

C.K.(A CHILD) through Ripples International as her guardian and Next friend) & 11 others v COMMISSIONER OF POLICE/INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE & 3 others [2013] eKLR



REPUBLIC OF KENYA

High Court at Meru

Petition 8 of 2012

C.K.(A CHILD) through Ripples International as her guardian and Next friend).....	1 ST
PETITIONER	
F.K.(A CHILD)through Ripples International as her guardian and Next friend).....	2 ND
PETITIONER	
M.M..(A CHILD)through Ripples International as her guardian and Next friend).....	3 RD
PETITIONER	
E.K.M.(A CHILD)through Ripples International as her guardian and Next friend).....	4 TH
PETITIONER	
P.K.(A CHILD)through Ripples International as her guardian and Next friend).....	5 TH
PETITIONER	
M.N.M.(A CHILD)through Jane Mwakiuma as her guardian and Next friend).....	6 TH
PETITIONER	
Y.N.(A CHILD)through Gladys Ng'inombabu as her guardian and Next friend).....	7 TH
PETITIONER	
L.W.(A CHILD)through Ripples International as her guardian and Next friend).....	8 TH
PETITIONER	
PAMELA WARUGURU.....	
.9 TH PETITIONER	
I.K(A CHILD)through Ripples International as her guardian and Next friend).....	10 TH
PETITIONER	
T.M.(A CHILD)through Agnes Gakii as her Guardian and Next friend).....	11 TH
PETITIONER	
RIPPLES INTERNATIONAL.....	12 TH
PETITIONER	
VERSUS	
THE COMMISSIONER OF POLICE/INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE.....	1 ST
RESPONDENT	
THE DIRECTOR OF PUBLIC PROSECUTIONS.....	2 ND
RESPONDENT	
MINISTER FOR JUSTICE, NATIONAL COHESION & CONSTITUTIONAL AFFAIRS.....	3 RD
RESPONDENT	
AND	

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS.....AMICUS CURIAE

J U D G M E N T

The twelve petitioners through a petition dated 11th October, 2012 brought under Articles 2, 10, 19, 21, 22, 23, 27, 28, 29, 48, 50(1) and 53 of the Constitution of Kenya, 2010, Article 1, 2, 3, 5, 7, 8 and 10 of the Universal Declaration of Human Rights, Articles 1, 2, 3, 4, 16 and 27 of the African Charter on the Rights and Welfare of the Child, Articles 2, 3, 4, 5, 6, 7 and 8 of the African Charter of Human and Peoples Rights, Section 3, 5, 15 and 22 of the Children Act 2001 (Chapter 141) of the Laws of Kenya, the Sexual Offences Act, 2006 (Act No. 3 of 2006) and the Police Act (Chapter 84) of the Laws of Kenya seek the following reliefs:-

1. A declaration to the effect that the neglect, omission, refusal and/or failure of the police to conduct prompt, effective, proper and professional investigations into the first eleven petitioners' complaints of defilement violates the first eleven petitioners' fundamental rights and freedoms-

(a) to special protection as members of a vulnerable group'

(b) to equal protection and benefit of the law;

(c) not to be discriminated against'

(d) to inherent dignity and the right to have the dignity protected;

(e) to security of the person

(f) not to be subjected to any form of violence from public or private sources or torture or cruel or degrading treatment; and

(g) to access to justice as respectively set out in Articles 21(1), 21(3), 27, 28, 29, 48, 50(1) and 53(1) (c) of the Constitution.

2. A declaration to the effect that the neglect, omission, refusal and/or failure of the police to conduct prompt, effective, proper and professional investigations into the first eleven petitioners' respective complaints violates the first eleven petitioners' fundamental rights and freedoms under-

(a) Articles 1 to 8 (inclusive) and 10 of the Universal Declaration of Human Rights,

(b) Articles 2, 4, 19, 34 and 39 of the United Nations Convention on the rights of the child;

(c) Articles 1, 3, 4, 16 and 27 of the African Charter on the Rights and welfare of the child, and

(d) Articles 2 to 7 (inclusive) and 18 of the African Charter on Human and people's rights.

3. An order of mandamus directing the 1st respondent together with his agents, delegates and/or subordinates to conduct prompt, effective, proper and professional investigations into the 1st to 11th petitioners' respective complaints of defilement and other forms of sexual violence.

4. an order of mandamus directing the 3rd respondent together with his agents, delegates and/or subordinates to-

(a) formulate the National Policy Framework envisioned by Section 46 of the Sexual Offences Act, 2006 through a consultative and participatory process, ensuring its compliance with the Constitution and to disseminate, implement and widely and regularly publicize the National Policy Framework, and

(b) Make and/or cause the National Policy Framework in (a) above to be made a mandatory component of the training curricular at all police training colleges and institutions.

5. An order of mandamus directing the 3rd respondent together with his agents, delegates and/or subordinates to implement the guidelines provided in the Reference Manual on the Sexual Offences Act, 2006 for prosecutors, Sections 27-36, excepting section 34.

6. An order of mandamus directing the 1st respondent together with his agents, delegates and/or subordinates to implement Article 244 of the Constitution in as far as it is relevant to the matters raised in this Petition.

7. An Order directing the Respondents to regularly and/or account to the Honourable Court, for such period as the Honourable court may direct, on compliance and/or implementation of the orders set out in paragraphs (3) to (6) (inclusive) above.

8. The costs of and incidental to this petition

9. such other, further, additional, incidental and/or alternative reliefs or remedies as the Honourable court shall deem just and expedient.

The learned State Counsel for the 1st and 3rd respondents, Mr. Menge filed grounds of opposition dated 6th March, 2013 and the 2nd respondent filed replying affidavit dated 17th January, 2012.

On the 3rd December, 2012 leave was granted to FIDA to be enjoined as party in this petition. On 11th March, 2013

Kenya National Commission on Human Rights was made a party to this matter and allowed to appear as Amicus Curiae. On the same day the court directed that the respondents who had not put in their written submissions do so within a month and this matter was set down for highlighting on 30th April, 2013.

On 30th April, 2013 the Counsel for the 1st and 3rd respondents had not filed his submissions, whereas the State Counsel for the 2nd respondent filed his submissions on the same day. The Advocate for the petitioners, FIDA and Kenya National Human Rights relied on their submissions filed on 11th February, 2013 and 27th February, 2013. The petitioners' submissions were filed on 11th February, 2013. All parties opted not to highlight on their aforesaid submissions.

I have carefully considered the petition and response by 2nd respondent, the affidavits in support and in opposition. The court has carefully also considered the written submissions and authorities in support and relevant provisions of law and the parties opposing positions.

The petitioners case in brief is that the eleven(11) petitioners, C.K., F.K, M.M, E.K, M.P.K, M.N.M;N.N, L.W, P.W, I.K, and T.M are Kenyan citizens by birth and residents of the Meru County in the Republic of Kenya. That each of the said petitioners were on all material dates relevant to these proceedings a "Child" and a victim of "Child abuse" and "defilement" as respectively defined under the Children Act, 2001 and the Sexual Offence Act, 2006. That each of the said 11 petitioners is averred was at all material times to these proceedings entitled to each and all fundamental rights and freedoms set out or implied in the Constitution of Kenya, 2010. That the 12th Petitioner is a Charitable Non-governmental Organization specializing in the promotion and protection of child rights and welfare within Meru County in the Republic of Kenya. That the 12th Petitioner is currently sheltering, educating and maintaining more that 200 vulnerable children from Meru County.

That the petitioners herein were on diverse dates between the year 2008 and 2012 victims of defilement and other forms of Sexual violence and child abuse. That the petitioners made reports of the acts of defilement at various police stations within Meru County and the police officers at those various Police Stations neglected, omitted, refused and or otherwise failed to conduct prompt, effective, proper and professional Investigation into the petitioners' complaints or record the petitioners' complaints in the police Occurrence Book or visit the crime scenes or interview the witnesses or collect and preserve evidence or take any other steps or put in motion such other processes of the law as would have brought the perpetrators of defilement and other forms of sexual violence to account for their unlawful acts or took such other legislative, policing and/or administrative measures as would protect the petitioners(in common with other Kenyan Children) from abuse, sexual violence, inhuman and degrading treatment. That due to neglect, commission, refusal and/or failure on the part of the police the petitioners averred and contended that they have suffered grave unspeakable and immeasurable physical and physiological trauma and that the perpetrators of the aforesaid unlawful acts roam large and free, with impunity and they continue to threaten the physical and psychological wellbeing of the petitioners.

The petitioners contended that the 1st petitioner, aged 5 years was defiled by her uncle (K) and that the 1st petitioner's family has been complicit in every cover up. The aforesaid defilement and subjecting the 1st petitioner to violence and other forms of abuse. That on 18th January, 2012, the 1st petitioner reported the defilement to Meru District Children's Officer, Kinoru Administration Police Camp and Meru Police Station. That the Kinoru Administration Police Camp Officers demanded kshs.1,000/- before they could intervene in anyway and refused to assist the 12th petitioner in rescuing the 1st petitioner. That the OCS Meru Police Station refused to investigate the complaint, claiming that the complaint had been made late. The 1st petitioner contends that the neglect, omission, refusal and/or failure of the police to conduct prompt, proper and professional investigation into her complaint violates her fundamental rights and freedoms under Article 2, 21(1),(3), 27, 29, 29, 48, 50(1) and 53(1), (c) of the Constitution of Kenya, 2010.

The 2nd petitioner contends that in August, 2011, then aged 15 years was defiled by her neighbor(MN) and as a result of the defilement, she conceived, dropped out of school and suffered grave physical and psychological trauma. That the 2nd petitioner reported the aforesaid act of defilement at Kariene Police Station on 17th January, 2012.

That the Police Officers at Kariene Police Station interrogated the 2nd petitioner loudly and in public in the hearing of all present at the police station, thereby subjecting the 2nd petitioner to humiliation, embarrassment and inhuman treatment. That the police officers refused to issue a P3 form to the 2nd petitioner, insisting that they had to wait until the 2nd petitioner's baby, conceived out of the defilement was born and further refused to arrest or interrogate the perpetrator and unlawfully, inexcusably and unjustifiably neglected, omitted and/or otherwise failed to conduct prompt, effective, proper and professional investigation into the 2nd petitioner's complaint.

The 2nd petitioner contends that the neglect, refusal and/or failure of police to conduct prompt, effective, proper and professional investigation, into her complaint violates her fundamental rights and freedom under Article 2, 21(1),(3),27,28,29,48,50(1) and 53(1),(c) of the Constitution of Kenya, 2010.

The 3rd petitioner, contends that on 27th December, 2011 when aged 8 years was defiled by a gang of three neighbours(M/S. Z K, KM and M N) and as a result of the defilement she contracted a sexually transmitted disease and suffered grave physical and psychological trauma. That the 3rd petitioner reported the said defilement at Laare

Police Station on 25th December, 2012. That the police officers at Laare Police Station arrested and charged only one of the three perpetrators in the defilement but failed to investigate, interrogate and/or arrest the other perpetrators in spite of their continued threat, harassment and intimidation of the 3rd petitioner's family. The 3rd petitioner contends that the refusal, neglect, omission and/or failure of the police to investigate, interrogate and/or arrest the other perpetrators violates her fundamental rights and freedoms under Articles 2, 2(1) 3, 27, 28, 29, 50(1) and 58(1), (c), of the Constitution of Kenya, 2010.

The 4th petitioner in June, 2010, then aged 12 years was defiled by an Administration Police Officer(JMM) as a result of which she conceived and has suffered a grave physical and psychological trauma. That the perpetrator who has since admitted to the offence is contended has been harassing, intimidating and threatening the 4th petitioner and her family. That though the perpetrator was formally charged in court, the petitioner contends, the police have frustrated and delayed the criminal proceedings by inter alia, insisting on receiving money and travel reimbursement from the petitioner, failing to avail the police investigation file and failing to timely avail DNA results. The fourth petitioner contends that the delay in the prosecution of the perpetrators and the manner of which the police have handled the case violates her fundamental rights and freedoms under Article 2, 21(1), 21(3), 27, 28, 29, 48 50(1) and 53(1),(c), of the Constitution of Kenya, 2010.

The 5th petitioner contends that on 11th May, 2011, then aged 11 years, was defiled by her neighbor(DM) causing her grave physical and psychological trauma. That the police have neglected, omitted, refused and/or otherwise failed to investigate, interrogate and/or arrest the perpetrator in spite of the 5th petitioner's complaint and ample evidence linking the perpetrator to the defilement. The 5th petitioner contends that the neglect, omission, refusal and/or failure on the part of the police to investigate, interrogate and/or arrest the perpetrator violates her fundamental rights and freedoms under Article 2, 21(1), 3(), 27, 28, 29, 48, 50(1) and 53(1) (c) of the Constitution of Kenya, 2010.

The 6th petitioner contends that she was repeatedly defiled by her father (MM) between the year, 2008 and 2011, as a result of which she has suffered grave physical and physiological trauma. The 6th petitioner averred that she reported the aforesaid acts of defilement at Tigania Police Station on 1st July, 2011 who failed, neglected, omitted and refused to conduct prompt, effective, proper and professional investigation into the 6th petitioner's complaint. The 6th petitioner contends that the neglect, omission, refusal and/or failure of the police to conduct prompt, effective, proper and professional investigations into her complaint violates her fundamental rights and freedoms under Article 2, 21(1),(3),27, 28, 29, 48, 50(1) and 53(1),(c) of the Constitution of Kenya, 2010.

The 7th Petitioner averred that on 6th August, 2011, then aged 8 years, was defiled by her neighbor(JK) causing her grave physical and psychological trauma. That a report was made to Nchiru Police Station whereby police officers are said to have demanded payment of KShs.1,000/- for fuel and as a precondition for taking 7th petitioner to the hospital and omitted, neglected, refused and failed to conduct prompt, effective, proper and professional investigation to the 7th complainant's complaint. She further contends that though the perpetrator was formally charged in court, the police offices at Nchiru have frustrated the prosecution by, inter alia, refusing to inform the 7th petitioner of the hearing dates and failing to present the perpetrator in court whenever the case is scheduled for hearing. The 7th petitioner contends her fundamental rights and freedoms under Article 2, 21(1), (3), 27, 28, 29, 48, 50(1) and 53(1)(c) of the Constitution of Kenya, 2010 had been violated by the Police Officers.

The 8th petitioner avers that on 31st August, 2011, then aged 13 years was defiled by her employer's husband(GG) and as a result of which she has undergone surgery at the Meru General Hospital and has suffered grave physical and psychological trauma. The 8th petitioner reported the defilement at Meru Police on 31st August, 2011. She contends the Police Officer at the Meru Police Station have neglected, omitted, refused and/or failed to conduct prompt, effective, proper and professional investigation into the 8th petitioner's complaint or visit the scene of crime or interrogate or arrest the perpetrator. She contends that the neglect, omission, refusal and/or failure of the police to conduct prompt, effective, proper and professional investigations into her complaint or interrogate or arrest the perpetrator violates her fundamental rights and freedoms under Article 2, 21(1),(3), 27, 28, 29, 48 50(1) and 53(1) of the Constitution of Kenya, 2010.

The 9th petitioner avers that in October, 2008, then aged 15 years, was defiled while under refuge at Huruma Children's Home(at Nkubu, Meru), as a result she conceived and suffered grave physical and psychological trauma. She reported the defilement at Nkubu Police Station on 22nd January, 2009. She contends that the police station have neglected, omitted, refused and failed to conduct prompt, effective, proper and professional investigations into her complaint and such failure violates her fundamental rights and freedoms under Articles 2, 21(1), (3),27,28,29,48,50(1) and 53(c) of the Constitution of Kenya, 2010.

The 10th petitioner avers that in June, 2008, then aged 11 years, was defiled by her neighbor(SK) and as a result of which she conceived and suffered grave physical and psychological trauma. She avers that on 21st January, 2011 she made a report at Kariene Police Station and that though the perpetrator was formally charged in court, the police have frustrated and delayed the case by, inter alia, failing to bring critical witnesses to court, failing to bring police file to court and by bringing to court witnesses who have no personal knowledge to the facts of the case. She contends that the manner in which the police have handled her case violates her fundamental rights and freedoms under Articles 2, 21(1),(3), 27, 28, 29, 48,50(1) and 53(1),(c) of the Constitution of Kenya, 2010.

The 11th petitioner avers that she was severally beaten and defiled by her step-father causing her grave physical and psychological trauma. That she reported the defilement at Meru Police Station on 4th June, 2012 but police officers refused to record or investigate her complaint. She contends that the neglect, omission, refusal, and/or failure of the police to conduct prompt, effective, proper and professional investigations into her complaint violates her fundamental rights and freedoms, under Article 2, 21(1), (3), 27, 28, 29, 48, 50(1) and 53(1), (c) of the Constitution of Kenya, 2010.

The 12th petitioner avers that it brings these proceedings in public interest and pursuant to the express and implied provisions of Article 22(2) of the Constitution of Kenya, 2010.

Section 22(1) and (2) of the Constitution of Kenya, 2010 provides:-

“22. (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court

proceedings under clause (1) may be instituted by--

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.”

The 12th petitioner contends that the neglect, omission, refusal and failure of the police to conduct prompt, effective, proper and professional investigations into the eleven petitioners respective complaints violates their respective fundamental rights and freedoms under, inter alia, Articles 2, 21(1), 21(3), 27, 28, 29, 48, 50(1) and 53(1), (c) of the Constitution of Kenya, 2010, Articles 1 to 8 (inclusive) and 10 of the Universal Declaration of Human Rights, Articles 2, 3, 19, 34 and 39 of United Nations Convention on Rights of the Child, Articles, 1, 2, 3, 16, and 27 of the African Charter on the rights and welfare of the child and Articles 2 to 7 (inclusive) and 18 of the African Charter on Human and people rights. The 12th petitioner further contends the police's failure to act on petitioner's complaints constitutes a grave abdication of statutory duty and express and implied provision inter alia:-

(a) sexual offences Act, 2006(Act No.3 of 2006) and

(b) The Police Act(Cap.84) of the Laws of Kenya)

The petitioners' petition is supported by affidavit of Mutuma Kirima, a Social Worker employed by the 12th Petitioner, a Charitable Non-Governmental Organization, specializing in the promotion and protection of child rights and welfare within Meru County. The affidavit supports each and every petitioner's claim as herein above analyzed and with supportive annexures MKI to MK8.

The 1st and 3rd respondents did not file any replying affidavit but grounds of opposition dated 6th March, 2013 alleging that the petition is incompetent, and bad in law as prayed against 1st and 3rd respondents. The 1st and 3rd respondents contended the petitioners have not identified the perpetrators by giving their names and that the court lacked jurisdiction to grant the prayers sought. The 1st and 3rd respondents further contended that the petitioners have not demonstrated how the respondents were involved to the order sought herein and that the petitioners had not exhausted all available avenues and a such constitutional remedies should be trivialized.

The 1st and 3rd respondents did not file any affidavit to controvert the matters raised in the affidavit of the 12th petitioner and I take the same as unchallenged and to be truthful. The names of the perpetrators have clearly been given and their whereabouts disclosed, I therefore find no merits in the 1st and 3rd respondents' objection on the ground that the particulars and names of the perpetrators have not been disclosed.

Under Article 22(1), everyone has the right to institute court proceedings for enforcement of Bill of Rights. Article 22(1),(a),(b),(c), and (d) of the Constitution of Kenya, 2010 provides:-

“22. (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by--

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.”

Further Article 23(1) of the Constitution of Kenya, 2010 provides:

“23. (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine

applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.”

In view of the foregoing I find and hold everyone has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed and the High Court has jurisdiction to entertain such proceedings and determine applications for redress of a denial, violation or infringement of, or threat to, a right on fundamental freedom in the Bill of Rights.

I therefore find no merits on 1st and 3rd respondents grounds of opposition and the same are rejected and dismissed.

The 2nd respondent through its replying affidavit dated 17th January, 2012 by Mr. Jackson Motende, State Counsel, in the office of the Director of Public Prosecution, Meru office referred to Article 157(4) of the Constitution of Kenya, 2010 which gives the Director of Public Prosecution power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct. He averred that court directions were given in accordance with the said Article and attached a letter dated 29th May, 2012 marked “JM”. The said letter is only on complaint by 2 victims and not all petitioners in this petition as can be observed. That since the said letter, it appears there had been no follow up or response from the DCIO. Significantly the letter was not written to Inspector General nor was it copied to the said office. The affidavit of the learned State Counsel Mr. J. Motende is clear that no action has been taken on the petitioners’ complaints as he deposes that majority of the complaints contained in the petition were never received by the 2nd respondent. Strange enough there is no affidavit filed denying that the petitioners reported to the various police stations mentioned in the petition and in the supportive affidavit. I therefore do not find any basis of the 2nd respondent denying petitioners complaints were not reported to police stations mentioned in the petition. The 2nd respondent has not given any reason for their refusal, neglect, omission to act on the petitioners’ complaints and their failure to prosecute the perpetrators promptly upon receipt of the various complaints. The 2nd respondent’s assertion that it is wrongfully enjoined to this petition is without any basis. Article 157(6), (a), (b), (c) and (II) of the Constitution of Kenya, 2010 provides:-

“(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—

(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

(c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

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(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”

It is therefore clear that it is the duty of the Director of Public Prosecutions to institute and undertake criminal proceedings against any person before any court and in doing so shall have regard to the public interest, the administration of justice and the need to prevent and avoid abuse of legal process.

The issue for determination in this petition is whether failure on the part of the police to conduct prompt, effective, proper and professional investigation into the petitioners’ complaints of defilement and other forms of sexual violence infringes on petitioners’ fundamental rights and freedoms under all or any Articles 21(1),(3),27,28,29,48,50(1) and 53(1), (d) of the Constitution of Kenya, 2010?

The petitioners as per affidavit in support, which had not been controverted by the respondents in anyway and which I find to be true having not been challenged have confirmed that they have been victims of defilement, and other forms of sexual violence and child abuse. The reports of defilement and other forms of sexual abuse were reported to various police stations. Police unlawfully, inexcusably and unjustifiably neglected, omitted and/or otherwise failed to conduct prompt, effective, proper and professional investigations to the said complaints. That failure caused grave harm to the petitioners and also created a climate of impunity for defilement as perpetrators were let free. This infringed the petitioners’ fundamental rights and freedoms under inter alia Articles 21(1),(3), 27,28,29,48,50(1) and 53(1),(d) of the Constitution of Kenya, 2010 and the general rules of international law, including any treaty or convention ratified by Kenya, which form part of the law of Kenya as per Article 2(5) and 2(6) of the Constitution of Kenya, 2010. That these international instruments are applicable to the petitioners cases. The relevant conventions include:

1. **The United Nations Convention on Rights of Child notably Article 2, 3, 4, 5, 6, 7 and 8.**
2. **The African Charter on Human and People's Rights notably Articles 2, 3, 4, 5, 6, 7 and 18.**
3. **The Convention on Elimination of all forms of discrimination against women(CEDAW) notably Articles 1 and 2.**
4. **The International Convention on Civil and political rights(ICCPR)notably Articles 3, 7, 9 and 26.**

I further find that the petitioners in this petition have suffered horrible, unspeakable and immeasurable harm due to acts of defilement committed against them. They each suffered physical harm in the form of internal and external wounds from the perpetrators assaults and some suffered consequences of unwanted pregnancies vested on children not physically mature enough to bear children. The petitioners have suffered psychological harm from assaults made worse by the threat, fear and reality of contracting HIV/AIDS and other sexually transmitted diseases or infections.

Whereas the perpetrators are directly responsible for the harms, to the petitioners, the respondents' herein cannot escape blame and responsibility. The respondent's ongoing failure to ensure criminal consequence through proper and effective investigation and prosecution of these crimes has created a "climate of Impunity" for commission of sexual offences and in particular defilement. As a result of which the perpetrators know they can commit crimes against innocent children without fear of being apprehended and prosecuted. This to me makes the respondents responsible for physical and psychological harms inflicted by perpetrators, because of their laxity and their failure to take prompt and positive action to deter defilement. The worse is that the petitioners' visited various police stations after defilements and gave names of the perpetrators being people they knew yet the respondents did not bother to take appropriate action. Instead the respondents showed disbelief, blamed the victims, humiliated them, yelled at and ignored them as they put them under vigorous cross-examination and failed to take action. The respondents are in my view directly responsible for psychological harm caused by their actions and inactions. The petitioner has since become self-doubtful, self-loathing, self-blame, and have low self-esteem. That has been documented amongst the petitioners following contact with the police.

It is as a result of the above-mentioned that the petitioners had to flee and seek protection and safety from the 12th petitioner leading to their separation from their close family members, friends, and community and removal from their homes, schools and where close support was mostly needed. The failure to act appropriately is directly liable for the psychological damage experienced by the petitioners arising from their alienation from family, schools and their own communities.

The petitioners' counsel attached opinions of two experts on Kenyan and International Police standards for establishing the standards to be applied to police treatment of defilement. The experts on Kenya Policing standards concluded inter alia that:

"In all cases investigations were inadequate in that the Police failed to visit scenes of crime to gather evidence that is vital in collaboration of a case, did not interview witnesses/victims, samples were not taken and even those produced by victims were never forwarded to the Government analysts' for examination..."

The expert on international policing standards concluded inter alia that:

"The Investigations of these eleven cases fall short of international policing standards. The very basic steps required to investigate crimes of this nature have been overlooked and ignored. There seems to be a prevailing attitude that crimes of this nature are not taken seriously. These failures are significant in that there not only is an urgent need to re-assess how these cases are investigated but there is also an immediate need to adjust the attitude of the Police handling them....."

The respondents in this petition failed to implement the rights and fundamental freedoms as enshrined under Article 21 of the Constitution of Kenya, 2010. The respondents have failed in their fundamental duties as stated under Article 21 in failing to observe, respect, protect, promote and fulfill the petitioners' fundamental rights and freedoms in particular the rights and freedoms relating to special protection as members of vulnerable group(Article 21(3), equality and freedom from non-discrimination(Article 27) humanity dignity(Article 29), access to justice (Article 48 and 50) and protection from abuse, neglect, all forms of violence and inhuman treatment(Article 53(1),(d) under the Constitution of Kenya, 2010.

The petitioners referred me to the case of **VAN EADER V MINISTER OF SAFETY AND SECURITY(2002) ZASCA 123** in which case police allowed a dangerous criminal and serial rapist to escape from their custody. The supreme court of Appeal of South Africa held:-

"The fundamental values enshrined in the Constitution include human dignity, the achievement of equality and the advancement of human rights and freedoms.....everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources..... In all the circumstances of the present case I have come to the conclusion that the Police owed the appellant a legal duty to act positively to prevent Mohammed's

escape.....I have reached this conclusion mainly in view of the State's Constitutional imperatives to which I have referred."

The court held that police had breached the applicant's fundamental rights and freedoms by allowing the rapist to escape from their custody.

In the instant petition the police have allowed the dangerous criminals to remain free and/or at large. The respondents are responsible for arrest and prosecution of the criminals who sexually assaulted the petitioners and the failure of State agents to take proper and effective measures to apprehend and prosecute the said perpetrators of defilement and protect the petitioners being children of tender years, they are in my opinion responsible for torture, defilement and conception of young girls and more particular the petitioners herein.

In case of **JESSICA LENAHAN(Gonzales) et al V UNITED STATES, Case 12.626, Report No.80/11, August, 17,2011. The inter-American Commission on Human Rights considered Police obligations to enforce a restraining order in circumstances where a father took his children from their mother's custody without permission and killed them. The Commission found that there was "broad International consensus" that States "may incur ..responsibility for failing to act with due diligence to prevent, investigate, sanction and offer reparations for acts of violence against women".....women.**

The State's duty to protect is heightened in the case of vulnerable groups such as girl-children and the State's failure to protect it need not be intentional to constitute a breach of its obligation. The courts have found that State has a clear duty to investigate crime and found the failure to do so constitute a Constitutional violation of claimant's rights.

In **R V Commissioner of Police & 3 Others** ex-parte **PHYLIS TEMWAI KIPTEYO HC.MISC.APPL.27 OF 2008,(2011) EKL(BUNGOMA)**the court stated:-

"All the same, the life of the victim and the interests of the family are protected by the Constitution and the statutes. The State through the respondents herein are responsible for security of citizens in this country. It is the duty of the state to inquire into any crime or suspected crime affecting any of its subjects. It is the duty of the State to investigate the disappearance of the victim herein who was its subject and its employee(emphasis added)

I agree with the above-mentioned case that once a report or complaint is made it is the duty of the police to move with speed and promptly, commence investigation and apprehend and interrogate the perpetrators of the offence and the investigation must be conducted effectively, properly and professionally short thereof amounts to violation of fundamental rights of the complainant.

In the instant case the police owed a Constitutional duty to protect the petitioners' right and that duty was breached by their neglect, omission, refusal and/or failure to conduct prompt, effective, proper and professional investigations and as such they violated the petitioners' fundamental rights and freedoms as entrusted in the Constitution.

Under Article 244 (a)-(e) of the Constitution of Kenya, 2010 it is provided:-

"244. The National Police Service shall—

(a) strive for the highest standards of professionalism and discipline among its members;

(b) prevent corruption and promote and practice transparency and accountability;

(c) comply with constitutional standards of human rights and fundamental freedoms;

(d) train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and

(e) foster and promote relationships with the broader society."

Further Article 27(1)-(4) of the Constitution of Kenya, 2010 it is provided:-

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

(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."

The petitioners contend that gender-based sexual violence constitutes discrimination and referred me to Article 1 of the Convention of **Elimination of ALL FORMS OF DISCRIMINATION AGAINST WOMEN** which defines discrimination against women as including "acts that inflict sexual harm".

Having considered the petitioners petition and affidavit in support and the fact that the police did not take appropriate action to ensure justice to the petitioners I find the police failure to conduct prompt, effective, proper, corruption free, and a professional investigation into petitioners complaints of defilement and other form of sexual

violence amounts to discrimination contrary to the expressly and implied provisions of Article 27 of the Constitution of Kenya, 2010 and contrary to Article 244 of the Constitution of Kenya, 2010.

Further to the above the Police failure to effectively enforce Section 8 of the Sexual Offences Act, 2006 infringes upon the petitioners right to equal protection and benefit of the law contrary to Article 27(1) of the Constitution of Kenya, 2010 and further by failing to enforce existing defilement laws the police have contributed to development of a culture of tolerance for pervasive sexual violence against girl children and impunity.

In the circumstances the respondents are responsible for violation of the petitioners' rights under Article 27 of the Constitution of Kenya, 2010. The respondents are obligated by law to protect girl children from defilement and ensure effective investigation of defilement claims (See section 14 and 14A of the Police Act (repealed and replaced by Act No. 11A of 2011), Section 2, 8 and 40 of the Sexual Offences Act and Articles 157(4) and Article 244 of the Constitution of Kenya, 2010).

In the case of **MC BULGARIA (MCV BULGARIA, EUROPEAN COURT OF HUMAN RIGHTS 39272/98, 2003)** the European Court of Human Rights held:-

"The investigation of the applicant's case, and in particular the approach taken by the investigators and the prosecutors in the case fell short of the requirements inherent in the States' positive obligations-viewed in the light of the relevant modern standards in comparative and international law-to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse.....The court thus finds that in the present case there has been a violation of the respondent State's positive obligations under both Articles 3(on torture and inhuman/degrading treatment) and 8(on protection of the law) of the Convention."

In the case of **CAS ROMANIA (CAS ROMANIA, EUROPEAN COURT OF HUMAN RIGHTS 26692/05 2012)**.

The European Court of Human Rights held that an ineffective investigation of sexual assault charges violates the Human Rights convention. The court held as follows:-

"It (the investigation) should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. This is not an obligation of result, but one of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eyewitness testimony, forensic evidence, and so on. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk failing foul of this standard, and a requirement of promptness and reasonable expedition is implicit in this context. In cases under Articles 2 and 3 of the Convention where the effectiveness of the official investigation has been at issue, the court has often assessed whether the authorities reacted promptly to the complaints at the relevant time. Consideration has been given to the opening of investigations, delays in taking statements and to the length of time taken for the initial investigation."

Yet in the case of **CARMICHELE V MINISTER SAFETY AND SECURITY AND ANOTHER (SUPRA)** the Court held:-

"The courts are under a duty to send a clear message to the accused, and to other potential rapists and to the community. We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights. South Africa also has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights. The police is one of the primary agencies of the state responsible for the protection of the public in general and women and children in particular against the invasion of their fundamental rights by perpetrators of violent crime."

In the case of **Gonzalez & Others (Cotton Field) V Mexica (Inter-American Court of Human Rights, judgment of November, 16, 2009)** the inter-American Court of Human rights held that State of Mexico had infringed on petitioners' rights to equality and non-discrimination, in claim relating to the discipline, torture, rape and murder of three young girls and stated as follows:-

"Evidence provided to the court indicates, inter alia, that officials of the state of Chihuahua and the municipality of Juarez made light of the problem and even blamed the victims for their fate based on the way they dressed, the place they worked, their behavior, the fact that they were out alone, or a lack of parental care.....The Court therefore finds that, in the instant case, the violence against women constituted a form of discrimination, and declares the State violated the obligation not to discriminate contained in Article 1(1) of the Convention, in relation to the obligation to guarantee the rights embodied in the Articles 4(1), 5(1), 5(2) and 7(1) of the American Convention."

On sexual violence, freedom and security of a person court have held that State has an obligation to protect all citizens from violence and ensure their security of person. This is enshrined in Article 29 of our Constitution.

In case of **Carmichele V Minister of Safety and Security & Another (supra)** the court stated:

“Thus one finds positive obligations on members of the Police force both in the IC and the Police Act. In addressing these obligations in relation to dignity and the freedom and security of the person, few things can be more important to women(and children) than freedom from the threat of sexual violence.”

Article 48 and 50 of the Constitution of Kenya, 2010 obligates the State to ensure access to courts is not unreasonably or unjustifiably impeded and in particular where there is legitimate complaint, dispute or wrong that can be resolved by the courts or tribunals. Needless to say in criminal justice system, Police play a critical role and its abdication from that role would inevitably deprive claimant’s access to courts and lead to miscarriage of justice or deny justice altogether. The centrality of police in criminal justice system is evidenced by their functions as set out under Part III of the Police Act(Now repealed), which has been re-enacted at Section 24 of the **NATIONAL POLICE SERVICE ACT(ACT NO.11A of 2011)** as follows:-

“24. The functions of the Kenya Police Service shall be the-

Provision of assistance to the public when in need;(b) maintenance of law and order;(e) investigation of crimes;(f) collection of criminal intelligence;(g) prevention and detection crime;(h) apprehension of offenders;(i) enforcement of all laws and regulations with which it is charged...”

The police in the instant petition by failing to conduct prompt, effective, proper, corrupt free and professional investigations into the petitioners complainants, and demanding payments as preconditions for assistance, whether for fuel or P3 forms or whatever the case might have been they violated petitioners right to access of justice and right to have disputes that can be resolved by the application of law decided in a fair and in public hearing before court of law in accordance with Article 50(1) OF the Constitution of Kenya, 2010.

Under Article 53(1),(d) and (2) of the Constitution of Kenya, 2010,it is provided as follows:-

53. (1) Every child has the right--

(d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;

(2) The State shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities.”

The above article clearly entitles petitioners to a fundamental inalienable right to be protected from abuse, neglect, harmful,cultural practices, all forms of violence, inhuman treatment and punishment and hazardous or exploitative labour.

The Article also provides that a child’s best interest are of paramount importance in every matter concerning the child.The police failure to act on petitioners complaints of defilement violated their rights under Article 53 of the Constitution of Kenya, 2010. The Constitutional requirement to protect the best interest of the child requires not only the establishmentof relevant laws but requires their proper enforcement by state agencies and any failure to implement laws aimed at protecting children amounts to infringement and/or violation of the Constitutional rights.

As recognized by the U.N, committee on rights of the child, under Article 19, General Convention, the State is obligated to investigate and punish those responsible for committing violence against children(see Director of Public Prosecutions, Transvaal V Minister of Justice and Constitutional Development, and others(2009) ZACC 8, 2009(4) SA 222(cc) 2009 (7) BCLR 637(CC) at para 200).

Having considered the evidence in the petitioners’ affidavit and the petition herein,the relevant articles in the Constitution of Kenya, 2010, the general rules of international law, treaty or convention ratified by Kenya and other related and relevant laws applicable in Kenya, I am satisfied that the petitioners have proved their petition and that the failure on part of the respondents to conduct prompt, effective, proper and professional investigations into the petitioners complaints of defilment and other forms of sexual violence infringes on the petitioners fundamental rights and freedoms, under Articles 21(1), 21(3), 27, 28, 29, 48, 50(1) and 53(1) (d) of the Constitution of Kenya, 2010.

In the circumstances I find the petitioners’ petition is meritorious and I proceed to grant the following orders:-

1. A declaration be and is hereby made to the effect that the neglect, omission, refusal and/or failure of the police to conduct prompt, effective, proper and professional investigations into the first eleven petitioners’ complaints of defilement violates the first eleven petitioner’s fundamental rights and freedoms-

(a) to special protection as members of a vulnerable group,

(b) to equal protection and benefit of the law;

(c) not to be discriminated against,

(d) to inherent dignity and the right to have the dignity protected;

(e) to security of the person,

(f) not to be subjected to any form of violence either from public or private sources or torture or cruel or degrading treatment; and

(g) to access to justice as respectively set out in Articles 21(1), 21(3), 27,28,29,48,50(1) and 53(1) (c) of the Constitution of Kenya.

2. A declaration be and is hereby made to the effect that the neglect, omission, refusal and/or failure of the police to conduct prompt, effective, proper and professional investigations into the first eleven petitioners' respective complaints violates the first eleven petitioners' fundamental rights and freedoms under-

(a) Articles 1 to 8(inclusive) and 10 of the Universal Declaration of Human Rights,

(b) Articles 2, 4, 19, 34 and 39 of the United Nations Convention on the rights of the child;

(c) Articles 1, 3, 4,16 and 27 of the African Charter on the Rights and welfare of the child, and

(d) Articles 2 to 7(inclusive) and 18 of the African Charter on Human and people's rights.

3. An order of mandamus be and is hereby made directing the 1st respondent together with his agents, delegates and/or subordinates to conduct prompt, effective, proper and professional investigations into the 1st to 11th petitioners' respective complaints of defilment and other forms of sexual violence.

4. Prayer No.4 is refused

5. Prayer No.5 is refused

6. An order of mandamus be and is hereby made directing the 1st respondent together with his agents, delegates and/or subordinates to implement Article 244 of the Constitution in as far as it is relevant to the matters raised in this Petition.

Prayer 7 is refused.

Costs of the petition to the petitioners against the 1st and 2nd respondents jointly and severally.

DATED, SIGNED AT MERU THIS 27thDAY OF MAY, 2013.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:-

1. Mr. Muthomi for the petitioner

2. Mr. Menge for 1st and 3rd Respondents

3. Mr. Makori for 2nd respondent

4. Mr. Mwakosi(Amicus curae) for Kenya National Commission on Human Rights.

5. M/S Beatrice Chalangat for FIDA.

J.A . MAKAU

JUDGE



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