



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW CASE NUMBER 343 OF 2016

REPUBLIC.....APPLICANT

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

PROVINCIAL POLICE OFFICER NAIROBI.....3RD RESPONDENT

O. C. P.D, EMBAKASI.....4TH RESPONDENT

O.C.S REUBEN POLICE POST.....5TH RESPONDENT

AND

BERNARD IMOSIA KILEMBA.....INTERESTED PARTY

EX PARTE: ANNE MWENDE

JUDGEMENT

Introduction

1. By an amended Notice of Motion dated 31st August, 2016, the *ex parte* applicant herein, **Anne Mwende**, seeks the following orders:

1. That the honourable judge do grant the order of Mandamus to compel the Inspector General of Police to lodge an inquiry into the negligent/accidental shooting of Anne Mwende that occurred on the 23/10/2006 at Reuben Police Post when she has gone to make a complaint on loss of identity card and as a result of the shooting, she sustained severe spinal injury.

2. That costs of this application be paid by the respondent.

Ex Parte Applicant's Case

2. According to the applicant, following the loss of her Identity Card, on the 23rd October, 2006 she went to report the same to Reuben Police Station Post Nairobi County and was at the police post at round 5.00pm when she was shot by police constable **Bernard Imosia Kilemba**. As a result thereof, she was rushed to Kenyatta National Hospital where she was admitted for 3 days and after a series of X-rays were done, it was discovered that the bullet was lodged in her back close to the spinal column and was therefore surgically in-accessible.

3. The applicant averred that the police constable who shot her entered in an agreement with the parents and accepted liability. The ex parte applicant averred that she reported the incident at the Industrial Area Police Station and was issued with a P3 Form. She also reported to the provincial Police Officer who wrote to the OCPD Embakasi asking him to open an inquiry file to investigate the incident which has never been done todate.

4. The applicant then sought help from Kituo Cha Sheria who wrote a letter to the Provincial Officer Nairobi Area inquiring as to whether any action has been taken regarding the incident but the Provincial Police Station Officer Nairobi Area did not respond to the letter. She then sought the services of an advocate who wrote a letter to the Inspector General of Police on 16th August, 2013 requesting them to open an inquiry file and to carry investigations on the incident but the Inspector General did not respond to the letter and that since the time she was shot todate no action has been taken to carry out inquiries into the incident yet the bullet is still lodged in her spine.

5. It was the applicant's case that she suffered pain and damage and still requires medication as a result thereof.

6. The ex parte applicant's case was that the Inspector General of Police has a duty to her to order an inquiry be conducted into the incident to ensure that justice is not only done but seen to be done.

7. It was submitted on behalf of the Applicant, based on Article 47 of the Constitution, section 87 of the National Police Service Act, Regulation 13 of the National Police Service Commission (Discipline) Regulations, 2015 that the 2nd Respondent who is vetted with authority to initiate disciplinary action against the Interested Party blatantly failed to do so despite numerous reports and complaints made to him over the unlawful and negligent shooting of the applicant.

8. It was submitted that having received the complaints through numerous letters from the ex parte applicant, the 2nd Respondent had the power to issue directions on investigations into the shooting incident under the aforesaid provisions but failed to do so.

9. In support of her case, the ex parte applicant relied on **Kenya National Examinations Council vs. Republic exp Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 [1997] eKLR.**

Respondents' Case

10. In response to the application, the Respondents filed the following grounds of opposition:

1. That no evidence has been rendered on record to support the claim that the respondents have declined to carry out their mandate

2. That the application lacks merit

3. That the application is frivolous, vexatious and an abuse of court process

11. According to the Respondents, it is the statutory duty of the Kenya police to maintain Law and Order in the Republic of Kenya and it is their prerogative duty to investigate crime. These powers of the police are exercised responsibly in adherence to the laws of the land and in good faith.

12. It was the Respondents' case that in the present application the ex-parte applicant has not demonstrated that the alleged shooting incident was reported and an O.B was issued by the Police. They contended that the day to day operations of the police in discharging its mandate of investigating crime requires the applicant in this case to have made an official report in the Occurrence book at the Police station to warrant the commencement of any investigation on the reported complaint as opposed to the alleged letters to the respondents requesting that investigations be conducted on the alleged incident.

13. The Respondents submitted that in the present circumstances so much time has lapsed since the alleged incident of shooting occurred and it is now over 10 years after the incident occurred that the applicant is seeking the intervention of the court. The Respondents contended that they will be faced with myriad of challenges in commencing investigations in the matter for the first time after 10 years have lapsed and that it would be impossible and impracticable to trace the witnesses present during the alleged shooting incident who can give information

14. To the Respondents, the application before this court is full of mischief on the part of the applicant because, if indeed such an incident did occur and the responsible police officer entered into an agreement with the applicants parents as alleged in the application, then all the applicant needed to do was to institute a suit under the Law of Torts and claim compensation for injuries suffered during the shooting incident. In the Respondents' view, it is only logical that the applicant is coming to court 10 years down the line because she sat on her right to file suit for compensation within the statutory period of 3 years until the limitation period to file a suit in negligence lapsed. Therefore it was the respondents' view that this is a backdoor attempt by the applicant to use these proceedings to buy time so that it would look as if investigations on the matter took a long time hence a ground to institute a claim in tort.

15. It was therefore the Respondents' case that they had not declined to carry out their prerogative duty to investigate in accordance with the law but that the failure to investigate was caused by the applicant's failure to make a formal complaint to enable the respondents to commence investigations. The Respondents therefore urged the Court to dismiss the Motion with costs.

Determinations

16. I have considered the application, the affidavits on record, the grounds of opposition and the submissions filed.

17. It is clear that the factual averments made by the applicant have not been controverted as the Respondents have opted to rely on the grounds of opposition.

18. In this application the only substantive order sought by the applicant is an order for *mandamus*.

19. Article 47 of the Constitution provides that:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

20. The said Article was the subject of judicial interpretation in **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR**, in which the Court of Appeal held that:

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs

and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”.

21. In Republic vs. Kenya National Examinations Council ex parte Gathenji & Others (supra) it was held *inter alia* as follows:

“The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

22. Similarly in in Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543 where Goudie, J held, *inter alia*, as follows:

“*Mandamus* is a prerogative order issued in certain cases to compel the performance of a duty...Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual...In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant *mandamus* to compel the fulfilment...Whereas *mandamus* may be refused where there is another appropriate remedy, there is no discretion to withhold *mandamus* if no other remedy remains. When there is no specific remedy, the court will grant a *mandamus* that justice may be done...In *mandamus* cases it is recognised that when statutory duty is cast upon a Crown servant in his official capacity and the duty is owed not to the Crown but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of *mandamus* to enforce it.”

23. Section 87 of the *National Police Service Act*, No. 1A of 2011 provides as hereunder:

(1) *There is established an Internal Affairs Unit (hereinafter referred to as “the Unit”) of the Service which shall comprise of—*

(a) *an officer not below the rank of assistant Inspector-General who shall be the Director;*

(b) a deputy director; and

(c) such other staff as the Unit may require.

(2) The functions of the Internal Affairs Unit shall be to—

(a) receive and investigate complaints against the police;

(b) promote uniform standards of discipline and good order in the Service; and

(c) keep a record of the facts of any complaint or investigation made to it.

(2A) Without prejudice to subsection (2), the unit may where necessary investigate and recommend appropriate action in respect of any found engaging in any unlawful conduct.

(3) In the performance of its functions, the Unit shall be subject to Article 47 of the Constitution.

(4) The Unit shall investigate misconduct and hear complaints—

(a) from members of the Service or members of the public;

(b) at the direction of a senior officer;

(c) on its own initiative; or

(d) on the direction of the Inspector-General; or

(e) at the request of the Independent Police Oversight Authority.

24. It is therefore clear that in performing its functions hereinabove, the Internal Affairs Unit must adhere to the principles of fair administrative action encapsulated in Article 47 of the Constitution which mandate the Unit to ensure that it carries out its said functions expeditiously, efficiently, lawfully and in a manner that is reasonable and procedurally fair.

25. The applicant has exhibited copies of documents including Police Form 3 (P3 Form) and letters written on behalf of the Provincial Police Officer showing that as early as February, 2007, she had reported the matter to the police. The Respondents contend that since no OB record of the incident was made, the investigations cannot be conducted. With due respect, the applicant, it has not been shown, is a police officer hence the OB was not in her custody. Having made a report in whatever manner, it was upon the Respondents, in line with its mandate as a service to take a pro-active action in the matter and undertake the necessary investigations. The Respondents cannot be permitted to get away with the failure on its part to adhere to the provisions of Article 47 of the Constitution and contend that due to time lapse, an inquiry is not feasible.

26. Under section 7(2)(j) of the **Fair Administrative Action Act, 2015**, a court or tribunal under subsection (1) may review an administrative action or decision, if there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law. In this case, the Respondents are expected to expeditiously deal with complaints made against the police. To take more than 10 years before addressing a complaint and then rely on such lapse of time to decline to carry out a statutory duty in my view is irrational and unlawful.

27. Considering the evidence on record, it is my view and I find that there is no lawful or justifiable cause why the Respondents did not take any action pursuant to the complaint made by the ex parte applicant.

28. In the premises, I find merit in the Motion dated 31st August, 2016.

Order

29. In the result, an order of *mandamus* is hereby issued compelling the Inspector General of Police to lodge an inquiry into the shooting of **Anne Mwendu** that occurred on the 23rd October, 2006 at Reuben Police Post. The said inquiry is to be commenced within 30 days from the date of service of this order upon the Inspector General of Police.

30. The applicant will have the costs of this application.

31. Orders accordingly.

Dated at Nairobi this 24th day of March, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ilako for Mr Ndhiwa for the Applicant

CA Mwangi