

Analysis of the Judgment Delivered in Petition 122 of 2013

Introduction

Following the announcement of results of Kenya's general election held in December 2007, widespread violence and demonstrations ensued and continued from late December 2007 until March 2008. During this period of unrest several women, men and children were targeted for attack and were subjected to forms of Sexual and Gender Based Violence ('SGBV') including rape, gang rape, sodomy, defilement, forced pregnancy, forced circumcision and mutilation or forced amputation of their penises. The petitioners' case against the respondents was that they failed to anticipate and prepare adequate and lawful policing responses to the anticipated civil unrest that contributed to the SGBV, and the failure to provide effective remedies to the victims of SGBV which violated the fundamental rights of the 5th to 12th petitioners and other victims.

Issues

Issues raised by the petitioners:

1. Whether the Right to Life, the Prohibition of Torture, Inhuman and Degrading Treatment, the Right to Security of the Person, the Right to Protection of the Law, the Right to Equality and Freedom from Discrimination, the Right to Information, and the Right to Remedy were violated in relation to the Petitioners 5 to 12 and other victims of SGBV during the post-election violence, as a result of the failure of the Government of Kenya to protect those rights;
2. Whether the failure to conduct independent and effective investigations and prosecutions of SGBV-related crimes during the post-election violence is a violation of the positive obligation to investigate and prosecute violations of the Right to Life, the Prohibition of Torture, Inhuman and Degrading Treatment, and/or the Right to Security of the Person;
3. Whether the failure to classify the SGBV-related crimes committed during the post-election violence as Crimes against Humanity is a violation of Kenya's obligations under the Constitution read together with the Rome Statute of the International Criminal Court, international human rights law and statutory law which requires the investigation and prosecution of Crimes against Humanity of rape, torture, persecution, other sexual violence, and other inhumane acts;
4. Whether the failure to establish an independent and effective investigations and effective investigations and prosecutions of SGBV related crimes committed during the post-election violence is a violation of Kenya's obligations under the Statute of the violation of Kenya's obligations under the Statute of the International Criminal Court, international human

rights law and statutory law which requires the investigation and prosecution of Crimes against Humanity of torture, persecution, other sexual violence, and other inhumane acts (mutilations);

5. Whether the failure to provide emergency medical care and ongoing access to medical services to victims of SGBV during the post-election violence is a violation of the Right to Life, the Prohibition of Torture, Inhuman and Degrading Treatment, the Right to Security of the Person, the Right to Equality and Freedom from Discrimination, and/or the Right to Remedy;

6. Whether the failure of the Minister for Medical Services to provide documentation of medical services to victims of SGBV is a violation of the Right to Life, the Prohibition of Torture, Inhuman and Degrading Treatment, the Right to Security of the Person, the Right to Equality and Freedom from Discrimination, and /or the Right to Remedy; and

7. Whether the effect that the failure to provide compensation, rehabilitation, medical and psychological care as well as legal and social services, and the failure to publicly acknowledge the scope and nature of SGBV committed during the post-election violence and apologize for the harms suffered by the victims, is a violation of the Right to Remedy;

The Judge summarized the issues as follows:

1. Whether the petitioners have Locus Standi;
2. Whether this petition is Res Judicata;
3. Whether the 5th to 12th Petitioners' rights were violated, threatened, infringed upon or denied by virtue of the SGBV committed against them and the State's failures;and
4. Whether the Petitioners are entitled to the reliefs sought.

Applicable Laws

1. The right to life protected by Article 70 of the former Constitution, Article 6(1) of the ICCPR, Article 4 of ACHPR, Article 4 of Maputo Protocol;
2. The right to protection from torture protected by Article 71 of the former Constitution, Article 5 of the UDHR, Article 7 of ICCPR, Article 5 of ACHPR;
3. The right to security of the person protected by Article 74 of the former Constitution, Article 9 of ICCPR, Article 6 of the ACHPR.
4. The right to protection of the law provided under Article 6 of UDHR and Article 16 of ICCPR.

5. Right to remedy provided under Section 84 of the repealed Constitution, Article 8 of the UDHR, Article 3 of the ICCPR, and Article 25 of the Maputo Protocol.
6. The Right to freedom from discrimination

Analysis of the Issues

A) Locus Standi of the petitioners

The 1st, 4th, 5th, and 6th respondents argued that the petitioners do not have locus standi to file this suit as the applicable law, the repealed Constitution, only provided locus standi to institute proceedings on behalf of persons in detention. They argued that Article 22 of the Constitution¹ cannot be applied retrospectively. The issue to be determined herein is whether the petitioners can institute public interest litigation under Article 22 of the Constitution on behalf of a group of persons. The issue to be determined was whether the petitioners can institute public interest litigation under Article 22 of the Constitution on behalf of a group of persons. The judge cited a few precedents such as Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR where the court held that:

“At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of the Constitution. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the Court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately occurred before the commencement of the Constitution.”

His interpretation of Article 22(1) of the Constitution was that the right to institute public interest litigation only exists in the context of the Bill of Rights of the 2010 Constitution. Therefore, he concluded that this provision and the right to institute proceedings on behalf of all victims of SGBV cannot apply retrospectively. In this regard, the determination was only in relation to the petitioners.

B) Res Judicata

¹ In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by a person acting in the public interest

The respondents argued that there are several cases which have been brought before the High Court in which the respondents in this case have been sued under the same title. Additionally, they argued that in the said suits the respondents are being pursued for acts and omissions which occurred during the 2007-2008 post-election violence. In particular, they identified the case of **Nairobi Petition No. 273 of 2011, FIDA Kenya & 27 others v Attorney General** as proof of this. The judge cited the case of **Kenya Commercial Bank Limited v Benjoh Amalgamated Limited [2017] eKLR**, the Court of Appeal highlighted the elements required to prove that a case is res judicata as:

“(a) The suit or issue was directly and substantially in issue in the former suit.

(b) That former suit was between the same parties or parties under whom they or any of them claim.

(c) Those parties were litigating under the same title.

(d) The issue was heard and finally determined in the former suit.

(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

The judge observed that the case of **Nairobi Petition No. 273 of 2011, FIDA Kenya & 27 others v Attorney General**, the International Commission of Jurists-Kenya Chapter was a petitioner in the matter and the Attorney General was also the 1st respondent in that matter. In addition to this, he stated that KHRC was also the petitioner in that matter unlike in this case where it is the Interested Party, hence it is not litigating under the same title. None of the other parties in the previous suit was pursued in the current suit. The judge stated that there is no similarity of parties in the previous suit and the current suit. Beyond the issue of parties, the judge stated that in the previous suit, the petitioners were pursuing the rights of internally displaced persons and in particular the mismanagement of the IDP camps which allegedly resulted in a number of human rights abuses including SGBV. Although the issue of SGBV is also pursued in the previous matter, it was not the main issue of the petition as it is in this petition. The judge concluded that this matter was not res judicata and even though two of the parties are litigating under the same title, the issues in the current petition were not directly or substantively in issue in the previous petition.

C) Whether the 5th to 12th Petitioners’ rights were violated, threatened, infringed upon or denied by virtue of the SGBV committed against them and the State’s failures

- i. Right to life, prohibition of torture, inhuman and degrading treatment or punishment, and right to security of the person**

The judge cited the Human Rights Committee's General Comment No. 31 on the ICCPR at paragraph 8² and **Florence Amunga Omukanda & another v Attorney General & 2 others [2016] eKLR** whereby the court held that the State has a legal duty and a positive obligation to protect each of its citizen's rights to security of their person and their property by securing peace through the maintenance of law and order.

On the issue of sexual violence as an infringement of the right to life, the judge stated that Article 4 of the Maputo Protocol recognizes Sexual violence as an infringement on the right to life. This was affirmed in **Shri Bodhisattwa Gautam v Miss Subhra Chakraborty 1996 AIR 922** where the Court determined that rape violates the right to life.

The judge stated that rape was recognised as form of torture, by the International Criminal Tribunal for the Former Yugoslavia decided in the case of **Prosecutor v Kunarac [2001] IT-96-23-T & IT-96-23/1-T** that rape and torture were synonymous.

In addition to this, the judge opined that forceful circumcision was a form of torture because it has the elements of inhuman and degrading treatment or punishment described in Article 16 of the Convention of Torture. This was also the position taken by the International Criminal Court in the case of **The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali No. ICC-01/09-02/11** where it was determined that forcible circumcision is a crime against humanity categorised as 'other inhumane act' as it is motivated by ethnic prejudice and intended to cause great suffering and serious injury to the body or mental or physical health.

Finally, on the right to security of the person, the Human Rights Committee determined in **Rodger Chongwe v Zambia, Communication No. 821/1998**, U.N Doc. CC that Article 9 of the ICCPR places an obligation on the State to protect the right to security of the person of non-detained persons.

The judge found that the state cannot escape liability because the 6th, 5th and 9th petitioners testified to having been raped by GSU officers. The 5th and 9th petitioners did not report the incidents to the Police. However, they are certain that they identified their violators as GSU officers due to their uniform. Their testimonies demonstrated that State actors were involved in acts of sexual violence against the citizenry, and were directly responsible for the violations of their rights. He concluded that there was a violation of the right to life, protection from torture,

² "The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However, the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities."

inhuman and degrading treatment and right to security of the person of the 5th, 6th and 9th petitioners.

On the other hand, the judge stated that the 7th, 8th, 10th, 11th and 12th petitioners who were assaulted by members of the public did not provide evidence to the effect that the persons who assaulted them did so with the instigation of a public official or other person acting in an official capacity. The 8th Petitioner, however, reported her assault to the Kilimani Police Station. She alleged, without any rebuttal from the respondents, that the Police failed to follow up and arrest all the perpetrators. The judge therefore found that the Police relinquished their responsibility to investigate her report fully and arrest all the three men who had raped her.

The court opined that establishing whether the State discharged the duty of care owed to the 7th, 10th, 11th and 12th petitioners, it must be determined whether it did all it could, to prevent the violations of their rights by non-State actors. The 6th, 8th, and 9th petitioners testified before the Court that there was a significant police presence in the areas where they resided, however, the police officers were unable to control the situation once it turned violent. The 5th Petitioner testified that although the police officers were not able to effectively contain the violence, they did help her children to escape Nairobi. The 10th Petitioner testified that she was assisted and protected by the Police in Kericho and Ekerenyo. The 7th and 11th petitioners testified that they did not see any police officer when the violence escalated. Nevertheless, the 11th Petitioner admitted to being protected by the Police in Naivasha Police Station and later at Naivasha Maximum GK Prison.

The judge cited a few Court of Appeal authorities such as its decision in **Agricultural Development Corporation v Harjit Pandhal Singh & another [2019] eKLR** that: *“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 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....”*

In concluding the judge stated that the state considered any intelligence that it may have received on impending violence and put in place police officers to maintain peace. However, he did not believe that the true magnitude of the 2007-2008 post-election violence could have been foreseen. He stated that it is impossible to have a police officer protect every citizen of Kenya from harm, particularly due to the low ratio of police officers to the population of this country.

Regarding the 5th, 6th, and 9th petitioners who were assaulted by State actors, the judge held that their rights to life, the security of the person, and protection from torture were infringed by the actions of the State actors which, in line with national, regional and international law, are regarded as actions by the State itself. Additionally, the 8th Petitioner who was assaulted by non-State actors

was owed a duty of care by the Police to investigate her report and make arrests, and when they failed to do so they in effect violated her rights to life; security of the person; and protection from torture, inhuman and degrading treatment or punishment.

As for the 7th, 10th, 11th, and 12th petitioners who were assaulted by non-State actors. The judge held that he could not find in their favour as they have failed to show that the Police failed to exercise reasonable diligence in the circumstances of their individual cases.

ii. Right to Equality, Right to Remedy, and the Right to Protection of the Law

The judge stated that to determine whether the petitioners' right to remedy was violated, one must look at their individual cases because the 5th, 6th and 9th petitioners were violated by police officers and no investigations, arrests or prosecutions have been initiated, the State is liable for violating their right to appropriate remedy which in such cases would include compensation.

The judge determined that the State is liable for the violation of the rights of the 8th Petitioner who was violated by non-State actors, and the State failed to investigate her claim even though she identified her assailants. Therefore, the 8th Petitioner is entitled to appropriate reparations from the State including compensation.

iii. The Right to Freedom from Discrimination

The judge cited the case of Florence Amunga Omukanda where it was pronounced as follows:

"Where a person claims that he or she falls within the class of persons that ought to be entitled to reparation of damages it behoves the State to investigate the said claims and make a decision thereon....."

He stated that the case establishes that the State owes a duty to the victims of 2007-2008 PEV to investigate the violations of their rights, prosecute the perpetrators, and provide appropriate remedies to the victims.

The judge held that there has been discrimination towards the 5th, 6th, 8th and 9th petitioners as they were owed a duty of care by the State to not only refrain from causing harm to them but also to pursue those whose acts or omissions caused them harm, and to compensate them appropriately.

iv. Right to Information

The judge cited the case of **Kenya Society for the Mentally Handicapped v Attorney General & 5 others [2011] eKLR** whereby the court held that:

“I am not inclined to grant prayers 8 and 9 of the application as the Petitioner has not requested the information from the state or state agency concerned and that request rejected. Coercive orders of the court should only be used to enforce Article 35 where a request has been made to the state or its agency and such request denied. Where the request is denied, the court will interrogate the reasons and evaluate whether the reasons accord with the Constitution. Where the request has been neglected, then the state organ or agency must be given an opportunity to respond and a peremptory order made should the circumstances justify such an order. I find that the petitioner did not make the request for information to the respondents hence I dismiss this request.”

The judge held that the petitioners had not claimed or produced evidence to the effect that they requested the government to release any information or reports on the cases of SGBV during PEV. For this claim to succeed it would have been necessary for the petitioners to have made a request to the respondents for such information, and that the request was ignored or refused. He therefore found that the petitioners did not prove that their right to information was infringed by the acts or omissions of the respondents.

D) Whether the Petitioners are entitled to the reliefs sought

The court entered judgement as follows:

1. A declaratory order was issued to the effect that the failure to conduct independent and effective investigations and prosecutions of SGBV-related crimes during the post-election violence is a violation of the positive obligation on the Kenyan State to investigate and prosecute violations of the rights to life; the prohibition of torture, inhuman and degrading treatment; and the security of the person of the 5th, 6th, 8th and 9th petitioners;
2. A declaratory order was issued to the effect that the right to life; the prohibition of torture, inhuman and degrading treatment; the right to security of the person; the right to protection of the law; the right to equality and freedom from discrimination; and the right to remedy were violated in relation to the 5th, 6th, 8th and 9th petitioners during the 2007-2008 post-election violence, as a result of the failure of the Government of Kenya to protect those rights;
3. The 5th, 6th, 8th and 9th petitioners were each awarded Kshs. 4 million as general damages for the violation of their constitutional rights; and
4. The 5th, 6th, 8th and 9th petitioners were awarded costs of this suit against the 1st and 4th respondents. The other parties were ordered to meet their own costs of the proceedings.

Conclusion

a) Locus Standi

To establish whether the petitioners can institute public interest litigation under Article 22 of the Constitution on behalf of a group of persons. We agree with judges reference to the Supreme Court decision in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR** where its stated “ *However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of the Constitution. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the Court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately occurred before the commencement of the Constitution.*”

The language of Article 22 of the Constitution of Kenya, 2010 does not indicate an aspect of retrospectivity since the wording does not imply operation of the provision on matters taking place before enactment of the 2010 constitution. Further, under the 1969 constitution, Public interest litigation was limited to those incarcerated.

b) Right to life, prohibition of torture, inhuman and degrading treatment or punishment, and right to security of the person.

To establish whether the State discharged the duty of care owed to the 7th, 10th, 11th and 12th petitioners We agree with reasoning of the judge in the case of **Charles Murigu Muriithi v Attorney-General [2015]** that 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.” However according to the WAKI Report, “Evidence was received to the effect that not only did the service [NSIS] gather information and data about what could potentially occur around the 2007 elections in terms of violence but developed a range of reports highlighting the issues and provided them to senior government officials as well as the police, military, prisons and other agencies. The NSIS produced both regular and special reports including hotspots/flash points up-dates, situation reports, weekly and fortnightly reports and briefs, security briefs at provincial and district level as well as NSAC reports regularly throughout the months leading up to the general elections. As early as September 2007, these reports warned of impending election related violence in clearly specified areas and provided a continuing alert process though updated assessment of potential PEV. This indicates that the security agencies had prior reports and knowledge of the PEV but failed to put up the appropriate measures to protect the citizens against human rights violations. Therefore as

stipulated in the **Agricultural Development Corporation v Harjit Pandhal Singh & another**, Kenya would therefore bear responsibility for these non-state actors' actions if she failed to comply with due diligence to prevent the actions. It is clear from the evidence of the petitioners that they were not protected from sexual violence which include the 7th, 10th, 11th, and 12th petitioners. The right to security of the person places an obligation to states to take measures to protect persons from foreseeable threats to life or integrity of the body from state or private actors

c) Right to Equality, Right to Remedy, and the Right to Protection of the Law

The reasoning of the Judge is sound as the 7th, 10th, 11th and 12th petitioners did not report the cases to warrant investigation and prosecution of the perpetrators. The State is not liable for violating their right to appropriate remedy which in such cases would include compensation however they did not receive equal protection before the law because despite the security agencies receiving credible information of an imminent violence eruption after the elections they failed to set up the appropriate structures to ensure that the petitioners were not harmed.

The right to emergency medical treatment is paramount to enjoying the highest attainable standard of health and denial in one public hospital and getting it in another does not negate the fact that medical treatment should be accessible and affordable to victims of SGBV.

d) The Right to Freedom from Discrimination

The State treated SGBV as a less serious crime than damage to and loss of property. In accordance with reports on PEV, despite the widespread SGBV, victims who lost their homes received compensation while those who suffered SGBV have not received any form of reparations nor compensation. There has been no valid explanation as to why victims of SGBV have been treated differently by the State. With the 7th, 10th, 11th and 12th not reporting the investigative agencies did not know about the violations and could not investigate fully and no prosecutions could be instituted.

e) Right to Information

In **Peter Manson Okeyo v Republic [2014] eKLR**, the court held inter alia..

:’... However, as has been held by our courts in various decisions, the right to information is not self-executing. **A party who claims the right has been infringed or is threatened with infringement must show that he or she made a request for such information, and that the request for information was not acceded to.**”

The same has been held by the courts in **Total Kenya and 9 Others -vs- The Director Criminal Investigation Department, the Commissioner of Police and 2 Others** **Petition No. 478 of 2012** and **Kenya Society for the Mentally Handicapped -vs- Attorney General, National Council for Persons with Disabilities and 4 Others** **Petition No. 155A of 2011** for the proposition that the rights under **Article 35 (1) (a)** of the **Constitution** is not self executing and that a petitioner must at least request for information before alleging that he or she has been denied access.

In the absence of proof by the petitioners showing request for any form of information which was thereafter ignored, we agree with the judge that a claim for the infringement of right to information does not succeed.