



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PETITION NO 466 OF 2012
AS CONSOLIDATED WITH PETITION NO. 416 OF 2012

BETWEEN

JEMIMAH WAMBUI IKERE.....PETITIONER

AND

STANDARD GROUP LIMITED.....1ST RESPONDENT

NATION MEDIA GROUP.....2ND RESPONDENT

RULING

Introduction

1. This Ruling is in respect of the 1st Respondent's preliminary objection dated 6th June 2013 and the same is worded as follows;

“That rights and fundamental freedoms set out in the Bill of Rights in the Constitution of Kenya, 2010 can be enforced by individuals by way of Constitutional Petition only as against the State and state organs and not by an individual as against private person(s) as sought in the Petition herein”.

2. The factual background to this Petition is well articulated in this Court's earlier Ruling dated 6th June 2013. In summary and to put the matters into context, the two Petitions relate to publications run by the 1st Respondent, **The Standard Media Group** in its newspaper, *'The East African Standard'* and the 2nd Respondent, **The Nation Media Group** in its newspaper, *'The Daily Nation'* on 21st February, 2007.
3. In those newspapers, the Respondents run a story detailing the killing of the late Simon Matheri, a man who had been described by the police as a most wanted criminal. Alongside the story, the 1st Respondent had published photos/images of Rahab Wacuka who was the wife of the late Simon Matheri together with images of six Matheri's children namely, David Njoroge, Ann Mueni, Elizabeth Wanjiku Matheri, Caroline Wanjiku Matheri and Michael Korongo Matheri (all minors) who stood beside her. Similarly, on page 3 of the 2nd Respondent's newspaper there appeared pictures of Anne Mueni and David Njoroge (Simon Matheri's children) under a headline titled *'the agony of being the wife of a wanted man'*. On Page 5 it had also depicted images of the child, Anne Mueni, sitting close to a police officer holding a rifle and had the narration, *'Matheri's three years old daughter examines a riffle barrel unaware that her father Simon Matheri Ikere had been shot dead...'* In another edition of 22nd February 2012, the 2nd Respondent published the photos of the minors; Anne Mueni, David Njoroge and Rahab Wacuka together with their mother,

Felistas Wanjiru and juxtaposed them with the images of the late Simon Matheri under the headline '*Police: Matheri family to remain in custody*'. Further, in its publication of 25th February 2007, the 2nd Respondent published a story entitled '*...leaflets target Matheri's close relatives*' alongside pictures of the minor, David Njoroge reading the Nation newspaper with the narration '*...one of Matheri's son goes through a copy of the 'Daily Nation' that reported his father's killings*'.

4. The Petitioners take issue with those publication and allege that the published stories, narrations and images were highly offensive and severely embarrassing to the minors as it prejudiced their innocence and psychological integrity. They further assert that the actions of the Respondents to publish the said stories, pictures and narrations were calculated, intentional, reckless and negligent since they failed to give due consideration to the general interests of the children and safeguard their constitutional rights to privacy and dignity, thus prejudicing their reputation, development and growth. They therefore seek the following reliefs in the consolidated Petition;

“1) A declaration that the minors' rights to privacy and protection from inhuman treatment or degrading treatment as enshrined and contemplated in Section 76(old constitution) and as modified under Article Article 31 of the Constitution (2010), Section 74 (Old Constitution) and as modified under Articles 28 & 29 of the Constitution (2010) all read together with Section 18 and 19 of the Children Act, Article 10 of the African Charter on the Rights and Welfare of the Child, Article 16 of the Convention on the Rights of the Child, Article 17 of the United Nations International Covenant on Civil and Political Rights and Article 12 of the Universal Declaration on Human Rights were violated by the Respondents.

2) A declaration that the minor's right not to be inhumanely treated as enshrined and contemplated in Section 74 of the Old Constitution as modified under Article 29(d) & (f) and Article 53 (1) (d) of the Constitution (2010) as read together with Sections, 13, 18 & 76 of the Children's Act (2001). Article 37 of the Convention of the Rights of the Child, Article 7 of the United Nations International Convention on Civil and Political Rights and Article 16 of the African Charter on the Rights and Welfare of the child were violated by the Respondents.

3) A declaration that the minors' right to human dignity as enshrined and contemplated under Section 74 of the Old Constitution, Article 28 of the Constitution (2010), Article 5 and 16 of the African Charter on the Rights and Welfare of the Child and Article 37 (c) of the Convention on the Rights of the Child were violated by the Respondents.

4) A declaration that the Respondent failed to safeguard uphold the best interests of the child in the manner the newspaper reports were done in respect of their deceased father.

5) A declaration that as a result of the breach of the aforesaid rights, the minors suffered damages, pain and suffering both psychological and emotional.

6) A declaration that the minors are therefore entitled to General, punitive and exemplary damages against the Respondents herein.

7) An order for permanent injunction against the Respondent whether by itself, its servant and/or employees or in any manner howsoever from infringing on the minor's privacy rights and to restrain the Respondent whether by its self, Servants, employees and/or agents from using the minor's photograph of identity or in any manner howsoever or further publishing the minors' photographs or images, name or contents of the Article. (sic)

8) An order for the compensation of each of the six (6) minors as enshrined and provided for under Article 23 (3) (c) of the Constitution made up of General damages for pain and suffering, punitive and exemplary damages.

9) An order directing the Respondents to make a written apology to the minors and their

guardians for infringing on their rights to privacy and the same to be given the same prominence as the publication made by the Respondens while running the aforesaid publications

10) *Costs of the Petition.*

11) *Any other order(s) as the Honourable Court shall deem fit and just.”*

5. All the parties filed written submissions and the same were highlighted before me on 16th August 2013.

The 1st Respondent's submissions

6. Mr. Abidha, represented the 1st Respondent's case in support of its Preliminary Objection. He submitted that rights and fundamental freedoms encapsulated under Chapter 4 of the Constitution cannot be enforced directly by way of a Petition to the High Court against non-state actors. Relying on the case of **Kenya Bus Services Ltd & 2 Others v Attorney General & Others HCC Misc Suit No. 413 of 2005**, he submitted that non-state actors are bound by private laws. He claimed that **Article 19(3)(b)** read together with **Article 2(5)** and **(6)** reveal that the Bill of Rights is not self sufficient and an interpretation of **Article 20** as the basis of the Petitioners' claim is restrictive and will likely occasion confusion in adjudicating breaches of rights within and without the Constitutional provisions. He submitted that **Article 24** demonstrates that rights and freedoms under the Bill of Rights can be limited by law interactions between non-state actors *inter se* on the one hand and State and Non-State actors on the other hand. He relied on the case of **Richard Nduati Kariuki v Hon. Nduati Kariuki and Another, Misc Civil Applic No. 7 of 2006** and **Rapinder Kaur Atwal v Manjit Singh Amrit Peittion No. 236 of 2011** in support of that proposition.
7. It was also his position that it is the duty of the State under the Constitution to observe, respect, promote and fulfil the rights and fundamental freedoms and that duty covers the State apparatus as defined under **Article 260** of the **Constitution**. That the Constitution enjoins all the organs of the State at different levels in exercising the sovereign power of the people, to serve, respect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. He relied on the case of **Uhuru Muigai Kenyatta v Nairobi Star Publications Ltd (2013) e KLR** and **Teitiwannang and Ariong & Others (1987)L.R.C** where it was held that a private individual cannot maintain an action for declaration against another private individual for alleged breach of the fundamental rights provisions of the Constitution where the issue in contest was one relating to defamation in the latter case.
8. He submitted that this Court pursuant to the provisions of **Articles 20(3)** and **(4)**, **23(1)**, **159** and **165** has jurisdiction to enforce the Bill of Rights either under its civil or criminal jurisdiction or as may be provided by any statute and to hear and determine issues of contravention of the Bill of Rights within such claims, more so where a non-state entity is alleged to have occasioned and or caused such violation. He thus submitted that the Constitutional and Human Rights Division can only adjudicate upon issues of breach of the Bill of Rights where the State, State Organ or Officer is alleged to have breached the Bill of Rights and to the extent that such violation is not covered by statute or common law and where the State has failed, neglected, ignored or omitted to formulate a policy or enact a legislation and which failure has opened an avenue for violation of the Bill of Rights and where provisions of a statute, subsidiary legislation or policies contradict the Constitution. He relied on the case of **Uhuru Muigai Kenyatta v Nairobi Star Publications Ltd (supra)** and **Richard Nduati Kariuki v Hon. Nduati Kariuki and Another (supra)** in support of that submission.
9. It was his further submission that even at the international level, no Convention has listed duties of non-state actors and the same has been left to domestic law so as not to open avenues for States to restrict and/or limit the enjoyment of rights to the governed. He relied on the scholarly works of

John H. Knox, Horizontal Human Rights Law, 2007 and urged the court to find that pursuant to **Article 2(5) and (6)**, the Constitution does not impose direct duties on non-state actors in sync with international Human Rights law and practice. He also referred the Court to the practice in the United States, Canada, Germany, Ireland and South Africa where the Courts in those countries have enforced human rights and freedoms within the claims in common law and statutory causes of action and no direct constitutional litigation is allowed against non-state actors.

10. For the above reasons, Mr. Abidha urged me to find that **Article 20** of the **Constitution** does not impose duties on non-state actors that can be enforced by a constitutional Petition and that if any claim arises, then the Petitioner ought to raise the same in an appropriate forum. He thus concluded by urging the Court to dismiss the Petition herein with costs.

2nd Respondent's case

11. The 2nd Respondent, **Nation Media Group** was represented by Mr. Mogere. He was in support of the preliminary objection and submissions made by Mr. Abidha and added as follows;

12. That this Court has in the past been reluctant to impose rights and obligations horizontally as it discourages parties to clothe civil actions as constitutional matters which can lead to abuse of the Court process and principles of law such as those that are based on limitation of time and thus parties should follow the route of a private law remedy where it exists. He thus claimed that there are remedies for the Petitioners in private law and relied on the cases of *Uhuru Muigai Kenyatta v Nairobi Star Publications Ltd (supra)*, *Kenya Bus Services Ltd & 2 Others v Attorney General (supra)* and *Rodgers Mwema Nzioka v Attorney General & 8 Others (2006) e KLR* where it was held that fundamental rights and freedoms are principally vertical and not horizontal and are guaranteed by the Government to individuals.

The Petitioner's submissions

13. The Petitioners opposed the preliminary objection. Mr. Maingi presented the Petitioner's position which is that the Constitution is the supreme law of the land and binds all State organs at both levels of Government. Accordingly, the intention of the drafters of the Constitution was to have both vertical and horizontal application of Constitutional duties as can be seen from the provisions of **Article 20** as read together with **Articles 21** and **260**. That **Article 21** in fact affirms vertical application of the Bill of Rights and that the Constitution has created a 'two dimensional application'. He relied on the South African Constitutional Court cases of *Khumalo & Others v Holomisa (2003) 1 LRC*, *Motala & Another v University of Natal (1995 (3)) BCLR 374* and *Du Plessis & Others v De Klerk & Another (1997) 1 LRC*.

14. He also relied on the Kenyan cases of *Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others (2012) e KLR* where the Supreme Court recognised both vertical and horizontal application of the Bill of Rights and also *Mwangi Stephen Murethi v Toroitich Arap Moi (2011) e KLR*, *Laws Society of Kenya v Betty Sungura Nyabuto & 2 Others (2012) e KLR* and *B.A & Another v The Standard Group Ltd (2012) e KLR*, where the High Court has held that the Constitution binds all persons including the State and private individuals.

Determination

15. Having read the Petition before me, the parties' written submissions and authorities thereto, the issue before me is not as difficult as it has been made to appear. Granted, there are a number of High Court decisions which have dealt with the issue whether a private individual can maintain an action for declarations against another private individual for breach of fundamental rights. In those decisions, the Judges have appeared to differ; some have held that the rights and duties of individuals are regulated by private law and the duties and the duties imposed by the Constitution under fundamental rights provisions are owed by the State and not private individuals. See *Kenya Bus Services Ltd & Another (supra)*, *Richard Nduati Kariuki v Hon. Leonard Nduati (Supra)*,

Alphonse Mwangemi Munga & 10 Others (supra).

16. I am also aware of the decisions from principally South Africa that the Constitution cannot be used as a substitute for primary causes of actions - See **Walters v Transnational Local Council of Port Elizabeth (supra)** and also the Trinidad and Tobago case of **Teitiwinnang and Ariong & Others (supra)** and the Indian Case of **Re Application by Bahadur (supra)**.

17. However, whereas I subscribe to and generally hold the same view, as can be seen from the cases of **Uhuru Muigai Kenyatta v Nairobi Star Publications Ltd (supra)** and **Rapinder Kaur Atwal v Manjit Singh Amrit (supra)** I have held previously that each case must be looked at in its specific and unique circumstances. And that the Court must determine whether there is a constitutional issue raised in the Petition that ought to be addressed by the Court under **Article 23(1)** of the Constitution. That explains the holding in **Uhuru Muigai Kenyatta case** and **Rapinder Kaur Atwal case**. Generally those two cases never raised any constitutional issues that required determination. In **Rapinder Kaur Atwal case** I expressed myself as follows;

“All the authorities above would point to the fact that the constitution is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes. In this case, the former must be true....I must add the following; our Bill of Rights is robust. It has been hailed as one of the best in any constitution in the world. Our Courts must interpret it with all the liberalism they can marshal. However, not every pain can be addressed through the Bill of Rights and alleged violations thereof”.

18. I still hold the same view but the two cases above must be distinguished in this context. **The Uhuru Muigai Kenyatta Case** was based on defamation while that of **Rapinder Kaur Atwal case** was founded on contempt of Court proceedings. In the circumstances, I did not find any violation of the Constitution and held clearly that the Constitution cannot be used as a general substitute where there are other remedies available in law.

19. Turning to the issue whether a private citizen can allege a violation of fundamental rights and freedoms as against another private citizen, I am clear in my mind that the Constitution in **Articles 2 and 20** and the definition of the term 'person' under **Article 260** envisaged both vertical and horizontal application of the Bill of Rights; Vertical application between the citizen and the State and horizontal application between one citizen and another citizen.

20. **Article 2** of the Constitution provides that; **“this Constitution is the supreme law of the Republic and binds all persons and all state organs at both levels of government.”** Similarly, **Article 20** provides that; **“The Bill of Rights applies to all and binds all state organs and all persons”**. **Article 260** has defined a 'person' as **“including a company, association or other body of persons whether incorporated or unincorporated”**

21. My reading of the above provisions of the Constitution reveals that no person is above the Constitution and every person is bound by the provisions of the Constitution including the Bill of Rights. It therefore means that the Petitioners are entitled under **Article 22** to institute a claim in this Court alleging a violation of the minors' rights, whether those violations are by a private citizen or the State. Should a private citizen be found to have violated the rights of another, then this court would have the jurisdiction to grant appropriate relief under the provisions of **Article 23** of the **Constitution**. In so holding I agree with the sentiments expressed by **Danwood Mzikenge Chirwa** in his article **“In search of Philosophical justifications and suitable models for the horizontal application of human rights”**, African Human Rights Law Journal, Vol. 8, (2008) where he stated as follows;

“As noted earlier, certain non-state actors have become as powerful as, or more powerful than states, while many states, especially those in the developing world, have increasingly lost the capacity to control or regulate these actors due to a range of reasons, including resource constraints, dependency on corporations, corruption and the fluidity of certain non-state actors. Where a non-state actor has

the capacity to redress the violation itself, it does not make sense to hold the state alone responsible. This is particularly the case where the non-state actor derives a financial or other benefit from the violation. More importantly, the doctrine of state responsibility does not hold the state responsible for every human rights violation committed by non-state actors. The state will be exonerated from responsibility if it establishes it exercised due diligence to prevent the violation and to respond to them. This means that many violations of human rights may not be accounted for by the state.

22. I wholly agree and I will add that this Court must interpret the law in accordance with the Bill of Rights so that rights are not undermined in the private sphere. By so doing, the non-state actors will become constrained by human rights and will be considered to be bound by them.

23. The South African Constitutional Court in *Motala & Another v University of Natal (1995) 3 BCLR 374* stated as follows;

“It goes without saying that many of the entrenched rights are, by their very nature, exclusively 'vertical' in their operation. But many of them are, in my view, not. For the purpose of furnishing these reasons I need only say that I consider that the rights entrenched in sections 8(1), 8(2) and 32, which are the only entrenched rights in issue before me, are enforceable not only against the state or its organs as defined, but also against individuals, natural or juristic, who may be disposed to threaten them or interfere with the exercise of them.”

24. The emerging jurisprudence in Kenya today tends to lean towards the South Africa stand; that there are instances where the non-state actors can be and have been held liable for breach of fundamental rights and freedoms. The rigid position that fundamental rights and freedoms only applies vertically has been overtaken by the emerging trend in the development of human rights law and litigation. It cannot be assumed any more therefore that the State is the only one capable of violating human rights of the individuals. Sadly, non-state agencies and even private citizens are involved in violation of those rights and I am therefore in agreement with Gacheche J in *Mwangi Stephen Murethii v Daniel Toroitich Arap Moi (supra)* where she stated as follows;

“The major challenge to horizontal application of human rights is the fact that it is a novel area and the courts bear great responsibility of examining each individual situation so as to decide each case on its own merit as horizontal application does not and should not cut across the board. In my humble opinion, it is important to embrace the progressive trends, for that is the only way in which we can move towards developing our jurisprudence to be tandem with other jurisdictions, and obviously with a view to ensuring that fundamental rights are enjoyed in the manner enshrined in our constitution.....I need not point out that this is the beginning of a new dawn for Kenya, one that should be embraced enthusiastically by all and it will not matter who the duty holder is, rather, what matters is who should enjoy the rights as enshrined in the constitution. It must be clear by now that the fundamental rights are applicable both vertically and horizontally, save that horizontal application would apply as a rule but it would be an exception, which would obviously demand that the court to treat on a cases basis by examining the circumstances of each case before it is legitimised”.

25. Majanja J and Mumbi J have similarly, held that the constitution applies both horizontally and vertically. See *Law Society of Kenya v Betty Sungura Nyabuto (supra)* and *D.A.O & Another v The Standard Group Ltd (supra)*.

26. I do not see any reason to depart from this reasoning and it is clear to my mind that there is nothing in the Constitution that draws the distinction between vertical and horizontal application of the Bill of Rights. The Bill of Rights applies to all persons and binds everybody and yet each case must be looked at in its context and circumstances.

27. In the present case, the question is whether the alleged acts violate any of the Petitioners' constitutional rights and that is an issue to be determined at the trial. To close the door at this stage would be unfair and unreasonable.

28. In the light of the foregoing, it follows that the preliminary objection before me is misguided and the same is overruled but costs shall abide the determination of the Petition.

29. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 18TH DAY OF DECEMBER, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Mr. Lempaa holding brief for Mr. Maingi for Petitioners

Mr. Nyaosi holding brief for Mr. Mogere for 2nd Respondent

Mr. Abidha for 1st Respondent

Order

Ruling duly delivered.

ISAAC LENAOLA

JUDGE