



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO 240 OF 2012**

**A.N.N.....PETITIONER**

**VERSUS**

**THE HON ATTORNEY GENERAL ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The petitioner has filed this petition alleging violation of his constitutional rights to dignity, privacy and freedom from torture and degrading treatment in violation of his rights under Articles 28, 29(f) and 31 of the Constitution. He alleges that these violations occurred when he was arrested and stripped naked in public by police officers attached to the Thika and Makongeni Police Stations in Thika Town, Kiambu County.
2. In the petition dated 6<sup>th</sup> June 2012, the petitioner seeks the following orders:
  - a. ***A declaration that the police violated his fundamental rights and freedom in their inhuman, degrading and cruel treatment in stripping him in public in the view of male and female police officers, employees of media houses and the public thereby losing human dignity in violation of Article 29(f) and Article 28 of the Constitution.***
  - b. ***A declaration that the police violated the search, checking and touching (sic) by the female police officer was in violation of his right to privacy under Article 31(a) and the right to human dignity as provided by Article 28 of the constitution.***
  - c. ***A declaration that the broadcasting and publishing the petitioner's private affairs and personal life was in violation of the right to privacy on unnecessarily revealing his private affairs as provided by Article 31(c) of the Constitution.***
  - d. ***A declaration that by the police threatening, ridiculing, teasing, pulling his hair and***

*intimidating him amounted to a subjecting him to torture that caused him to be psychologically affected and the same amounted to being violent on him in contravention of Article 29© and Article 29(d) of the Constitution.*

- e. A declaration that by the police denying the petitioner the right to communicate with his family, friends or counsel was in violation of Article 49(1)(c) of the Constitution*
- f. Compensation for violation of fundamental rights and freedoms.*
- g. Costs of this petition*
- h. Any other relief the court may deem fit to grant.*

### **The Petitioner's Case**

3. In presenting the petitioner's case, Mr. Mathenge relied on the petition dated 6<sup>th</sup> June 2012, the supporting affidavit sworn by the petitioner on the same date, the further affidavit sworn on 28<sup>th</sup> September 2012 and written submissions dated 8<sup>th</sup> February 2013 as well as a further list of authorities dated 14<sup>th</sup> March 2013.
4. The events which form the basis of the petitioner's complaint took place on 14<sup>th</sup> January 2011 at the Makongeni Police Stations, Thika, Kiambu County. According to the petitioner, he was stripped naked in the full glare of the media. He has annexed to his further affidavit annexure **ANN1** which comprises photographs taken on the material date allegedly extracted from a clip ran by Citizen T.V. The petitioner alleges that the police stripped him naked on the assertion that they wished to identify his gender in order to put him in custody for an alleged assault committed on 20<sup>th</sup> April 2010.
5. The petitioner alleges that the acts of the police officers in stripping him naked in the presence of the media were unlawful and caused him to suffer psychological discomfort and depression necessitating Counselling session; that he was attended by a doctor on 12<sup>th</sup> January 2011 who opined that the petitioner had a Gender Identity Disorder.
6. Mr. Mathenge submitted that the acts of the police in stripping the petitioner in public and in the presence of the media amounted to a violation of his rights under various Articles of the Constitution namely Article 28 on the right to human dignity, 29 on the right not to be subjected to cruel and degrading treatment, 31 on the right to privacy and 49 on the rights of an accused person. He submitted further that they also contravened Articles of international conventions and of Articles 243, 244 and 259 with regard to the acts of the National Police Service. Mr. Mathenge asked the court to find that the petitioner had made out a case of violation of his rights and award him damages for the violations.
7. The petitioner relied on several authorities, among them Anarita Karimi Njeru -vs- Republic, Nelson Akhahukwa Munyela -vs- The Attorney General High Court Petition No 783 of 2003 and Rev. Lawford Ndege Imunde -vs- Attorney General High Court petition No 783 of 2008.

### **The Respondent's Case**

8. The respondent did not file any affidavit in response to the petitioner's case and does not dispute the occurrence of the events that form the basis of the petition.

9. He did, however, file grounds of opposition dated 28<sup>th</sup> November 2012 in which he contends that the petition is an abuse of the court process, is misconceived and unfounded; that it is fundamentally defective, and ought to be struck out with costs; that the petitioner lacks capacity to originate and prosecute the petition; and that the police were executing a statutory duty when they arrested, detained and instigated the prosecution of the petitioner.
10. Mr. Moimbo, Learned State Counsel, submitted that under the provisions of section 26 as read with section 28 of the Mental Health Act, Chapter 248 of the Laws of Kenya, the petitioner has no capacity to bring this petition as the Act requires that where an individual has a mental disorder, he should come to court through a guardian appointed by the court. He referred in this regard to annexure **NM 5** in the affidavit sworn by the petitioner in support of the petition, which is a letter by Dr Muiruri. He submitted that Dr. Muiruri indicates that the petitioner has what the doctor terms as a Gender Identity Disorder. According to Mr. Moimbo, on the basis of these documents, the petitioner should have come to court through a guardian.
11. The respondent also takes issue with the photographs annexed to the petitioner's further affidavit. Mr. Moimbo argued that the photographs, which were allegedly obtained from a video clip aired on Citizen T.V, fall in the category of edited video clips under section 105(a) and (b) of the Evidence Act and are inadmissible as they were not accompanied by the certificate of the person who had taken them. He contended further that it was not possible, from a casual look, to tell who is who in the photographs, and he asked that the entire affidavit be expunged.
12. With regard to the submission by the petitioner that the reason why the officers were stripping him was to ascertain his gender, Mr. Moimbo submitted that the police had no capacity to ascertain his gender, and that is why, as illustrated by the P3 form from Makongeni Police Station annexed to the petitioner's affidavit as **NN2**, they had referred him to the Medical Officer of Health, Thika District, for gender assessment.

## Rejoinder

13. In his reply to the respondent's submissions, Mr. Mathenge submitted that the assertion by the respondent that the petitioner is of unsound mind is unsubstantiated; that despite suffering from Gender Identity Disorder, the petitioner is of sound mind. He called in aid Article 22 (1) and (2) on the right of any person to bring a petition before the court alleging violation of a right or fundamental freedom.
14. With regard to the admissibility of the petitioner's further affidavit and the photographs annexed thereto, Mr. Mathenge referred the court to Article 159(2)(d) on the issue of procedural technicalities. He submitted, however, that in the event that the further affidavit is expunged, the petitioner would rely on the affidavit in support of the petition which was still on record; that the fact that the petitioner was stripped was not disputed; and that the page from the Investigation Diary (**NM1**) has an entry at the foot indicating that the petitioner was searched by a female even though he is a male; that the petitioner was at the time dressed as a female but has a Gender Identity Disorder, and his rights should not be violated on this account.

## Determination

15. The facts of this matter are undisputed and are as set out in the petitioner's affidavit in support of

the petition sworn on 6<sup>th</sup> June 2013. In the said affidavit, the petitioner avers that he is a male adult of sound mind and competent to swear the affidavit; that he is a resident of [particulars withheld] Estate within Thika Town where he earns a living by selling farm produce at the market in Thika town; that he was arrested on 14<sup>th</sup> January 2011 by police officers attached to Makongeni Police Station on allegations that he had assaulted one Elizabeth Wambua Mutio.

16. The petitioner alleges that while he was held in the police station, he was undressed by male and female officers in public and in the full glare of the media whom he alleges had been summoned by the police and the public; that following his arrest and before being placed in the cells, although he is a man, he was searched by a female police officer, one Lucy; that the police officers touched him all over his body, pulled his hair, beat him and teased him with a view to humiliating him in public and threatened him with guns in order to compel him to co-operate with them; that the police acted as they did allegedly in order to establish his gender which he avers they cannot do as only a medical doctor is capable of gender assessment.
17. The petitioner has contended that as a result of the treatment he received at the hands of the police, he suffered such psychological stress that he has had to undergo treatment at the Thika Level 5 Hospital between 24<sup>th</sup> May 2011 and 13<sup>th</sup> October 2011. He also states that as a businessman, he has lost friends and business as a result of the broadcast of the events at Thika as the impression created is that he is a man of low morals and low social standing. He has also deponed that charges for the offence of assault were preferred against him in the Chief Magistrates Court at Thika in Criminal Case Number 323 of 2011.
18. While the petitioner's Counsel did inform the court, in the course of his submissions at the hearing of this petition, that the petitioner was dressed as a woman at the time of his arrest, neither the petitioner nor the respondent addressed in their pleadings the question why the police who arrested the petitioner had doubts about his gender, and why it was necessary to ascertain it. The only reference to a possible reason is the report of Dr. Muiruri S. M. dated 14<sup>th</sup> January 2012 in which he opines as follows:

***'A. already identifies himself/herself as female, hence the dress code. This is called Gender Identity Disorder (GID).'***

19. Dr. Muiruri then opines, while referring to the petitioner with both personal pronouns for male and female (his/her), that what the police should have done was to refer the petitioner to a medical provider for gender verification, *'hence respecting his/her privacy'*.
20. He then notes as follows in his report:

***N/B; Gender Identity Disorder (GID) is a condition associated with experience of significant discomfort with the biological sex/gender assignment at birth (gender dysphoria). People with GID desire to live as members of the opposite sex and often dress and use mannerisms associated with the other gender. The cause of the disorder is unknown but hormonal influences in-utero, genetics and environmental factors (such as parenting) are suspected to be involved.'***

21. The conclusion that one may draw from the acts of the police considered in light of the above opinion is that at the time of his arrest, the petitioner was dressed in a manner that would have led to doubts about his gender. While the petitioner does not state as much directly, it is implicit from the documents attached to his petition that he attributes his appearance and or manner of dress to his mental condition, GID. Since the respondent has not filed any affidavit in response to

the petition, there is nothing before me to indicate the basis on which the police doubts about the petitioner's gender arose.

22. At any rate, the facts disclose that he was stripped or compelled to strip, and was searched by a female police officer. The petitioner asserts that this was in violation of his right to dignity under Article 28, to his right to privacy under Article 31, to freedom from torture and degrading treatment under Article 29(f), and of his rights as an accused person under Article 49 of the Constitution.
23. While the respondent do not dispute the facts as contained in the petitioner's affidavit, they submit that, because of his mental condition, he does not have legal capacity to file this petition, and should have done so with the assistance of a guardian.
24. In my view therefore, two issues arise for consideration in this matter:
  - i. ***Whether, as a person who suffers from Gender Identity Disorder, the petitioner has the mental capacity to file this matter without a guardian.***
  - ii. ***Whether the acts of the respondent following the petitioner's arrest violated his rights under the Constitution.***

### **Mental Capacity**

25. I have set out above Dr. Muiruri's opinion with regard to the petitioner, particularly his observations that the petitioner suffers from a condition known as Gender Identity Disorder (GID). There is no evidence before me with regard to the impact of GID on a person's capacity with regard to other matters. GID appears to affect a person's perception of self it,s terms of gender so that, as in this case, a man perceives himself as a woman and acts accordingly.
26. The respondent has contended that the petitioner lacks capacity to file this petition, and have relied on the provisions of Section 26 and 28 of the Mental Health Act. However, my reading of these sections, which provide for the circumstances in which orders may be made with regard to a person with a mental disorder or with regard to his guardianship or estate, do not assist in a determination of the mental capacity of the petitioner.
27. However, on the material before me, (bearing in mind that no authorities or articles were placed before me by the respondent on the basis of which I could make any findings with regard to the mental capacity of the petitioner) I can find no basis for the allegation that the petitioner has no capacity to lodge this petition. There is nothing before me that indicates that GID affects one's mental capacity so as to bar him or her from bringing a matter before the court without the aid of a guardian. I therefore find and hold that the petition is properly before me.

### **Violation of Rights**

28. The petitioner has alleged, and it has not been denied, that police officers stripped him naked in public, and that he was searched by a female police officer while at the Makongeni Police Station in violation of his right to dignity under Article 28 and his right to privacy under Article 31 of the Constitution. The petitioner has annexed photographs to his further affidavit, which, as correctly

submitted by the respondents, these photographs do not comply with the rules of evidence under the Evidence Act with regard to their production and I will therefore not place any reliance on them. However, as the averments of fact have not been disputed, I will consider the issue of violation of rights on the basis of those facts.

## Right to Dignity

29. Article 28 provides that ***‘Every person has inherent dignity and the right to have that dignity respected and protected’***. While it does not define the term ***‘dignity’*** or ***‘human dignity’***, the Constitution of Kenya underscores the place of human dignity in the enjoyment of all other human rights. This is in keeping with the international treaties and jurisprudence in other jurisdictions which place human dignity at the centre of and as the basis for recognition and protection of all human rights.

30. The Preamble to the Universal Declaration on Human Rights (UDHR) proclaims that:

**Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,.....**

**Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.’**

31. At Article 1, the UDHR states that ***‘All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.’***

32. Both the **international Covenant on Civil and Political Rights (ICCPR)** and the **International Covenant on Economic, Social and Cultural Rights (ICESCR)** recognise that human beings have inherent dignity: the preambles of these covenants are similar and read in part:

***“Considering that, in accordance with the [principles proclaimed in the Charter of the United Nations](#), recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Recognizing that these rights derive from the inherent dignity of the human person...”***

33. At the regional level, the **African Charter on Human and People’s Rights** recognises and guarantee human dignity. Article 5 of the Charter provides that:

***Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman of degrading punishment and treatment shall be prohibited.’***

34. As a signatory to the above international and regional conventions, which are now expressly incorporated into municipal law by virtue of Article 2(6) of the Constitution, the Kenyan State and all its agents are bound to respect the inherent dignity and worth of all citizens. Indeed, the Constitution provides that all persons respect the rights contained in the Bill of Rights.

35. As noted above, the Constitution of Kenya now contains specific recognition and protection of the inherent dignity of everyone as a human right. More than this, it has set out in various provisions the importance of the right to dignity, emphasising that recognition and protection of the right is binding on all.

36. Article 10 of the Constitution, contains the national values and principles of governance. This article is binding on all State organs and State officers in the exercise of their functions. The national values and principles enumerated at Article 10 (2) include human dignity, social justice and inclusiveness. At Article 19 (2), the Constitution stipulates that the reason for recognising and protecting human rights and fundamental freedoms is ***'...to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.'*** These provisions, when read together with the express provisions of Article 28 set out above, make it clear that the protection of the dignity of all human beings is at the core of the protection of human rights under the Constitution.

37. In addition, Article 27 of the Constitution sets out the non-discrimination provisions of the Constitution as follows:

***27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.***

***(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.***

***(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.***

***(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.'***

38. I would be so bold as to hazard that the provisions of Article 27 and 28 of the Constitution are the foundation on which the rest of the Constitution is build. Regardless of one's status in life, gender, ethnic or social origin, one has inherent dignity, is entitled to equal treatment before the law, and to have equal protection and enjoyment of all the rights set out in the Constitution.

39. I am persuaded by and find support in this view from several decisions of courts in South Africa, whose Constitution, in terms almost identical to Article 28 of the Constitution of Kenya, provides at Section 10 that;

***Everyone has inherent dignity and the right to have their dignity respected and protected.***

40. In both Kenya and South Africa, human dignity is recognised not only as a value that underlies a democratic society, but it is a right capable of enforcement. In ***Dawood and Another v Minister of Home Affairs and Others (CCT35/99) [2000] ZACC 8*** the Constitutional Court of South Africa stated that:

***'Human dignity informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable***

**and enforceable right that must be respected and protected. In many cases however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.**

41. In *S v Makwanyane and Another (CCT3/94) [1995] ZACC 3*, the Constitutional Court, in determining the propriety of the death penalty, stated that:

**“The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter Three. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does...”**

42. The Constitutional Court in *Barkhuizen v Napier (CCT72/05) [2007] ZACC 5* has also stated that the right to dignity includes the right to determine one’s own affairs. The court at paragraph 57 stated that:

**“Self-autonomy, or the ability to regulate one’s own affairs, even to one’s own detriment, is the very essence of freedom and a vital part of dignity.”**

43. This position was further clarified in *Mayelane v Ngwenyama and Another (CCT 57/12) [2013] ZACC 14* when the Court stated that:

**“...the right to dignity includes the right-bearer’s entitlement to make choices and to take decisions that affect his or her life – the more significant the decision, the greater the entitlement. Autonomy and control over one’s personal circumstances is a fundamental aspect of human dignity.”**

44. It is thus apparent that human dignity is the foundation for recognition and protection of human rights, which, as provided at Article 19(3)(a), **‘belong to each individual and are not granted by the State.’** Regardless of one’s status or position, or mental or physical condition, one is, by virtue of being human, worthy of having his or her dignity or worth respected. Consequently, doing certain things or acts in relation to a human being, which have the effect of humiliating him or her, or subjecting him or her to ridicule is, in my view, a violation of the right to dignity protected under Article 28.

45. In this matter, the petitioner was arrested on suspicion of having committed the offence of assault in 2010. Something in his appearance or mode of dress appears to have led to some doubts about his gender and it led to the police referring him to the Thika District Hospital for gender assessment, according to the P3 Form attached to the petitioner’s affidavit, on 19<sup>th</sup> January 2011. This, in my view, was the proper course for the police to follow. However, upon his arrest, instead of referring him to the hospital for gender assessment immediately, they stripped him or forced him to strip in full view of the public, and from the petitioner’s averments, in front of the media, as a result of which the incident was broadcast on national television.

46. The question is whether it was lawful, necessary, or in keeping with the petitioner’s rights to strip him in front of third parties and the media. Whether he was a man or a woman, and whether his appearance or mode of dress raised doubts about his gender, was it proper to subject him to a public search?

## The Right to Privacy

47. In considering the issue of the search conducted on the petitioner, I must also bear in mind the provisions of Article 31 of the Constitution which guarantees to everyone the right to privacy by providing as follows:

**31. Every person has the right to privacy, which includes the right not to have—**

**(a) their person, home or property searched;**

48. I believe that the right to privacy, particularly with regard to the right not to have one's privacy invaded by an unlawful search of the person, is closely linked with the right to dignity. I recognise, however, that the right to privacy may be limited by law as provided under Article 24, and this limitation, which permits searches of persons and property, can be found in various penal statutes including the Criminal Procedure Code.

49. Section 25 of the Criminal Procedure Code permits a police officer to search an arrested person, while Section 27 of the Criminal Procedure Code makes specific provision with regard to the search of a woman by providing that:

***'Whenever it is necessary to cause a woman to be searched, the search shall be made by another woman with strict regard to decency.'***

50. However, even though no specific provision is made with regard to searches of male persons, whatever the gender or apparent gender of an arrested person, the operative words with regard to personal searches by police officers, in my view, are regard to decency and respect for the dignity of the arrested person. No one should be subjected to a search that is intended or has the effect of humiliating the suspect.

51. By subjecting the petitioner to a search in front of members of the public and of the media, the police appear to have had the intention of humiliating him in a manner to suggest that their actions were directed at him specifically because he was dressed as a woman while they had reason to believe that he was male. It is regrettable (and, in my view, actionable had the petitioner chosen to join the media houses that broadcast the incident as respondents in this petition) that the media who were present participated in the assault on the petitioner's dignity and privacy by broadcasting the incident as the petitioner avers.

52. I can find no justification for the conduct of the police in this matter. As a human being, the petitioner is entitled to have his dignity respected and protected. Whatever his choices or his conduct in relation to his mode of dress, regardless of the fact that he perceives himself as a woman, though a man, he still retains the inherent worth and dignity to which all humans are entitled, and which our Constitution guarantees to everyone, and he was still entitled to his privacy. It is wrong and unlawful, and in my view it diminishes all of us, when officers of the state, members of the public and of the media, find it fitting to humiliate and degrade a person because of his mode of dress or a mental condition that he may have no control over by subjecting him to a personal, humiliating, public search.

53. I therefore find and hold that the respondent violated the petitioner's right to human dignity and privacy as contained in Articles 28 and 31 of the Constitution.

### **Violation of Article 29(f)**

54. The petitioner has also alleged violation of Article 29(f) and Article 49 of the Constitution. Article 29 provides that

**29. Every person has the right to freedom and security of the person, which includes the right not to be—**

**(f) treated or punished in a cruel, inhuman or degrading manner.**

55. The pleadings and submissions of the petitioner with regard to the violation of this Article relate to the search by a female police officer, one Lucy. As noted above, the law requires that a woman who has been arrested should be searched by another woman, with strict regard to decency. In this case, given the fact that the petitioner was dressed as a woman, it was, in the circumstances, reasonable for the search to be conducted by a woman.

### **Violation of Article 49**

56. The petitioner has also alleged violation of his rights under Article 49 of the Constitution. Article 49 contains the constitutional guarantees to arrested persons, including the right to be produced in court within 24 hours and the right to bail. Though the petitioner has alleged violation of this right, there is no evidence that supports the allegation of violation, and I therefore make no findings with regard thereto.

57. The upshot of my findings is that the respondent is liable for the violation of the petitioner's rights under Article 28 and 31 by police officers attached to Makongeni Police Station, and the petitioner is entitled to damages for the violations.

58. The violations were part of the same transaction which took place on the same day, and I make a global award of Kshs 200,000.00.

59. The petitioner shall also have the costs of this petition.

**Dated, Delivered and Signed at Nairobi this 14<sup>th</sup> day of June 2013**

**MUMBI NGUGI**

**JUDGE**

**Mr. Mathenge instructed by Mbiyu Kamau & Co. Advocates for the Petitioner**

**Mr. Moimbo, Litigation Counsel, instructed by the State Law Office for the Respondent**



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