

## SEXUAL ABUSE, ASSAULT AND VIOLENCE

*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, Petition No. 8 of 2012  
Kenya, High Court at Meru

### COURT HOLDING

The Court held that the police failed to conduct prompt, effective, proper, and professional investigations into the petitioners' complaints of defilement and other forms of sexual violence, and that this amounted to discrimination, contrary to the express and implied provisions of Article 27 and Article 244 of the Constitution of Kenya 2010.

This failure infringed on the petitioners' fundamental rights and freedoms, under Articles 21(1) and (3), 27, 28, 29, 48, 50(1), and 53(1)(d) of the Constitution and the general rules of international law, including any treaty or convention ratified by Kenya which forms part of the law of Kenya as per Articles 2(5) and 2(6) of the Constitution. These include Articles 2, 3, 4, 5, 6, 7, and 18 of the African Charter on Human and Peoples' Rights, Articles 1 to 8 (inclusive) and 10 of the Universal Declaration of Human Rights, Articles 2, 4, 19, 34, and 39 of the United Nations Convention on the Rights of the Child, and Articles 1, 3, 4, 16, and 27 of the African Charter on the Rights and Welfare of the Child.

Furthermore, the police did not effectively enforce Section 8 of the Sexual Offences Act 2006. This amounted to a breach of Article 27(1) of the Constitution of Kenya 2010 that provides the right to equal protection and benefit of the law.

### Summary of Facts

Eleven petitioners, who claimed to be survivors of defilement, child abuse, and other forms of sexual violence, brought this case against Kenyan law enforcement agencies. They alleged that the police had failed to effectively investigate their complaints and take the necessary action, which would have brought the perpetrators to account for their unlawful acts. They based their petition on diverse national and international laws, including the Constitution of Kenya 2010, the Sexual Offences Act 2006, the Police Act of the Laws of Kenya, the Universal Declaration of Human Rights, the African Charter on the Rights and Welfare of the Child, and the African Charter on Human and Peoples' Rights.

### Issues

The issues put before the Court were the following:

1. Whether the neglect, omission, refusal, and/or failure of the police to conduct a prompt, proper, and professional investigation into the complaints of petitioners violated the petitioners' fundamental rights and freedoms under Articles 2, 10, 19, 21, 22, 23, 27, 28, 29, 48, 50(1), and 53 of the Constitution of Kenya 2010.

2. Whether the conduct of the police described above violated petitioners' fundamental rights and freedoms under Articles 1, 2, 3, 5, 7, 8, and 10 of the Universal Declaration of Human Rights; Articles 2, 3, 19, 34, and 39 of the United Nations Convention on the Rights of the Child; Articles 1, 2, 3, 4, 16, and 27 of the African Charter on the Rights and Welfare of the Child; and Articles 2, 3, 4, 5, 6, 7 and 18 of the African Charter on Human and Peoples' Rights.
3. Whether failure of the police to act on the petitioners' complaints constituted an abdication of statutory duty, contrary to the express and implied provisions of the Sexual Offences Act, 2006 and the Police Act.

## Court's Analysis

The Court found that the petitioners were survivors of sexual violence and child abuse, that they had suffered physical and psychological harm, and that they had reported the crimes to various police stations. The police had failed to conduct prompt, effective, and professional investigations into these complaints. This caused further harm to the petitioners as the perpetrators continued to threaten their physical and psychological well-being. The Court also stated that this created a climate of impunity for defilement, as the perpetrators were not held accountable for their unlawful acts.

The Court found that while the perpetrators were directly responsible for the harm caused, the respondents were culpable for the ongoing failure to ensure that criminals were brought to account through effective investigation and prosecution of these crimes. The Court found that the police not only failed to take action, but also put the victims under onerous cross-examination, and humiliated and blamed them when they reported their ordeals. For these reasons, the Court found the respondents directly responsible for the psychological harm caused to the petitioners as a result of their actions and inaction.

The Court agreed with the principle set out in the South African case of *Van Eader v. Minister of Safety and Security* (2002) ZASCA 123, where a fundamental breach of the petitioners' freedom was found to have occurred when the police failed to pursue the perpetrators of child abuse and sexual violence. The Court cited *Jessica Lenahan (Gonzales) and others v. United States*<sup>18</sup> in support of the proposition that the state had a positive obligation to protect the vulnerable, such as children, and its failure to do so did not need to be intentional in order to constitute a breach of this obligation. The Court further agreed with the principle stated in the Kenyan case of *R. v. Commissioner of Police & 3 others ex-parte Phylis Temwai Kipteyo*,<sup>19</sup> that once a report is made to the police, the police have a duty to take the appropriate steps and actions to investigate and apprehend the perpetrators, and the failure to do so violated constitutional rights of the victims as guaranteed under Article 244 of the Constitution of Kenya 2010.

The Court referred to other supporting case law to demonstrate the central role the police played in facilitating access to the courts by victims of sexual abuse, with the consequence that when the police failed to discharge their obligations, victims are denied access to the courts and therefore access to justice. Furthermore, as the petitioners were children, the Court stated that the failure of the police to act on the complaints of abuse also infringed on the constitutional requirement to protect the best interests of the child.

## Conclusion

The Court found that the actions and inactions of the respondents violated various fundamental rights and freedoms of the petitioners that are guaranteed in the constitution of Kenya and other laws, and ordered the respondents to conduct investigations into the petitioners' complaints.

## Significance

This case serves as an example of the challenges that vulnerable victims, and in particular children, have to face when reporting sexual abuse and violence to the authorities. Victims are often discouraged from reporting crimes as a result of the treatment they receive from the authorities. In this case, the police disbelieved and blamed the victims and failed to take action.

This case is significant because the Court found that the police failed in their duty to protect the fundamental and constitutional rights of the petitioners. They were held accountable for their actions and inactions under local police statutes as well as under the constitution of Kenya and international treaties ratified by Kenya that enshrine fundamental rights and freedoms.

In its ruling, the Court was clear that the petitioners, who it noted were a vulnerable group, were owed equal protection and benefit of the law by the law enforcement agencies.

The significance of this case can be understood against the backdrop of the common law principle, restated in *Hill v. Chief Constable of West Yorkshire* [1989] AC 53 (United Kingdom), that the police did not owe a general duty of care to unidentified members of the public. This set the precedent in the common law tradition for refusal by the courts to hold the police accountable for their failure to protect and undertake proper investigations, even in cases where the police were aware of the threat a known perpetrator posed to a particular victim. This precedent is still influential in many jurisdictions that have adopted the common law tradition.

The High Court at Meru, Kenya, however, took a different line of reasoning. Its approach hinged on human rights law rather than common law. It found that the petitioners could be heard on the grounds that a constitutional right or fundamental freedom had been infringed. The Court not only looked at how the police failed in their duties and obligations under the relevant laws, but also how the police mistreated the victims when they reported the crimes. The Court cited expert testimony on Kenyan and international police standards which described the investigations as "inadequate" and "fall[ing] short of international standards." The Court found that the police were directly responsible for the psychological harm the victims suffered as a result of their failures. The Court found further that such failures by the police have contributed to the development of a culture of impunity and tolerance for pervasive sexual violence against girl children.

Since 2010, Kenya has revised its Constitution and enacted legislation, including the Police Act, which has brought the country into line with internationally accepted human rights standards. This enabled the Court to come to a decision that favoured the victims who had suffered at the hands of the police. Other countries, such as South Africa, have also adopted stronger human rights approaches in court decisions based on a strong rights-based Constitution and supporting legislation. As such, this case can be seen as a positive step among efforts being made in Africa to address the problem of sexual abuse and violence against girls and women.