



REPUBLIC OF KENYA
High Court at Nairobi (Nairobi Law Courts)
Petition 155A of 2011

KENYA SOCIETY FOR THE MENTALLY HANDICAPPED (KSMH)
PETITIONER

AND

THE ATTORNEY GENERAL 1ST
RESPONDENT

NATIONAL COUNCIL FOR PERSONS WITH DISABILITIES 2ND
RESPONDENT

THE MINISTER FOR EDUCATION 3RD
RESPONDENT

THE MINISTER FOR HEALTH 4TH
RESPONDENT

THE MINISTER FOR MEDICAL SERVICES 5TH
RESPONDENT

THE MINISTER FOR GENDER, CHILDREN & SOCIAL DEVELOPMENT ... 6TH
RESPONDENT

AND

UNITED DISABLED PERSONS OF KENYA 1ST
INTERESTED PARTY

KENYA PARAPLEGIC ORGANISATION 2ND
INTERESTED PARTY

RULING

1. This matter is brought by the Kenya Society for the Mentally Handicapped, a society that represents persons who are mentally and intellectually challenged. It presents this petition on its own behalf and in public interest. It avers that there are between 3.6 to 8.5 million Kenyans with one form of mental, intellectual and psychosocial disability. These persons remain unidentified and unaddressed because of the discriminatory and inadequate State policies.

2. On the other side are the respondents, the Government ministries involved in various aspects of administration of matters that concern persons with disabilities and the National Council for Persons with Disabilities (NCPD), a State policy making and implementing agency concerned with persons with disabilities established under the *Persons with Disabilities Act, 2003*.

3. The state of persons with mental health disabilities in Kenya is not in dispute and it has been well documented. The Kenya National Human Rights and Equality Commission conducted a study and in a report titled, **“Silenced minds; the systematic neglect of mental health systems in Kenya; A Human Rights Audit of the Mental Health Systems in Kenya”** November, 2011. That report concluded as follows;

(i) There is an entrenched stigma and discrimination against mental illness and persons with mental disorders and low level of awareness on mental health; (the human rights model of disability in this finding is that there is “entrenched stigma and discrimination against people with mental, intellectual and psychosocial disabilities; and low level of awareness on their rights to inclusive health services together with informed habilitation and rehabilitation services, in line with the Kenya Constitution 2010 and the UN Convention on the Rights of Persons with Disabilities (UNCRPD).

(ii) The health sector has been severely neglected and persons with mental disorders have been neglected and abandoned in mental health facilities ..., this finding reflects the failure to deinstitutionalise habilitation and rehabilitation programmes of people with mental, intellectual and psychosocial disabilities and the need to abolish diagnostic labelling, which is degrading due to promotion of an image of people who are sick as opposed to people with disabilities in line with the Kenya Constitution 2010 and the UNCRPD.

(iii) The legislature, policy, programmatic and budgetary steps of the Government have been ineffective in realizing the right to the highest attainable standard of mental health; this finding shows the failure by government to put in place laws and policies that recognise people previously labelled mentally ill to be amongst those recognised under the Kenya Constitution 2010 and the UNCRPD to be with mental, intellectual and psychosocial disabilities; and to align the Persons with Disability Act 2003 and the Mental Health Act with the Kenya Constitution 2010 and the UNCRDP.

4. The petition was filed prior to the conclusion of the study, but it alleges in a very general manner some of the problems highlighted by the study and which I have pointed out in the pleadings. A substantial part of the petition is descriptive and consists of a recital of the provisions of the Constitution.

5. In summary the petitioner accuses the State of violating the rights of persons with mental and intellectual disability by discriminating against them in the provision of support and services. These acts of violation are set out in the petition and are as follows;

(a) The 2nd Respondent has been slow to formulate and develop measures and implementing policies designed to achieve equal opportunities for persons with mental and intellectual disabilities to obtain education and employment, to recommend measures to prevent discrimination against person with disabilities contrary to **Articles 21(3), 28 and 27(1)**.

(b) The 2nd Respondent has failed to formulate policies that seek to protect people with mental and intellectual disability from being discriminated against when they seek admission to learning institutions contrary to **Articles 47, 27(6), 27(7) and 54**.

(c) The 2nd Respondent has intentionally failed to fulfil its mandate which demands implementation of various policies under the national health programme under the Ministry of Health with the purpose of preventing disability, early identification of disability of persons with mental or intellectual disability contrary to **Articles 21(3), 43, 47, 27(6) and 27(7)**.

(d) The 3rd Respondent has ignored, neglected or declined to establish a sound legal policy framework governing education for the Constitution of the mentally and intellectually disabled children contrary to **Articles 21(3), 27 and 28**.

(e) The 4th Respondent has discriminated against persons with mental and intellectual disabilities by not establishing any sufficient, reliable and comprehensive structures to promote adequate provision of mental health care in public health institutions contrary to **Articles 27(6), 27(7), 43 and 47**.

(f) The 5th Respondent has violated its mandate of providing quality mental health care as the mental health care institutions are understaffed, has poor and deplorable infrastructure and finance restricted violating **Articles 27(6) 26(7) 43 and 47**.

(g) The 6th Respondent is keen to disburse Kshs.365,000,000/00 that had been allocated to disabled persons in the 2011/2012 financial year on a basis and manner that would be in violation of human rights in violation of **Articles 21(3), 12(1), 47, 43, 27(6), 27(7), 73 and 75**.

6. The petitioner seeks the following reliefs in the petition:-

(a) A declaration that the 2nd, 3rd, 4th, 5th and 6th respondents have discriminated against persons with mental and intellectual disabilities in the provision of support and services and violated the constitution of Kenya.

(b) A mandatory order to compel the 2nd Respondent to account for all the funds allocated to them by the 6th Respondent.

(c) A mandatory order to compel the 3rd Respondent to establish a sound legal policy framework governing education that adequately addresses the peculiar needs for persons with mental and intellectual disability.

(d) A declaration that persons with mental and intellectual disabilities are entitled Free and Compulsory Primary Education as citizens of the Republic of Kenya under the Constitution.

(e) A mandatory order to compel the 3rd Respondent to provide interventions and other rehabilitative facilities to aid in educating of children with mental and intellectual disability.

(f) A mandatory order to compel the 3rd Respondent increase resource allocation to schools for children with mental and intellectual disabilities to meet their peculiar needs such as hiring of support staff and teachers aides as well as provision of the necessary equipment necessary for their education.

(g) A mandatory order to compel the 3rd Respondent facilitate an all inclusive education system where hiring children with mental and intellectual disability can seek admission in “ordinary schools” and such admissions be accepted.

(h) A mandatory order that the 3rd Respondent do abolish the functional based curriculum for children with mental and intellectual disability and the academic based curriculum for children free of mental and intellectual disability and implement a curriculum that is both functional and academic for both children with mental and intellectual disability and those free of mental and intellectual disability thus wiping out discrimination.

(i) A declaration that the Cash Transfer Programme for people with severe disabilities is discriminatory in the sense that it discriminates against persons with mental and intellectual disabilities who need disability-specific intensive lifelong support.

(j) A mandatory order to compel the 6th Respondent to implement a mechanism for the disbursement of the funds to the people with mental and intellectual disabilities.

(k) Any other Orders that this Honourable Court may be pleased to issue.

(l) That the costs of this petition be borne jointly and severally by the Respondents.

7. The petitioner’s case is supported by the affidavit of Edah Maina sworn on 29th August 2011 and several witness statement of persons who suffer mental disability who have narrated the travails of persons with disability. The petitioner has also filed written submissions dated 25th October 2012.

8. The respondents have opposed the petition through the replying affidavit of Dr James Nyikal, the Permanent Secretary, Ministry of Gender, Children and Social Development sworn on 26th March 2012. There are two interested parties. The first interested party is the United Disabled Persons of Kenya is an umbrella organisation of organisations representing the interests of persons with disability including persons with mental disability. The second interested party is the Kenya Paraplegic Organisation, an organisation representing paraplegics.

9. The petitioner in any case has the obligation to set out their case in the petition and supporting affidavit. It is the petition that sets out the framework of the case and in this case it is unfortunate that the petition and the supporting deposition are inadequate for this court to conduct an inquiry necessary to reach any conclusions to determine whether rights are violated as alleged. A case such as that presented is not about legal arguments but facts and evidence presented to support legal arguments.

10. Unlike the former Constitution which did not recognize and protect the rights of persons with disabilities, the Constitution now has explicit provisions which provide a foundation for the rights of persons with disabilities (see *RM (suing through next friend JK) v Attorney General*(2008) 1 KLR (G & F) 574). The preamble and the provisions on national values and principles contained in **Article 19** lays emphasis on dignity, human rights and social justice for all persons. In giving effect to the provisions of the Constitution and the Bill of Rights, the place of persons living on the margins of society must be articulated as required by **Articles 19(2), 20 and 21**. **Article 28** protects the right of any person to be treated with dignity.

11. It is true that persons with disabilities have suffered through our history and that is why the Constitution makes special provisions for vulnerable persons. As I demonstrated at the beginning of this judgment, these facts are well documented. The Court, however, is required to adjudicate issues based on evidence and facts in order to reach conclusions and thereafter grant appropriate relief. It is for this reason that the respondents and the 1st interested party opposed the petition on the basis that there was insufficient material for them to answer the petitioner's case. They relied on the case of *Anarita Karimi Njeru v Attorney General* [1979] KLR 154.

12. The case of *Anarita Karimi Njeru v Attorney General* (*Supra*) established the principle, that in matters concerning enforcement of fundamental rights and freedoms, a petitioner must plead with particularity that of which he complains, the provision said to be infringed and the manner in which the particular right is violated. This principle is correct, however, I think the gloss put on it by the *Trusted Society of Human Rights Alliance v Attorney General and Other Nairobi Petition 229 of 2012 (Unreported)* is more appropriate. In that case the court went further and noted that it was not necessary to set out the violations with mathematical precision but in a manner that will enable the respondent have notice of the allegations and defend himself or herself and to enable the court adjudicate the violation. In light of the general principles of access to justice, the Court is obliged to go further and inquire about the petitioner's grievance and see whether a case was made out to warrant relief.

13. I have directed my mind to this approach and analysed the pleadings, depositions and statements to find what the petitioner's grievance is. The petitioner complains about health and education policies which are discriminatory and that undermine the dignity of persons with disabilities. The petitioner does not set out specific policies for the court to examine and make an appropriate assessment for itself. Are these policies contained in legislation, policy papers or directions or persuasive practices? Apart from the general grievances, there is a lack of clarity on specific policies. In the absence of such clarity the Court is unable, in an objective manner, to weigh those "policies" against the Constitution.

14. The result of the petitioner's claims is that, the respondents have also filed a very general replying affidavit. Dr Nyikal outlines measures which the state has taken to ameliorate the position of persons with disabilities but in the absence of a specific and clear plea by the petitioner, it is difficult to weigh whether the policies or measures outlined by Dr Nyikal are adequate or aggravate the state of the persons with disabilities and whether indeed those policies are in breach of the Constitution.

15. The second broad area of complaint by the petitioner was that concerning budgetary allocation. On this issue, the petitioner once again failed to put the mental health budget in context. A party who is seeking to enforce socio economic rights must be alive to the provisions of **Article 21** but also take into account **Article 20(5)**. A bland statement that persons with disability are not provided for adequately will not do. There must be some material basis for such an averment that will assist the court and the opposing side to deal with the issue.

16. According to the petitioner, the sum of about Kshs.365,000,000/00 was disbursed to persons with disabilities for the financial year 2011/2012. The petitioner avers that the basis and manner in which it is distributed violates the rights of persons with disabilities. Unfortunately the petitioner does not set out how this was done and demonstrate the violation of the rights and fundamental freedoms of the persons with disabilities. In the absence of such plea, the court feels helpless.

17. At the core of the petitioner's claims are economic and social rights protected under **Article 43**. Budgets and budgetary allocation are a key consideration in the enforcement of these rights and **Article 20(5)** sets out principles applicable when determining whether the State has met its obligations in terms of providing resources. It is clear, that apart from the figure cited, the petitioner has made no attempt to provide the context of the budget to enable the Court make the necessary assessments and determination. Counsel for the petitioner, during submissions, admitted that there was no averment in the petition or in the pleadings regarding the total budgetary allocation to the mental health sector. When examining whether budgetary allocation is adequate or is consistent with the State's constitutional obligation, the Court cannot rely on one figure put out there for consideration. There must be more and in the absence of such evidence, I think it is unnecessary to proceed with such an inquiry.

18. I think the petitioner's have brought this case to address the whole spectrum of issues concerning persons with disabilities. In their submissions, the petitioners have dealt with the right to education, the right to health, the right to employment, access to justice, the right to justice and political rights. In a nutshell, what the petitioner requires is for the Court to direct the State to take steps to adopt its proposals for reform and promotion of persons with disabilities. The Court's purpose is not to prescribe certain policies but to ensure that policies followed by the State meet constitutional standards and that the State meets its responsibilities to take measures to observe, respect, promote, protect and fulfil fundamental rights and freedoms and a party who comes before the Court.

19. Before I conclude this judgment, it would be important to provide a brief context of the origins of the case. When the petition was filed, the petitioner filed an application for conservatory orders and obtained an ex-parte conservatory order, "**restraining the 2nd and 6th Respondents from disbursing Kshs. 385,000,000/00 being the budgetary allocation for persons with disabilities in the fiscal year 2010/2011 for 14 days.**"

20. The 1st interested party filed an application to discharge the conservatory order. The application was supported by the 2nd interested party and the respondents. I heard the application and discharged the conservatory orders and I will reiterate what I stated in my ruling of 28th October 2011, "[47] *In his affidavit, Mr Halake, the Chairman of the NCPD*

stated that the 6th Respondent is ready to have any issues settled through alternative dispute resolution (ADR) mechanisms. This dispute puts one group of persons with disability against the others and also against the state and state agencies concerned with the interests of persons with disability. I note that the Chief Executive of the Petitioner was a member of the NCPD Board where she was the Chair of the Public Relations Advocacy Committee and therefore instrumental in making some of the policies that the petition seeks to impugn. With her credentials she would be in a position to agitate and influence the Council and the other state agencies to adopt an agenda that promotes the interests of her organisations members. [48] This Court is mandated by Article 159 (2) (c) of the Constitution to promote alternative dispute resolution. The petitioner's claim is one that involves the formulation of policies, establishment of legal frameworks and implementation of programs that promote the rights and welfare of persons with mental and intellectual disabilities. Ordinarily, such activities involve multi- stakeholder consultations and public participation, a task that the court is not particularly well suited. This is the kind of dispute that is amenable to ADR. I would welcome suggestions from the counsel's before me on how this could be achieved. [49] This is not to say that this court is powerless or unable to meet the challenge thrust upon it by the Constitution and the people of Kenya. It is only a realisation that judicial resources are not infinite and justice can be achieved in many other ways through our system of government underpinned by the values enshrined in our Constitution. Progress, particularly for persons with disability can only be achieved through building consensus amongst the group of persons with disability. Only by achieving such unity of purpose can voice of person with disability be strengthened to enable the community achieve its objectives."

21. Unfortunately, my plea for alternative dispute settlement was not taken up and the matter has now come for hearing. I have much sympathy with the petitioner, but this is a case in which the petitioners have failed to present the kind of material that would entitle them to relief. I am constrained to dismiss the petition. It is hereby dismissed with no order as to costs.

DATED and DELIVERED at NAIROBI this 18th day of December 2012

D.S. MAJANJA

JUDGE

Mr Onyore instructed by Onchuru Oyieko and Associates Advocates for the petitioner.

Mr Bitta, Principal State Counsel, instructed by the State Law Office for the respondents.

Ms Ashioya instructed by the Odhiambo Ashioya and Company Advocates for the 1st interested parties.



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