom and security of the person under Article 29 was violated by being bound with ropes, blindfolded and transported to Mbitini in Kitui to take the oath. That his freedom of conscience under Article 32- was violated by being forced to take an oath against his wish. Should the Petitioner marshal evidence that indeed, the alleged violations did in fact occur in the manner alleged, this Court cannot hesitate to find that violations to his Constitution rights occurred. Under Article 3 of *the Constitution*, “Every person has an obligation to respect, uphold and defend *the Constitution*” no person is authorized to violate *the Constitution* or rights of another.
27. The task therefore is for this Court to determine if the Petitioner discharged the burden of proof regarding the alleged violations. The *Evidence Act* Cap 80 places the burden of proof on he who that asserts the existence of a fact. Section 107 provides:
107. Burden of proof
1. 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.
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
108. Incidence of burden
- The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
109. Proof of particular fact
- The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
28. The Supreme Court discussing the burden of proof in *Samson Gwer & 5 others vs Kenya Medical Research Institute & 3 others* (2020)eKLR opined as follows:

“

“(49) Section 108 of the *Evidence Act* provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and Section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

[50] This Court in *Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others*, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:



“...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...”

29. Likewise, in *Alice Wanjiru Ruhiu v Messiac Assembly of Yahweh* [2021] eKLR it was noted that:

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“22. I also refer to *The Halsbury’s Laws of England*, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

(16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”

30. Equally, in *Evans Otieno Nyakwana vs Cleophas Bwana Ongaro* (2015) eKLR it was held that:

“

“15. ... As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107(1) of the *Evidence Act* (Chapter 80 of the Laws of Kenya)...

16. Furthermore, the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

17. The Court of Appeal in *Jennifer Nyambura Kamau Humphrey Mbaka Nandi* [2013]eKLR considered the applicability of these provisions as follows;

We have considered the rival submissions on this point and state that section 107 and 109 of the *Evidence Act* places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 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.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.”

31. The allegations made by the Petitioner that he was forcefully bound, with ropes, blindfolded and transported to Mbitini in Kitui in a pick-up truck to be exorcised of powers of witchcraft were disputed by the Respondents. Whereas they admitted that the ceremony took place, they denied that the Petitioner was forced into participating in the said traditional ngata ceremony and stated that it was a voluntary affair which even other adult family members went through.
32. The question is who between the Respondents and the Petitioner is telling the truth as to what actually transpired on that particular day?
33. Although the matter did not proceed by way of viva-voce evidence hence the witnesses were not subjected to cross-examination for purposes of testing the truth by digging out any inconsistencies, embellishments or observation of demeanor, my view is that the Court is not impotent and can still assess other relevant circumstances which may point out to the direction of the truth in this case.
34. Firstly, according to the Petitioner, the incident complained of took place in August, 2005 yet it was not until 3rd June, 2019 that he instituted this Constitution Petition, 14 years after the alleged incident. In his affidavit, he appears to acknowledge the fact there has been delay in instituting legal action by stating at paragraph 15 of the Petition that: “It is never too late for this Honourable Court to do justice” but makes no attempt to offer any explanation for the long delay without any taking any legal action.
35. In fact, he did not even bother to report to the Police when the incident occurred. In paragraph 10 of the petition, he says that he wrote a letter to the 7th Respondent on 4th January, 2019 but does not even exhibit the said letter. This casts doubt as the veracity of that claim as well. In any case, even assuming that he wrote the letter to the police as alleged, it is quite obvious that that method of reporting to the police is very unconventional. It is common knowledge that by practice, anybody making a complaint or report to the police physically presents himself before a particular Police Station, makes a report which is booked in the occurrence book and is given an OB Number followed by recording of a statement. The Petitioner does not say to which Police Station his complaint was lodged, has no evidence of filing any complaint with the police or recording a police statement.
36. Although it is now settled that Constitutional violations have no limitation period, it has been held that prolonged delays before seeking enforcement of a right must be explained. The Court of Appeal in Wellington Nzioka Kioko Vs. Attorney General (2018) eKLR was on point in asserting this position when it held thus:

“...Whereas there is no time limitation in respect of constitutional petitions, the delay must not be inordinate and there must be a plausible explanation for the delay...”

37. Further, the Court in James Kanyita Nderitu vs AG & Anor (2019) eKLR held as follows:

“... We have considered the appellant’s submission and the learned judge’s finding that there was inordinate delay in the filing of the petition. In this context, the learned judge invoked the principle of laches. Laches means the failure or neglect, for an unreasonable length of time, to do that which by exercising due diligence could or should have been done earlier; it is



negligence or omission to assert a right within a reasonable time. (See Republic of Phillipines vs. Court of Appeals, G.R. No. 116111, January 21, 1999, 301 SCRA 366, 378-379). We are alive to the decision of this Court in Peter N. Kariuki vs. Attorney General [2014] eKLR, Civil Appeal No. 79 of 2012, where it was held that there is no time limit within which a party can file a claim for violation of constitutional rights. We have considered the persuasive dicta from the High Court in Kamlesh Mansuklal Damji Pattni & Another vs. Republic 2013] eKLR where it was noted that *the Constitution* did not set a time limit within which applications for enforcement of fundamental rights should be brought. Nevertheless, it is an accepted principle that a claimant who unreasonably delays his proceedings or otherwise misconducts himself regarding those proceedings may have his claim denied as an abuse of the court process. (See Metal Box Co Ltd vs. Currys Ltd, (1988) 1 All ER 341....”

38. Sluggishness on the part of the person asserting his or her rights is frowned upon by law and equity, particularly if there is no reasonable explanation for the delay hence the maxim equity aids the vigilant not the indolent.
39. Despite the extended delay, the Petitioner did not attempt to provide any reasons for the delay in bringing this petition other than stating that “it is never too late for this Court to do justice.”
40. I find the claim by the Petitioner that he was compelled by the Respondents to undergo the traditional ngata cleansing ritual questionable given the circumstances and his studious silence for the last 14 years for which he has not offered reasons for the inaction. It is my humble view that this Petition is an afterthought.
41. On the contrary, I find the assertions by the respondents that the Petitioner alongside 41 other adult members of the family willingly participated in traditional ngata ritual for cleansing purposes persuasive as the reason why he did bother to file any complaint against anybody for the last 14 years!
42. The upshot is that I do not find any merit in this Petition which must fail. I hereby dismiss it.
43. Considering that the Petitioner and the Respondents are family members, I make no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF APRIL, 2024.

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L N MUGAMBI

JUDGE

