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Constitutional Petition E002 of 2021

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Ogero & another v Attorney General & 6 others
(Constitutional Petition E002 of 2021)
[2023] KEHC 22662 (KLR) (28 September 2023)
(Judgment)

Neutral citation: [2023] KEHC 22662 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CONSTITUTIONAL PETITION E002 OF 2021

WM MUSYOKA, J

SEPTEMBER 28, 2023

BETWEEN

JAMES ATOGO OGERO 1ST PETITIONER

KENYA NATIONAL 2ND PETITIONER
COMMISSION ON HUMAN
RIGHTS
.....

AND

THE ATTORNEY-GENERAL 1ST RESPONDENT

THE INSPECTOR-GENERAL 2ND
OF POLICE RESPONDENT

THE CABINET SECRETARY 3RD
FOR INTERIOR & RESPONDENT
COORDINATION OF
GOVERNMENT

THE OFFICE OF DIRECTOR 4TH
OF PUBLIC PROSECUTIONS RESPONDENT

CI ROLEX NYOKA 5TH RESPONDENT

JUDGMENT

1. The 1st petitioner was a public health worker, who was going about his business on 28th March 2020, at Nambale, and was cruising on his motorcycle, when, without any form of provocation, the 7th respondent hit him across the face with a police baton, forcing him to lose control of the motorcycle, fall off the same and land on the side of the road. Several other police officers set upon him, while he was on the ground, and hit him repeatedly with batons, but he identified the 6th and 7th respondents. The 2 were stationed at Nambale Police Station at the time, and were on duty. Members of the public intervened to save him from the wrath of the police, but were dispersed. When the police stopped the assault, the 1st petitioner was assisted by 2 members of the public, who took him to Nambale Health Centre, where he was examined, and given first aid, before being transferred to Aga Khan Hospital, Kisumu, for specialized treatment. He was admitted there from 29th March 2020 to 12th April 2020, but was re-admitted at the Aga Khan Hospital, Kisii, on 14th April 2020, after he developed complications, while recuperating at home at Kisii. He thereafter reported the matter at Nambale Police Station, vide OB/17/04/2020. The matter was also taken up by the 2nd petitioner and other agencies. That is the background, as set out, in the petition herein by the 1st petitioner, and more so in his affidavit sworn on 13th September 2021, and that of Dr. Bernard M. Mogesa, of the 2nd petitioner, sworn on even date.
2. The complaint is that the acts of the 7th respondent, of striking the 1st petitioner with a baton, as he was riding a motorcycle, causing the same to crash, was a threat to his life, and that the subsequent assaults by the 6th and 7th respondents and the other officers caused him serious life-threatening injuries. It is averred that the said acts violated

his rights to freedom and security of the person, and violated his rights to freedom from torture and cruel inhuman and degrading treatment, they contravened his right to life and freedom and security of the person, contrary to the provisions of the Constitution (<http://resolver.caselaw.kenyalaw.org/resolver/akn/ke/act/2010/constitution>) of Kenya and other human rights instruments. It is averred that the failure by the State agents to facilitate medical aid, having inflicted upon him life-threatening injuries, also violated the Constitution (<http://resolver.caselaw.kenyalaw.org/resolver/akn/ke/act/2010/constitution>) and other human rights instruments.

3. The 1st petitioner seeks declarations that his human rights, as enshrined in the Constitution (<http://resolver.caselaw.kenyalaw.org/resolver/akn/ke/act/2010/constitution>) and international human rights instruments, were violated, an order of compensation for violation of his fundamental rights, mandamus orders to compel prosecution of the 6th and 7th respondents, and directing the 2nd respondent to develop guidelines on use of force and public order management in the enforcement of public health containment measures, and to deposit the same in court within 12 months, and a declaration that the 6th and 7th respondents were unfit to remain in the police force.
4. The respondents were served. They entered appearance, and filed responses through affidavits sworn by several individuals.
5. The 6th respondent, Dennis Mungai, swore an affidavit on 15th November 2021. He denies any wrongdoing. He avers that on 28th March 2020, he was on duty, while attached to Nambale Police Station, at Mungachi market towards Tanga Corner, implementing the Covid-19 pandemic curfew order. He accuses the 1st petitioner of negligently riding his motorcycle at high speed, and refusing to stop when flagged down by the officers enforcing the curfew, and of swerving and hitting a pillar on the side of the road, and he fell and sustained injuries. He says that he was not assaulted by anyone. Later the 7th respondent came and drove them away

to enforce curfew orders elsewhere. He avers that it was his office which helped the 1st petitioner get medication. The 7th respondent swore an affidavit on the same date, averring to similar facts, save to say that he was a standby driver, who did not witness the incident involving the 1st petitioner.

6. Rolex Charo Nyoka, was the officer commanding the Nambale Police Station at the time, and is named in the petition as the 5th respondent. He swore his affidavit on 12th November 2021. He avers that if the 1st petitioner was assaulted, then the police officers involved were under investigation, and had been internally prosecuted, and a verdict was due. He avers that there was no police vehicle available to take the 1st petitioner to hospital, but it was through their efforts that a vehicle from the Busia County government was availed for that purpose. He states that a report was filed the following day, and a P3 Form issued. He states that the OB report indicated that the 1st petitioner was assaulted by the 6th and 7th respondents, who had since taken plea, in criminal proceedings initiated at the Bungoma law courts, over the incident.
7. Gibson Gwaro Mayaba, Prosecution Counsel, swore an affidavit, on 19th January 2022, on behalf of the 4th respondent. He avers that the 4th respondent had received an investigation file from the Independent Police Oversight Authority (IPOA), Kakamega, from which the 4th respondent was convinced that the 1st petitioner had been assaulted by the 6th and 7th respondents within Nambale Sub-County on 28th March 2020. The 4th respondent had instructed IPOA to charge the 6th and 7th respondent with the offence of causing grievous harm to the 1st petitioner, contrary to section 234 of the Penal Code, Cap. 63, Laws of Kenya. He avers that the 6th and 7th respondents were charged in court at Bungoma. He avers that the current proceedings are likely to interfere with the criminal proceedings, and usurp the jurisdiction of the trial court. He says that there was no delay in getting the 2 officers charged, as the problem had something to do with scaling down of government operations during the Covid-19 period. He states that judicial review orders had been sought against the 4th respondent, yet he had not sought feedback

on the matter, and had not exploited the remedies under section 9(2) of the *fair Administrative Action Act* (<http://resolver.caselaw.kenyalaw.org/resolver/akn/ke/act/2015/4>), No. 4 of 2015.

8. Dr. Mogesa swore a further affidavit on 27th April 2022, in response to the affidavit of Mr. Mayaba. He avers that the 1st petitioner was assaulted by more than the 2 identified police officers. He asserts that the petition herein was filed prior to charges being preferred against the 2 police officers. He states that the petition is not inconsistent with the criminal matter, for while the latter will determine the criminal liability of the 2, the former seeks civil perpetrator accountability and victim relief and redress. He cites the doctrine of ripeness, and availability of remedies under Article 22 of the *Constitution* (<http://resolver.caselaw.kenyalaw.org/resolver/akn/ke/act/2010/constitution>) to address gross violations of the *Constitution* (<http://resolver.caselaw.kenyalaw.org/resolver/akn/ke/act/2010/constitution>). Dr. Mogesa swore another affidavit on 7th October 2022, to place on record a copy of a report on the investigations conducted by IPOA on the matter.
9. Directions were given, on 10th May 2022, for canvassing of the petition by way of oral evidence, based on affidavits.
10. Only the 1st petitioner gave oral evidence, on 19th June 2016th December 2022. He testified that on the material day, he was intercepted by police officers. He knew 2 of them, who were based at Nambale Police Station. The 7th respondent hit him on the head, and his motorcycle swayed, hit the roadside and crashed to the ground. The other police officers then came and assaulted him as he lay on the road. He identified the 6th and 7th respondents as among the officers involved. He was beaten unconscious, and bled profusely. 2 good Samaritans came to his rescue. They called the 5th respondent, and a police vehicle came to the scene, but he refused to board it, for fear of his own life. He later changed his mind, boarded the vehicle, and was taken to hospital. He later reported the matter at Nambale Police Station, and was issued with a P3 form. He also reported the matter to the 2nd

petitioner and IPOA, among others. He said that he was assaulted by police officers in uniforms, who were using rungun.

11. Mr. Juma, for the respondents, indicated that he did not intend to cross-examine the witness for the 2nd petitioner, saying that he would deal with the issues raised by him in his affidavits, by way of written submissions. The impression I got is that the State treated this fairly serious claim casually, in the way it handled the oral hearing of the matter. It was going to cost the State, and a more serious approach ought to have been adopted for the hearing of the matter.
12. The case by the 1st petitioner is fairly straightforward. He argues that the way he was assaulted by police officers, on duty, and wearing uniform, on that material day, grossly violated his rights. The police were out there to enforce the curfew that had been imposed, for the purpose of containment of the spread of the corona virus. Violation of curfew regulations is a minor infraction of the law. Such infractions do not have the quality of criminality, for they amount to nothing more than non-adherence to administrative rules or regulations. Such infractions amount to mere misdemeanours, and cannot be classified as felonies. They are not so serious as to justify any form of brutal or lethal force to enforce them.
13. The police power to arrest is exercisable in a manner commensurate with the infraction of the law that necessitates the arrest. For serious offences, such as murder, treason, terrorism, robbery with violence, among others, where the persons suspected of perpetrating them are likely to be armed, the police would be justified to use force, to effect the arrests. Even then, there are standards. The arrests must be done in accordance with *the Constitution* (<http://resolver.caselaw.kenyalaw.org/resolver/akn/ke/act/2010/constitution>) and the law, without violating the human rights of the persons to be arrested. The standards are set out in *the Constitution* (<http://resolver.caselaw.kenyalaw.org/resolver/akn/ke/act/2010/constitution>),

and in international human rights legislation. For misdemeanours and infractions of administrative regulations, the persons who commit such infractions, do not even have to be arrested, but where arrest becomes necessary, no force of any kind is necessary, for the suspects are least likely to be armed and dangerous, or violent.

14. The issues that arise in this petition fall under Articles 28 and 29 of the Constitution (<http://resolver.caselaw.kenyalaw.org/resolver/akn/ke/act/2010/constitution>), which state as follows:

“28. Human dignity

Every person has inherent dignity and the right to have that dignity respected and protected.

29. Freedom and security of the person

Every person has the right to freedom and security of the person, which includes the right not to be –

- (a) ...
- (b) ...
- (c) subjected to any form of violence from either public or private sources;
- (d) subjected to torture in any manner, whether physical or psychological;
- (e) subjected to corporal punishment; or
- (f) treated or punished in a cruel, inhuman or degrading manner.”

15. When Article 28 of the Constitution (<http://resolver.caselaw.kenyalaw.org/resolver/akn/ke/act/2010/constitution>) is applied to a situation where the police have to effect an arrest, or enforce administrative regulations, like a curfew, the dignity of the person to be arrested, or with respect to whom the administrative regulations have to be enforced, have to be respected and protected. Article 28 is specific that human dignity is inherent. Inherent in all human beings, and any action contemplated against any human being, must be

carried out with the background that he or she had inherent dignity, which must be respected and protected.

16. The question then is, was the 1st petitioner here treated with human dignity? Was his right to have that dignity respected and protected observed? In other words, was his human dignity respected and protected, when the manner he was treated is taken into account? I do not think so. Of course, there is a dispute as to whether the incident happened within curfew hours. The 1st petitioner argues that the time had not yet reached for enforcement of the curfew regulations. The respondent argue that the 1st petitioner was moving around during curfew hours; hence he was in breach of those regulations. The 1st petitioner argues that the police did not ask him to stop, and that they hit him with a baton instead, as he was riding his motorcycle by. The police argue that he was asked to stop, but defied. The police also argue that they saw him crash on his own, without any form of intervention from the police. Whether it was curfew time or not is neither here nor there. In any case, the respondents did not adduce any evidence. What is critical is whether the police took action on the 1st petitioner in a manner that was consistent with his inherent dignity, a manner that respected or protected his inherent dignity. In short, whether he was treated like a human being.
17. Did the 1st petitioner crash because of police intervention, or did he crash on his own? Only the 1st petitioner gave oral evidence in open court, and breathed life to his affidavit. The respondents did not testify, and therefore, life was not breathed into the averments made in their affidavits. Directions had been given for a viva voce hearing, based on the affidavits. The principle is that where a hearing is to be conducted orally, based on affidavits, a party who wishes to have the contents of their affidavits considered must testify, to breathe life into them, and where the deponent of any affidavit does not testify, the effect would be that the affidavit is to be treated as abandoned. In this case, only one of the deponents of the affidavits lodged herein attended court, to breathe life to his affidavit, the 1st petitioner herein. It shall be the case then that his testimony, on oath, was not

controverted. I shall give it primacy over the untested affidavits of the respondents. His case was that as he rode his motorcycle close by police officers who were at a roadblock, moments before the onset of curfew, one of them hit him on the head with a baton, and he lost control of his motorcycle and it crashed, causing him serious bodily injuries. Instead of the police officers present attending to him, after the crash, they set upon him and assaulted him. After the assault, they did not take steps to have him taken to hospital, and he lay there hopeless for a considerable while, before some action was taken.

18. If there was need for the police to arrest the 1st petitioner for violating the curfew rules, it should have stopped him, and apprehended him. There was absolutely no need for the police officers to use violence in the manner narrated by the 1st petitioner. The 1st petitioner had an inherent right to be treated with human dignity. He was not so treated. The fact that he was hit on the head, as he was riding his motorcycle, with the consequence that he lost control of the motorcycle, pointed to the fact that the police officers involved did not treat him in the manner a human being ought to have been treated. The officer knew that, by hitting him on the head, while his motorcycle was in motion, could cause him to lose control of the same, leading to a crash, and to occasion on him serious injuries. The officer who hit him was indifferent to that. To make matters worse, rather than the police attend to him after his motorcycle crashed, they attacked him, and beat him senselessly. That, again, amounted to treatment that did not respect his human dignity. They had a duty to protect a human being, whose motorcycle had crashed with him on top. Attending to him, and minding his welfare, is what was expected of him, and not setting upon him and visiting violence on him. Whatever wrong he had committed did not warrant his being treated in the manner that the police dealt with him. Article 28 of *the Constitution* (<http://resolver.caselaw.kenyalaw.org/resolver/akn/ke/act/2010/constitution>), was, no doubt, violated.
19. Article 29 is about the right to security of the person. The elements of that right are elaborated in paragraphs (c)(d)(e)

(f) of that Article. It is about a person not being subjected to any form of violence from public sources; not being subjected to torture in any manner, both physical and psychological; not being subjected to corporal punishment; and not being treated in a cruel, inhuman or degrading manner. Article 29 is really an elaboration of Article 28. Being subjected to violence, torture and corporal punishment, and treated in a cruel, inhuman or degrading manner, are all elements of being treated in a manner that does not respect and protect the inherent human dignity of the person. Physical violence was visited on the person of the 1st petitioner. He was first hit on the head, which caused his motorcycle to crash, and while on the ground he was beaten. Any form of physical violence has psychological effects on the person. The beatings that he received after his motorcycle crashed amounted to torture. The police officers present ought to have made an effort to establish whether he was alright after the fall, and if he was not, to get him to hospital for medical attention. They did no such thing, instead they all fell upon him, and beat him. That amounted to torture. It was also corporal punishment, for he was, apparently, being punished for breaching the curfew rules. The treatment was cruel, inhuman and degrading, in the circumstances, for he was treated worse than a human being.

20. It should be pointed out that the band of rights under Article 29(c)(d)(e)(f) cannot, by virtue of Article 25 of *the Constitution* (<http://resolver.caselaw.kenyalaw.org/resolver/akn/ke/act/2010/constitution>), be limited. They cannot be derogated from. They cannot be taken away by any law. Any person who is treated in a manner that violates Article 29(c)(d)(e)(f) is entitled to legal redress, under *the Constitution* (<http://resolver.caselaw.kenyalaw.org/resolver/akn/ke/act/2010/constitution>), for these bands of rights are fundamental and inalienable, and their violation is a serious abrogation of *the Constitution* (<http://resolver.caselaw.kenyalaw.org/resolver/akn/ke/act/2010/constitution>).
21. For avoidance of doubt, Article 25 of *the Constitution* (<http://resolver.caselaw.kenyalaw.org/resolver/akn/ke/act/2010/constitution>) states as follows:

“25. Fundamental Rights and freedoms that may not be limited

Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited –

- (a) freedom from torture and cruel, inhuman or degrading treatment or punishment;
- (b) ...
- (c) ...
- (d) ...”

22. As indicated above, the way the 1st petitioner was treated amounted to torture, and was cruel and degrading. The rights that the police infringed were inherent, fundamental and inalienable. The police officers involved handled the 1st petitioner in a manner that violated his inherent, fundamental and inalienable rights. They violated *the Constitution* (<http://resolver.caselaw.kenyalaw.org/resolver/akn/ke/act/2010/constitution>).

What makes the violations so egregious is the fact that the police officers were officers of the law who were on duty and in uniform. They were, as officers of the State, expected to be the protectors of the very Constitution that creates the State, in which they serve as officers of the law. Their source of authority, to act as police officers, is *the Constitution* (<http://resolver.caselaw.kenyalaw.org/resolver/akn/ke/act/2010/constitution>), and any act by them, which violates the same Constitution, is a grave matter.

23. An issue was raised as to whether the 6th and 7th respondents should be subjected to these constitutional proceedings, parallel to ongoing criminal proceedings. The answer to that lies with Article 22(1) of *the Constitution* (<http://resolver.caselaw.kenyalaw.org/resolver/akn/ke/act/2010/constitution>), which states the right of every person to move the court claiming that their rights or fundamental freedoms, in the Bill of Rights, have been denied or violated or infringed or are threatened. The petition herein is not just about the 6th and 7th respondents, but also against the State as an entity

created by the Constitution
(<http://resolver.caselaw.kenyalaw.org/resolver/akn/ke/act/2010/constitution>),
and conferred with jurisdiction to implement the Constitution
(<http://resolver.caselaw.kenyalaw.org/resolver/akn/ke/act/2010/constitution>).
Initiation of constitutional proceedings is an accountability
process, where the State and its agents are called to account
for their actions, with respect to implementation of the
Constitution
(<http://resolver.caselaw.kenyalaw.org/resolver/akn/ke/act/2010/constitution>),
and for that reason proceedings founded on the Constitution
(<http://resolver.caselaw.kenyalaw.org/resolver/akn/ke/act/2010/constitution>),
cannot be subordinated to proceedings initiated under
statute or subsidiary legislation. In any event, if any
proceedings have to give way, it would not be the
constitutional proceedings, it would have to be those
commenced under legislation.

24. For avoidance of doubt, Article 22(1) of the Constitution
(<http://resolver.caselaw.kenyalaw.org/resolver/akn/ke/act/2010/constitution>)
states as follows:

“22. Enforcement of Bill of Rights

- (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
- (2) ...
- 3) ...
- (4) ...”

25. Article 23(1) of the Constitution
(<http://resolver.caselaw.kenyalaw.org/resolver/akn/ke/act/2010/constitution>)
is equally relevant. It confers jurisdiction on the High Court
to entertain and determine proceedings initiated under the
Bill of Rights, to redress denial or violation or infringement
of or threat to a right or fundamental right set out in the Bill
of Rights in the Constitution
(<http://resolver.caselaw.kenyalaw.org/resolver/akn/ke/act/2010/constitution>),
and to grant reliefs to proceedings brought under Article 22.

The proceedings herein are at the High Court, which has jurisdiction to deal with the sort of applications that have been placed before me.

26. Article 23(1) provides as follows:

“23. Authority of courts to uphold and enforce the Bill of Rights

(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(2) ...

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.”

27. The jurisdiction of the criminal trial court, and that of the court seized of constitutional proceedings, are different and separate. The criminal jurisdiction is conferred and exercised under the Criminal Procedure Code, Cap 75, Laws of Kenya, and it seeks to establish the criminal responsibility of the persons charged, with respect to the offences in question. The jurisdiction over constitutional proceedings is vested by and exercised under *the Constitution* (<http://resolver.caselaw.kenyalaw.org/resolver/akn/ke/act/2010/constitution>), and it is about determining whether the rights and

fundamental freedoms under the Bill of Rights have been violated or infringed or threatened. One is criminal, the other is quasi-civil in nature. The pendency of the constitutional proceedings, therefore, has no effect whatsoever on the criminal proceedings. The 2 proceedings can quite properly proceed side by side. The issue of an accused person suffering double jeopardy, on account of the 2 matters proceedings parallel to each other, does not arise.

28. In addition, there are provisions, in the Criminal Procedure Code, which state that the pendency of civil proceedings, touching on the same facts and cause of action with the criminal proceedings, would not preclude continuation of the criminal proceedings. That provision is in section 193A of the Criminal Procedure Code, and it states as follows:

“193A. Concurrent criminal and civil proceedings

Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

29. The 1st petitioner also seeks, in his petition, for an order, directed to the 2nd respondent, to develop guidelines on use of force and public order management in the enforcement of public health containment measures and to deposit the same in court within 12 months. When he testified orally, the 1st petitioner did not deal with this aspect of the petition. He made no mention of it at all. He did not attempt to demonstrate that there are gaps in the law with relation to those matters. The responsibility lay with the 1st petitioner, to demonstrate, by way of evidence, that there was need for such regulations to be made. Other than what is pleaded in the petition, no material was placed before me to justify the making of the order sought.
30. At the end of it, it is my finding, and holding, that there was violation of the rights of the 1st petitioner, as enshrined in Articles 28 and 29, and that he is entitled to reliefs under

Article 22 of the Constitution (<http://resolver.caselaw.kenyalaw.org/resolver/akn/ke/act/2010/constitution>), specifically that related to compensation. Taking everything into account, I order payment of compensation to the 1st petitioner, by the respondents, at the sum of Kshs. 1,500,000.00. I also award costs of the litigation to the 1st petitioner. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUSIA THIS 28TH DAY OF SEPTEMBER 2023

W. MUSYOKA

JUDGE

Advocates

Ms. Odeny, instructed by Jacqueline Ingutiah-Onyango, Advocate/Kenya National Commission on Human Rights, for the 1st and 2nd petitioners.

Carren Masaka & Juma Collins, instructed by the Attorney-General, for the 1st, 2nd, 3rd, 5th, 6th and 7th respondents.

Mr. Mayaba, instructed by the Director of Public Prosecutions, for the 4th respondent.

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