

**IN THE HIGH COURT OF FIJI AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action No. HBM 09 of 2019**

**BETWEEN**

**KELEPI SALAUCA**

**APPLICANT**

**AND**

**MITIELI NACAGILEVU (POLICE)**

**FIRST RESPONDENT**

**AND**

**THE COMMISSIONER OF POLICE**

**SECOND RESPONDENT**

**AND**

**THE ATTORNEY GENERAL**

**THIRD RESPONDENT**

**Counsel** : The Applicant in person.  
Ms. Ali N. for the respondents

**Date of Hearing** : 08<sup>th</sup> July 2020

**Date of Judgment** : 30<sup>th</sup> July 2020

## JUDGMENT

- [1] This an application for constitutional redress. The applicant's alleges that Sigatoka Police arrested him on 20<sup>th</sup> July 2016 and the officer Mitieli Nacagilevu led the police team at the time of his arrest. He has averred in the affidavit that at the Police Station he was assaulted by six different Police Officers and it went on for two days. He avers further that the officers punched him on the face and also hit him with a wooden stick.
- [2] At the hearing the learned counsel for the respondents raised an objection that the applicant has not completed Form HCCR 1 properly, in that he has not stated the right has alleged to have been violated by the 1<sup>st</sup> respondent.
- [3] In Form HCCR 1 the applicant states:
- (a) That due to the Police brutality that has caused me a eye (LT) injury, the onus for the eye treatment rests now on the Fiji Police Force, at any expense.
  - (b) That my LT. eye has become impaired.
  - (c) That the Fiji Police Force compensate me as this has become a life time problem.
- [4] It is correct to say that the applicant has not specifically stated which right guaranteed by the constitution has been violated. However, it is important to consider at this stage the purpose for which the Form HCCR 1 was introduced to the judicial system. This is to facilitate the claimants who seek remedy under the constitution who cannot afford to obtain legal assistance. The applicant in this matter had been in detention since he

was arrested by the police and later was sentenced to prison for ten years. In the affidavit filed by the applicant in support of the application he has clearly stated what happened to him at the Police Station. Being a layman one cannot expect the applicant to indicate exactly what section of the Constitution the 1<sup>st</sup> respondent is alleged to have been violated. Also in paragraph 3 of Form HCCR 1 he has stated that the violation of his rights resulted in causing severe injuries to him. For these reasons the court overrules the objection and decides to determine the application on its merits.

- [5] The second objection raised by the learned counsel for the respondents is that the application for constitutional redress has been filed out of time.
- [6] Rule 3(2) of the Constitutional Redress Rules an application for constitutional redress must not be admitted or entertained after 60 days from the date when the matter at issue first arose unless a judge finds there are exceptional circumstances and that it is just to hear the application outside that period.
- [7] In this matter the alleged assault had taken place on 20<sup>th</sup> July 2016 and the present application was on 15<sup>th</sup> May 2019 and it is clearly out of time. However, at this stage the court has to consider whether there are exceptional circumstances for the court to determine this matter on its merits.
- [8] It appears from the affidavit of the applicant and the documents tendered in support that this is not the only application the applicant made seeking redress. The applicant had filed an application on 19<sup>th</sup> August 2016 and it had been received by the Suva Criminal Registry on the same day at 9.30 am. It appears that the Criminal Registry has not processed the application of the applicant.
- [9] The applicant has been incarcerated since he was arrested by the police. After filing the application all what he could do was to await for response from the Criminal Registry. The applicant had without any delay, filed the application seeking constitutional redress and for no fault of his that application had not been processed by the Criminal registry.
- [10] The applicant has also written two letters to the Chief Justice and the Chief Registrar the copies of which are attached to his affidavit. The letter addressed to the Chief Justice has been received on 06<sup>th</sup> September 2016 at 9.35 am but there is no evidence that the letter written to the Chief Registrar reached his office.

[11] Therefore, in my view the applicant has sufficiently explained the delay in making the application and there has been no delay on his part.

[12] On the other hand the allegation is a serious one. The court cannot turn a blind eye on the allegations made by the applicant against police whose duty is to protect the public.

[13] The learned counsel for the respondents submitted that if there is an alternative remedy available to the applicant he cannot come by way of an applicant for constitutional redress.

[14] Section 44(4) of the Constitution provides:

The High Court may exercise its discretion not to grant relief in relation to an application or referral made under this section if it considers that an adequate alternative remedy is available to the person concerned.

[15] Section 44(4) of the Constitution confers a discretion upon the court not to grant relief in an application made under this section if an alternative adequate remedy is available to the applicant.

[16] Section 44(4) of the Constitution must always be read with section 44(2) in deciding in whose favour the court should exercise its discretionary power. Section 44(2) of the Constitution provides:

The right to make application to the High Court under subsection (1) is without prejudice to any other action with respect to the matter that the person concerned may have.

[17] It is therefore, clear that the mere fact that there is an alternative remedy available it will preclude any person whose rights guaranteed by the Constitution has been violated in bringing the matter before the court by way of an application for constitutional redress.

[18] As I have stated in my judgment in the case of **Proceedings Commissioner v Attorney General of Fiji** [2018] FJHC 1039; HBC249.2017 (26 October 2018) the question whether an application for constitutional redress should be refused on the ground that the party seeking redress has an adequate alternative remedy depends on the facts of each case. The discretion conferred upon the court by section 44(4) of the Constitution

must be exercised cautiously and the court must always consider whether the alternative remedy available to the applicant is adequate before refusing an application for constitutional redress. There are no set guidelines to follow in deciding whether a particular alternative remedy available to a party is adequate.

[19] In this matter the applicant alleges that he was assaulted by the 1<sup>st</sup> respondent and other officers causing injuries to him. The Fiji Police Medical Examination Form, under the heading Summary and Conclusion, says:

Blunt trauma resulting in nasal fracture, Right shoulder soft tissue injury, Needs to follow up for soft tissue injury.

[20] Section 11 of the Constitution provides;

- (1) Every person has the right to freedom from torture of any kind, whether physical, mental or emotional, and from cruel, inhumane, degrading or disproportionately severe treatment or punishment.
- (2) Every person has the right to security of the person, which includes the right to be free from any form of violence from any source, at home, school, work or in any other place.
- (3) Every person has the right to freedom from scientific or medical treatment or procedures without an order of the court or without his or her informed consent, or if he or she is incapable of giving informed consent, without the informed consent of a lawful guardian.

[21] In affidavit in response of Rajesh Krishana, Superintendent of Police denies this allegation but the person who was present at the time of allege assault has not denied the assault. Affidavit is a statement of fact and it is also sworn evidence. The facts contained in the affidavit must be facts within the personal knowledge of the affirmant.

[22] In the affidavit in opposition the allegation of assault is denied and avers that the applicant has failed to give evidence on the details of the alleged assault. The only evidence that can be given by the applicant is what is contained in the affidavit. In applications for constitutional redress the court makes its finding on the affidavits and other documents tendered in evidence. From the affidavit of Rajesh Krishna, Superintendent of Police it appears that he had no personal knowledge of what transpired at the police station when the applicant was arrested.

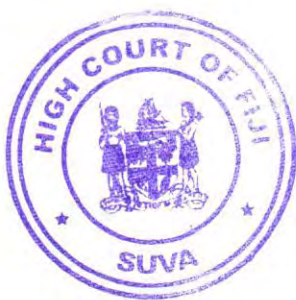
[23] The affidavit evidence of the applicant is supported by the Fiji Police Medical Examination Form and unless there is an explanation offered by the 1<sup>st</sup> respondent as to how the applicant sustained injuries while in police custody the court has to accept the affidavit evidence of the applicant.

[24] There is sufficient evidence before this court to arrive at the conclusion that the 1<sup>st</sup> respondent with the other officers who arrested the applicant assaulted him and caused injuries as stated in the Fiji Police Medical Examination Form, in breach of section 11 of the Constitution.

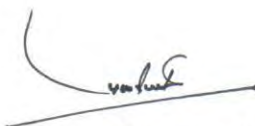
[25] The applicant also seeks damages for the injuries caused. The proper cause for the applicant to seek damages for the injuries caused is to institute proceedings by way of writ of summons. To assess damages the court requires evidence. It cannot be done by affidavit evidence. However, Court orders the 1<sup>st</sup> respondent to pay the applicant \$1000.00 for violation of his right guaranteed by section 11 of the Constitution.

#### **ORDERS**

1. The court declares that the 1<sup>st</sup> respondent has violated the rights of the applicant guaranteed by section 11 of the Constitution.
2. The 1<sup>st</sup> respondent is ordered to pay the applicant \$1000.00 as compensation.
3. The 1<sup>st</sup> respondent is also ordered to pay the applicant \$500.00 as costs of this application.



30<sup>th</sup> July 2020

  
Lyone Seneviratne

**JUDGE**