



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PETITION 160 OF 2012

FRANCIS ANYANGO JUMAPETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1st RESPONDENT

THE COMMISSONER OF POLICE..... 2nd RESPONDENT

JUDGMENT

Introduction

1. The petitioner, **Mr. Francis Anyango Juma** has filed this petition on behalf of his deceased sister, one **Agnes Takaa Juma**, alleging that her right to life was violated by the respondents. The petition dated the 19th of April 2012 seeks the following orders:

(a) An order that inquest proceedings be commenced forthwith before the subordinate (sic) at Nairobi to investigate the surrounding circumstances and the cause of death of AGNES TAKAA JUMA.

(b) General damages

(c) Costs of the suit.

2. The petition is supported by the affidavit of the petitioner sworn on the 19th of April 2012 in which he describes himself as the brother and administrator of the estate of the deceased pursuant to letters of administration issued in his favour.

3. The petition is opposed. A replying affidavit sworn by PC **HERMAN WANJOHI** on the 20th of June 2012 was filed on behalf of the respondents. The petition was argued before me on the 21st of June 2012.

The Petitioner's Case

4. According to the petitioner, the deceased allegedly died in a road traffic accident on the 29th of January 2010. However, the documents available to him in relation to her death contain such contradictions as to lead him to believe that the circumstances of her death were other than as a result of a road traffic accident.

5. The petitioner avers that he filed the petition after being issued with letters of administration *Ad Litem* to pursue a claim under the Law Reform Act and Fatal Accidents Act on behalf of his sister's estate. He

stated that he believed that he would be unable to succeed in his claim for damages as the information in the Police Abstract contradict the information given by the Police to the pathologist at the City Mortuary touching on the death of Agnes Takaa Juma.

6. He contends that if it is true that the deceased died on the spot as alleged by the police, then the police were unable to explain where the body was between 4.40 p.m. when the accident is alleged to have occurred along Mombasa road and 1.20 p.m the following day when the body was first received at the City mortuary. He claims that the police did not explain the particulars of the motor vehicle which took the body to the City Mortuary at 1.20 p.m. He also challenges the entry in the Police Abstract with regard to the time of death. While the Abstract states that the accident occurred at 10.40 p.m., the post mortem form states that the accident occurred at 4.40 p.m.

7. The petitioner alleges that he personally conducted inquiries along Mombasa Road and discovered that no accident actually occurred along Mombasa Road on that date contrary to allegation made by the police. He contends that to-date the police have not explained to his family why the driver of motor vehicle registration number KAV 138K Subaru Forester that was said to have hit the deceased did not record a statement with the police and why he has not been arrested and charged with the offence of causing death by dangerous driving.

8. He states further that he believes his sister may not have died as a result of the road accident; that she had a right not to be subjected to ritual killings or torture or degrading punishment. He asks the court to order an inquest so that the cause of death can be established to enable him file a suit for recovery of damages in respect of the death of his sister.

9. Mr. Ngoge for the petitioner submitted that the respondents had violated the right of the deceased to life contrary to the provisions of Article 26 of the Constitution of Kenya and the international obligations to which Kenya is a party. The respondents have violated this right by refusing to investigate the circumstances leading to her death.

10. Mr. Ngoge submitted that the Police Abstract in relation to the deceased's death was totally at variance with the contents of the replying affidavit filed by the respondents; that the Abstract listed the deponent, PC Wanjohi, as the person who witnessed the accident but in the affidavit he states that he was informed by someone else; that the time of death of the deceased was indicated in the Police Abstract as 4.40 p.m. while the post mortem report indicates that it occurred at 10.40 p.m.

11. Mr. Ngoge contended that the police are involved in a cover up in relation to the deceased's death in order to perpetrate extra judicial killings and asked the court to order that an inquest be held to ascertain the real cause of death.

12. Mr. Ngoge argued further that the government has a duty to protect life and to carry out investigations; that the court should make an order for damages of not less than Kshs 50,000,000.00 against the police for refusing to carry out investigations and for denying the deceased's relatives a chance to go to court to be paid damages.

The Respondents' Case

13. The respondents' case as set out in the affidavit of PC Herman Wanjohi and presented by Ms. Kahoro is that the deceased died as a result of a road traffic accident and that there had not been any cover up as alleged.

14. PC Wanjohi and another officer, one Leah Githaiga, were on duty on the 29th of January 2010 when they were informed at about 10.50 p.m. that there had been a fatal road accident along Mombasa road. They went to the scene and found the body of a female adult and a motor vehicle Reg. No KAV 138 K Subaru Forester parked 10 metres away from the body. They established that the owner of the motor vehicle, a Mr. Zablon Omwoyo Isaaka had knocked down the deceased, one Agnes Takaa Juma.

15. The respondents deny the allegations by the petitioner that no investigations had been carried out. The investigating officer, PC Wanjohi, had proceeded to the scene, seen the body, and detained the motor vehicle. The vehicle had been taken for inspection on the 30th of January 2010 and it had been established that it had a shattered windscreen, dented bonnet, dented and damaged front grills, all consistent with a road traffic accident. The officers had recorded a statement from the driver, and a copy was annexed to the affidavit of PC Wanjohi as **HW-2.**

16. The respondents also aver that the body was taken to the mortuary immediately and not the following day. They explain the discrepancy in the time in the documents- 4.40 p.m. and 10.40. p.m. as being due solely to a typographical error resulting from a direct translation from mother tongue to English, which they say is a common type of error. The error had since been corrected.

17. The respondents also question the filing of this petition two years after the accident, and draw the attention of the court to the fact that the petitioner has already made a demand to the motor vehicle's insurer, indicating that he had accepted that the death was as a result of a road traffic accident. The petitioner had not adduced any evidence to support his allegation that the deceased's death was as a result of a ritual killing.

18. Finally, Ms. Kahoro submitted that the police had done everything in accordance with the law; their file was intact, and indeed, they had carried out investigations into the death and had recommended that the file be placed before a magistrate to be dealt with by way of an inquest. Ms. Kahoro therefore asked the court to dismiss the petition as it has no basis and is an abuse of the court process.

Findings

19. This petition being one for the enforcement of constitutional rights, the petitioner has a duty to show which right has been violated, and the manner in which it has been violated. See the case of **Anarita Karimi Njeru -v- Republic, (1979) KLR 154** where the court stated at Page 156 of the judgment that:

'We would however again stress that if a person is seeking redress from the High Court or an order which invokes a reference to the Constitution, it is important (if only to ensure that justice is done in his case) that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.'

20. Where the petitioner has complied as set out above, the issue for determination by the court is then whether the facts show that there was a violation of the petitioner's, or in this case the deceased's, constitutional rights as alleged by the petitioner.

21. The petitioner's argument is that the deceased may not have died as a result of a road traffic accident; that she may have died as a result of a 'ritual killing'; that the respondents violated her right to life by failing to investigate her death. It is noteworthy that the petitioner does not allege that the respondents were responsible for the death of the deceased. Such failure as can be attributed to them, if any, arises after the death of the deceased. Article 26, which the petitioner relies on, is quite clear in its terms:

26. (1) Every person has the right to life.

(2)

(3) A person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law.

22. There is nothing before the court that suggests that anyone, let alone the respondents, **intentionally deprived** the deceased of her life. The driver of the motor vehicle that hit the deceased has made a statement in which he explains the circumstances under which the deceased died.

23. All that the petitioner accuses the respondents of is failing to investigate the circumstances surrounding the death of the deceased. However, the averments by the petitioner with regard to the alleged failure by the respondents have been controverted, with supporting documents, by the respondents. A statement from the driver of the motor vehicle has been produced to the court, alongside a post mortem examination report and an examination of the motor vehicle involved. All point to the fact, as submitted by the respondents, that the police did indeed carry out their investigations. All the evidence before the court suggests, contrary to the assertion by the petitioner, that the deceased did indeed meet her death as a result of a road traffic accident. Accordingly, any claim with respect to the deceased's death lies in a civil claim in tort, a claim that the petitioner has already initiated in his demand to the motor vehicles insurer.

24. The petitioner asks this court to order the respondents to carry out an inquest into the death of the deceased. The circumstances under which and by whom an inquest will be ordered are provided for under the provisions of **Section 385-388 of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya**. Section 385 empowers a magistrate of the first or second class, or a magistrate specifically empowered by the Chief Justice, to conduct inquests. Section 386 provides that a police officer in charge of a police station, or any other police officer specially empowered by the Minister in that behalf, on receiving information that a person has either committed suicide, been killed by another or by an accident; or has died under circumstances raising a reasonable suspicion that some other person has committed an offence, shall give the information immediately to the nearest magistrate empowered to hold inquests.

25. The provisions with regard to inquests clearly relate to circumstances where the cause of death was unclear, or occurred in police custody or in prison. In the present case, the police, according to the submissions by Ms. Kahoro, had recommended an inquest into the death, even though it appeared clear that the deceased had died in a road traffic accident.

26. The question is whether this court can order the police to carry out an inquest in this case. The powers relating to investigations by the police, previously vested in the Attorney General, are now vested in the Director of Public Prosecutions by Article 157 of the Constitution. Section 388 of the Criminal Procedure Code empowered the Attorney General to direct a magistrate to hold an inquest in the circumstances set out in section 387 of the Code. These powers are now vested in the Director of Public Prosecution and are exercisable in accordance with the powers vested in him by the Constitution.

27. With respect to the carrying out of investigations, it is the DPP who has power to direct the police to carry out such investigations as he deems necessary. Under Article 157(4), the Director of Public Prosecution is empowered to

'direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.'

28. The powers of the DPP are intended to be exercised independently. Article 158(10) provides as follows:

The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.'

29. Clearly, the intention under the Constitution was to enable the Director of Public Prosecutions to carry out his constitutional mandate without interference from any party. This court cannot direct or interfere with the exercise by the DPP of his power under the Constitution or direct him on the way he should conduct his constitutional mandate, unless there was clear evidence of violation of a party's rights under the Constitution, or violation of the Constitution itself.

30. From the evidence before me, there is nothing to justify interference by the court in the functioning of the office of the DPP in respect of this matter. The police did carry out their investigations of the circumstances surrounding the death of the deceased, and there is nothing to suggest that she died from

anything other than a road traffic accident.

31. No violation of constitutional rights has been made out, and in the circumstances, I find no merit in this petition and the same is dismissed with no order as to costs.

Dated, Delivered and Signed at Nairobi this 30th day of July 2012

**MUMBI NGUGI
JUDGE**