



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION
PETITION NO. 51 OF 2015

COL..... 1ST PETITIONER

GMN2ND PETITIONER

VERSUS

RESIDENT MAGISTRATE KWALE COURT.....1ST RESPONDENT

DCIO MSABWENI POLICE DIVISION 2ND RESPONDENT

COAST PROVINCIAL GENERAL HOSPITAL3RD RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS4TH RESPONDENT

CABINET SECRETARY MINISTRY OF HEALTH5TH RESPONDENT

JUDGMENT

THE PETITION

1. In an Amended Petition dated 13th November, 2015 and filed on 16th November 2015, COI and GMN (the Petitioners) sought the following orders:-

(1) a declaration that the manner in which the first Respondent acquired evidence from the Petitioners herein was unconstitutional and go 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;

(2) that upon granting prayer (a) above, a declaration that the criminal proceedings in the lower court are unconstitutional and be terminated;

(3) 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;

(4) 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;

(5) 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.

(6) 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.

(7) such other orders as the Court shall deem fit to make under the circumstances.

2. The Petition is based upon the grounds on the face thereof, the written submissions, of Ms. Sande, learned Counsel for the Petitioners, dated 27th April 2016, and filed on 29th April 2016, and the extensive comparative list of authorities and the oral arguments of counsel aforesaid made at the hearing hereof on 12th May, 2016.

THE PETITIONERS' CASE

3. The Petitioners claim is that their rights were violated by the Respondents contrary to the provisions of Article 22(1) of the Constitution. On this ground, the Petitioners' counsel submitted that the violation of the Petitioners' right started from the time of their arrest on suspicion of being homo-sexuals.

4. Counsel submitted that under investigations the Petitioners refused to undergo medical tests. However, after being charged before the Kwale Principal Magistrate's Court, they were ordered to undergo medical examination including anal check-up, HIV and Hepatitis B testing. Counsel therefore contended that the medical examination was a violation of the Respondents constitutional rights, both in terms of the Constitution of Kenya, and principles of international treaties to which Kenya is a party.

5. Counsel contended that the medical examination in particular violated the Petitioners right under Article 29 (f) of the Constitution. The said Article prohibits cruel and degrading treatment when the Petitioners were made to lie with their legs up and metal spatulas were inserted and torches were shone into their anuses to see any abnormalities.

6. Counsel contended that the signing of Post Rape Case Forms by the Petitioners did not constitute consent for the third Respondent's medical personnel to examine the Respondents. Counsel contended that the use of the metal spatulas was cruel, and the presence of police officers was humiliating.

7. It was counsels' contention that the medical examination was interference with the Petitioners' privacy, and was a violation of Article 28 of the Constitution, and Article 10 of the International Covenant on Civil and Political Rights, and Articles of the African Charter on Human and Peoples Rights.

8. It was learned Counsel's submissions that human dignity must be upheld all the time, because human dignity is at the heart of the human being, irrespective of their sexual orientation

9. Counsel contended that consent is fundamental to invasion of a person's body, that to do so, without such consent, is an assault or torture, and that consent is not required where an order of the court is made under section 36 (1) of the Sexual Offences Act.

10. Counsel also contended that the tests for Hepatitis "B" was unnecessary without the consent and taking of blood was contrary to Article 31 of the Constitution. In this regard Counsel relied on the decision of the **European Court of Human Rights in the case of 715 YF Vs. TURKEY, (2004) 3 E.H. RR 34**, where that court held unanimously that the Petitioner's right to private life as guaranteed by Article 8 of the European Convention on Human Rights was violated. In that case the Turkish Police had arrested the complainant's wife and had subjected her to medical examination by a Gynecologist while being held on suspicion of aiding members of the Turkish Peoples Party (PKK).

11. Counsel further contended that the Reports obtained from the examination were made public and everybody knew the status of the Petitioners. Counsel relied on the case of **ERIC GITARI Vs. NON GOVERNMENTAL CO-ORDINATION BOARD & 4 OTHERS (2015) EKLR** where the Court declared that the words "**every person**" in article 36 of the Constitution includes "**all persons living within the Republic of Kenya despite their sexual orientation, entitled to form an association**".

12. It was the further contention of counsel that the evidence obtained violated the Petitioners' rights to fair trial as guaranteed by Article 50 of the Constitution. Counsel again relied on the decision of the European Court of Human Rights **JALSO Vs. GERMANY (2007) 44 E.H. R.R. 32** where that Court held that the Petitioner's rights against torture, inhuman or degrading treatment had been violated by German police when emetic substances were administered against him to regurgitate satchets of cocaine which he had swallowed to hide evidence. The Respondent was also awarded damages.

13. In **CRYSTAL M. FERGUSON et al Vs. CITY OF CHARLESTON, 532, US 67**, the Appellants were obstetrics patients who were arrested after testing positive for cocaine. They were convicted by the trial court, and their appeals were dismissed by the United States District Court of South Carolina. On further appeal, the Supreme Court of the United States held that;

"(1) urine tests were "searches" within the meaning of the Fourth Amendment, and

(2) tests and reporting positive test results to the Police, were unreasonable searches in the absence of the patients' consent, in view of policy's law enforcement purpose."

14. The purpose of the medical examination was to aid the court to find the Petitioners guilty, and that such evidence must be excluded from the Court record.

15. On the question of the right of fair hearing counsel relied upon the case of **PURITY KANANA KINOTI Vs. REPUBLIC [2011] eKLR**, that a right to fair hearing cannot be limited under Article 25 (c) of the Constitution.

16. The end does not justify the means, counsel submitted, it is an abuse of Court process and therefore unconstitutional. The offence created under section 162 of the Penal Code (Cap 63 Laws of Kenya), criminalizes anal acts against the order of nature, and that there was no anal act the Petitioners were arrested out of suspicion merely.

17. For those reasons, the counsel urged the court to allow the Petition and hold that the Petitioners rights were violated.

THE RESPONDENTS' CASE

18. The Petition was opposed, **firstly** by the Replying Affidavit of Salim Yunis sworn on 13th October 2015 and filed on 22nd October 2015, the further Replying Affidavit of the said Salim Yunis sworn on 15th March 2016 and filed on 22nd April 2016, **secondly**, the Replying Affidavit of Christine Njagi sworn on 19th April 2016, and filed on 21st April, 2016, **thirdly** the written submissions on behalf of the First and Fifth Respondents dated 11th May, 2016, and filed on 12th May, 2016. **fourthly** the submissions on behalf of the Second and Fourth Respondents dated 10th day of May 2016, and filed on 12th May 2016, **fifthly** the oral submissions of Ms. Lutta Senior State Counsel, on behalf of the First and Third Respondents and **sixth**, the submissions of Mr. George Mungai Senior Prosecution Counsel on behalf of the Second and Fifth Respondents, all made at the further hearing of the Petition on 13th June, 2016.

SUBMISSIONS FOR THE FIRST AND THIRD AND FIFTH RESPONDENTS

19. It was counsel Lutta's contention that the Petition herein raised no constitutional issue. The issues here relate to the fact that the Petitioners have been charged in Kwale Principal Magistrate's Court, Criminal case No. 209 of 2015. The Petitioners were charged under the Sexual Offences Act and the particulars of charge are set out in the Charge Sheet.

20. Counsel contended that apart from the requirement that issues of discrimination must be specifically pleaded, the issue in this case is whether the medical examination carried out on the Petitioners was unconstitutional. The issues set out in the Petition Counsel submitted, and in particular paragraphs 25 and 26 all refer to nonconsensual or forced sex, while the Petitioners contend that there was no consent to the medical examination and that other prayers seek damages. In this regard the Respondents (the First, Third and Fifth) relied on the Replying Affidavit of Christine Njagi, the Resident Magistrate and trial magistrate and the written submissions dated 11th May, 2016 and filed on 12th May, 2016.

21. Counsel contended the actions of the Respondents are not in breach of any provision of the Constitution, and referred to section 36 of the Sexual Offences Act which grants to the Court jurisdiction to order the taking of samples from any accused and section 36 (7) immunizes the Respondents from any liability in respect of any action relating to taking of samples under section 36 (1).

22. In addition to section 36 aforesaid, Counsel submitted that Regulations 5 of the Sexual Offences Medical Treatment Regulations 2012, allows the collections of samples, and no consent is required under the Sexual Offences Act as was decided in the case of **REPUBLIC VS. JOHN KITHYULU [2016] eKLR**.

23. Counsel submitted further that consent did not amount to obtaining incriminating evidence against the Petitioners. Counsel relied on the case of **RICHARD DICKSON OGENDO & OTHERS VS. ATTORNEY GENERAL & 5 OTHERS (2014) eKLR**, that medical examination was lawful and did not violate the Petitioners rights because the Sexual Offences Act is not being challenged.

24. On the cases cited by counsel for the Petitioners and most of which concern sexual orientation, did not apply to the Petitioners herein, that the Judicature Act sets out the hierarchy of courts, and that the Petitioners have no claim in this Court, but at the criminal trial Court, and that any orders from this court would subvert the Constitution and legal order of the country. Counsel asked the court to dismiss the Petition.

THE CASE OF THE SECOND AND FOURTH RESPONDENTS

25. The case of the Second and Fourth Respondents is set out **firstly** in the Replying Affidavit of Salim Ali sworn on 13th October, 2015 and filed on 22nd October 2015 and the Further Affidavit of Salim Yunis sworn on 15th March 2016, and filed on 22nd March 2016, and **secondly** on the written submissions of George Mungai dated 10th May, 2016, and filed on 12th May, 2016.

26. It was this counsel's submissions that Section 36 (7) of the Sexual Offences Act immunizes officers from liability in the absence of evidence of any fraud or bad faith for the Respondents to be made liable at all.

27. The Petitioners, Counsel submitted are adults and consented both in court and in the Hospital's testing clinic to the medical examination; the claim is an afterthought to deny consent as defined by section 42 of the Sexual Offences Act, the Petitioners appended their signatures, and denied any inhuman and degrading treatment. In this regard Counsel relied on the case of **DAVIS GITAU NJAU & 9 OTHERS VS. THE HON. THE ATTORNEY GENERAL [2013] eKLR** and once again emphasized that there was no evidence of violation of the Petitioners' rights. The subjection to medical examination was normal practice. It was voluntarily done. Cases cited from outside Kenya were only relevant where there was a lacuna in Kenya law. Counsel urged the Court to apply the Bangalore Principles, and in particular , principles on the application of international law and give effect to the municipal or national law. Counsel urged the Court to dismiss the Petition with costs to the Respondents.

REPLY BY MS. LIGUNYA SANDE FOR THE PETITIONERS

28. The Petitioners' case is brought under Article 22 of the Constitution, that their rights to privacy were violated, It does not matter, counsel submitted, that the Petitioners have been charged both under the Sexual Offences Act and the Penal Code. The Petitioners' case is that their rights to privacy, and not to be subjected to inhuman and degrading treatment, and that the acts of the Respondents were discriminatory of the Petitioners, the PRC Form for instance says that the Petitioners were suspected of being gay men. Counsel relied on the case of **ERIC GITAU Vs. ATTORNEY GENERAL (supra)** that no one should be discriminated against on the basis of their sexual orientation, there should be no sexual discrimination, hence no anal examination.

29. It was also counsel submission's that under Article 2 of the Constitution international law is part of the law of this country once treaties are ratified and that whereas section 36 of the Sexual Offences Act allows medical examination, the issue is whether the medical examination on the Petitioners was proper and reasonable, and whether there was a complaint to warrant culpability.

30. Counsel submitted that even where medical examination is done, it must not be intrusive, otherwise it is degrading. Counsel also reiterated that there was no consent by the Petitioners and that is why the lower court made orders for such examination, besides the signing of Post Rape Case (PRC – Form) which cannot be a document of consent. Counsel therefore urged the Court to allow the Petition in terms of the orders sought.

ISSUES AND ANALYSIS

31. The Petitioners are charged with three counts charged with the offence of;

COUNT I- Practising unnatural offence contrary to section 162 (a) as read with section 162 (c) of the penal Code (Cap 63, Laws of Kenya).

COUNT II- (COMMITTING) an INDECENT ACT with an Adult contrary to Section 11 A of the Sexual

Offences Act 2006 (No. 3 of 2006).

COUNT III – trafficking in obscene literature (publications) Contrary to section 181(1) of the Penal Code (Cap 63, Laws of Kenya).

32. The Petitioners decry violation of their rights to **firstly** freedom from torture and cruel, inhuman or degrading treatment or punishment contrary to section 25 (a) of the Constitution, **secondly**, the right to equality before the law and freedom from discrimination, as guaranteed by Article 27 of the Constitution, **thirdly**, the right to human dignity as guaranteed under Article 28 of the Constitution, **fourthly** freedom and security of the person as guaranteed under Article 29 of the Constitution, **fifth**, the right to privacy contrary to Article 31 of the Constitution, **sixth** the right to freedom of expression as guaranteed by Article 33 of the Constitution, **seventh**, the freedom of association contrary to Article 36 of the Constitution, **eighth** protection of the right to property , **ninth** the right not to be compelled to make any confession or admission that could be used as evidence against the person, contrary to Article 49 (1) (d) of the Constitution, **tenth**, the right to fair hearing as guaranteed by Article 50, and **eleventh**, the right of a detained person or persons in custody to enjoy all rights, contrary to Article 51 of the Constitution.

33. Despite reference to alleged breach or violation of their rights in less than eleven articles of the Constitution the Petitioners complaint or biff against the Respondents relate to the collection of evidence relating to the sexual offences under Counts I & III of the charge. Two related issues arise from this complaint namely:-

(1) whether the medical examination was a violation of the Petitioners rights to privacy and non-discrimination, torture and cruel, inhuman or degrading treatment or punishment, to human dignity and security of the person;

(2) whether the right not to be compelled to make any confessions or admissions that would be used in evidence against the accused person.

34. To answer these issues, it is necessary for the Court to consider the relevant provisions relating to the offences under Counts I and II. The law in this regard is the Sexual Offences Act (Cap 62 A of the Laws of Kenya) and in particular sections 26, 36(1) 36(7) and 42.

35. Section 26, provides that it is an offence to deliberately transmit HIV or any other life threatening sexually transmitted disease, even if that offender is married to that other person, and is on conviction liable to imprisonment of not less than fifteen years but which may be for life. Section 36 however provides for collection of evidence of medical, forensic and scientific nature, and says;

“36 (1) Notwithstanding the provisions of sections 26 of this Act or any other law where a person is charged with committing an offence under the 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 “DNA test, in order to gather evidence and to ascertain whether or not the accused committed an offence”.

34. On matters of consent section 42 of the Sexual Offences Act provides that for the purposes of the Act, a person consents if he or she agrees by choice and has the capacity to make that choice, and where a sample or samples are taken a Minister of State (Cabinet Secretary), any medical officer or other designated person are immune from any action in respect of any injury or loss caused by or in connection with the taking of an appropriate sample in terms of sub- section (5) except where the taking

of the sample was unreasonable or done in bad faith or the person who took the sample(s) was culpably ignorant and negligent. Besides it is an offence to hinder or obstruct the taking of an appropriate sample.

36. In addition, Regulation 5 of the Sexual Offences (Medical Treatment) Regulations 2012, provides that a court may order the collection from such person charged with a sexual offence at such place and subject to such conditions that the court may specify. Regulation 6(3) states that the medical practitioner may conduct examination and treatment on the person who is suspected to have committed a sexual offence.

37. The Regulations do not make reference to consent of an accused person, but where an accused person declines to a voluntary medical examination, the prosecution has an option to seek a court order under Section 36 (1) of the Sexual Offences Act. An appropriate sample or samples taken may consist of 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, and in the case of blood or tissue sample, may be taken from a part of the accused person's body selected by the medical practitioner or designated person concerned in accordance with the accepted medical practice.

38. Counsel for the Petitioners submitted that the Petitioners did not consent to undertake the tests and that the signing of the Post Rape Care Forms did not constitute consent. A record of proceedings is instructive. The Petitioners did not in fact object nor did they protest to the tests. Counsel for the Petitioners at the hearing said:-

“We do not oppose the prosecution’s application and the same be done immediately to avoid holding accused indefinitely. We can come back on 23/02/2015. The accused persons are willing to undergo any test”.

39. It is thus clear to me that the Petitioners willingly and voluntarily consented to the medical examination. The Petitioners were ably represented by Counsel , and if they had any doubt about the Consent, they were at liberty to apply for stay of proceedings and appeal against such decision or order to undergo medical examination.

40. The right to fair trial guaranteed under Article 50 (2) (d) of the Constitution, does not, with respect, extend to excluding an accused from medical examination. **REPUBLIC Vs. JOHN KITHYULU [2013]eKLR**, the court held that an accused persons’ right against self-incrimination constitutes giving oral or documentary testimony against himself, and does not extend to taking of blood samples to prove a particular fact.

41. On the question of fair hearing I agree with the opinion of Majanja Judge in **RICHARD DICKSON OGENDA & 2 OTHERS VS. ATTORNEY GENERAL (2014) eKLR** where he inter *alia* stated:-

“To my mind the privilege of an accused person not to incriminate himself, protects against compulsory oral examination for the purpose of exorting unwilling confessions or declarations implicating the accused in the commission of a crime. The purpose of prosecution against self-incrimination was summed up by the US Supreme Court in MURANDA VS. ARIZONAA 3844, US 4336 (1996) where it observed as follows-

“All of these policies point to one overriding thought. The constitutional foundation underlying the privilege is respect of government, state or federal, must accord to the dignity and integrity of US citizens. To maintain a fair state – individual balance, to require the government to shoulder

the entire load to respect the inviolability of the human personality our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labours, rather than by the cruel, simple expedient of compelling it from its own mouth. In **SCMEMRER VS CALIFORNIA, 389, US 757 (1966)** the United States Supreme Court held that the compulsory taking of blood for analysis of its alcohol and its use in evidence did not violate the defendants privilege against self-incrimination”.

42. In the case of **PENNYSLANACA Vs. NUNITY 4966 US 582**, the United States Supreme Court further held as follows:

“The privilege against self- incrimination protects an accused from being compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature (Sel Maerber Vs. California, 304, US 757, UDS 761 but not from being compelled by the state to produce “real or physical evidence” at 389, us 764”

43. My understanding of both the Kithyulu’s Case, and the above US Supreme Court decisions, is that there is no guarantee that the result of the analysis of the accused person’s blood would match blood that was found at the scene of the crime although there is a chance that it could be exculpatory or inculpatory at the outcome of such a test would not be known until such test was done.

44. Learned Counsel for the Petitioners relied heavily upon the provisions of many international treaties, and instruments, incorporated as a source of Kenya law by virtue of Article 2 of the Constitution of Kenya 2010. Neither the Penal Code, nor the Sexual Offences Act is on trial in this Petition. Reliance upon interpretation of the cited Constitutional provisions on such treaties and covenants such as the international **Covenant on Civil and Political Rights** or the **Convention Against Torture and other Cruel Inhuman or Degrading Treatment** or punishment is of little assistance to the petitioners. The presence or adequacy of evidence is a matter for the trial court and not this Court.

CONCLUSIONS

45. Much time was taken on the question of medical examination of the Petitioners. The medical examination was discussed as an affront to human dignity, cruel, inhuman and degrading treatment.

46. I am not a doctor, nor do I understand much biology. But this much I could be tested on. The human alimentary canal starts from the mouth, ringed with lips, teeth, tongue and salivary glands, leading to the throat, the small intestine, large intestine the digestive system where the necessary bodily nutrients are squeezed and absorbed into the body and surplus waste is passed out through the urinary duct, for waste water and the rectum through the anus for the solid waste.

47. That to my understanding means that neither the mouth nor the anus is a sexual organ. However if modern man and woman have discovered that these orifices may be employed or substituted for sexual organs, then medical science or the purveyors of this new knowledge will have to discover or invent new methods of accessing those other parts of the human body even if not for purposes of medical forensic evidence, but also curative medical examination.

48. Until such discoveries are made and approved for use, medical examination under the Sexual Offences Act, the Narcotics, Drugs and Psychotropic Substances Act, and similar statutes where parts of the human anatomy are ordinarily repositories of bacteria harmful to the health of the person, medical examination under these statutes will, of necessity be intrusive, in the same way as medical practitioners will examine the labia and vagina of a victim of defilement or rape to establish whether there was

penetration. That too is intrusive. That too is an intimate part of the victim's body.

49. So on matters of sexual offences, whether heterosexual or sodomite, medical examination will be carried out on those parts of the body most connected with the sexual act, the **vagina**, or sodomy, the **anus**.

50. Likewise if those parts and the stomach are employed to hide or carry prohibited substances such as sachets of cocaine, the suspects are likely to be given emetic substances to ensure that their valuable cargoes are secreted, or vomited out.

51. So to repeat on matters of sodomy or acts against the order of nature as is envisaged in Section 162 of the Penal Code, rectal or anal examination is according to current medical science, and constitution of the human anatomy , the only way of examination to show whether the anus is dry or has been subjected to application of medical lubricants for ease of anal penetration. The anus, unlike the vagina has no natural lubrication. There is no other part of the human body upon which to carry out the medical examination.

52. Whether the examination was reasonable or not is a question of fact which only the trial court or as the case may be the appellate Court after ascertaining all the facts may determine and, whether or not the person who took the samples was ignorant or negligent.

53. Was there, was there no anal sex" Those are questions before the trial, not the Constitutional, court.

54. The Sexual Offences Act is not being challenged. The issue of damages, only arises where the Court finds that the Petitioners' rights were violated.

55. Having considered the submissions of Counsel for the Petitioners, and the Respondents, the Court in arriving at its decision in matters of this nature, must balance the enforcement of a right in favour of an individual or individuals, against various interests such as the principles and values of the Constitution, and objectives to be achieved, a sense of proportionality, public policy as set out in the relevant statutes, the Penal Code and the Sexual offences Act.

56. In summary, the medical examination of the Petitioners and taking of samples was in accord with the applicable law, and I find no violation of any of the Petitioners rights as contended in the Petition.

57. The Petition dated 3rd September, 2015 and filed on 4th September, 2015 has no merit and is dismissed with a direction that this being public interest litigation, each party shall bear its own costs.

58. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 16th day of June, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Miss Elizabeth Aroko holding brief Ligunya Sande for Petitioners

Miss Lutta for 1st, 3rd and 5th Respondents

Mr. Ayodo holding brief for Mr. Mungai for 2nd and 4th Respondents

Mr. S. Kaunda Court Assistant



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