



**Macharia v Commissioner of Police & another (Constitutional Petition 16 of 2012)  
[2024] KEHC 14815 (KLR) (Constitutional and Human Rights) (22 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14815 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION 16 OF 2012**

**EC MWITA, J**

**NOVEMBER 22, 2024**

**BETWEEN**

**WILSON MWANGI MACHARIA ..... PETITIONER**

**AND**

**THE COMMISSIONER OF POLICE ..... 1<sup>ST</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The petitioner filed this petition against the respondents for the violation of his rights and fundamental freedoms and sought declarations of violations of his rights and an order for compensation in both general and special damages. The petition is supported by, the petitioner's affidavits and those of his witnesses, Kinyanjui Njuguna and Martha Wanjiku Kamunyei as well as written submissions.

**Petitioner's case**

2. The petitioner stated in his affidavits in support of the petition, that on 22<sup>nd</sup> June 2011 at around 7.0 0 am while doing his work at a public spot near Sellineru Hotel, he was arrested by a traffic police officer known as Barrack in the company of unknown persons. He was taken to Kiserian police station where he was detained for over six hours.
3. The petitioner stated that at the time of his arrest, he was not given any reason for the arrest, detention or informed of the crime he had committed. At the police station, he was flogged with a baton for several hours and beaten on the arms, elbows and knees using assorted weapons. Barack and other police officers also stepped on him and kicked his head and body.



4. The petitioner asserted that as a result of the assault, he sustained injuries and was taken to Mars Medical Clinic for first aid. His right knee was dressed and he was referred to Mbagathi District Hospital for further treatment. He was released after executing a free bond of Kshs. 2,000 and asked to appear at the Chief Magistrates' court at Kibera on 28<sup>th</sup> June 2011.
5. He subsequently attended the ENT Clinic at Kenyatta National Hospital (KNH) for an audiogram which revealed normal right hearing and mild sensory-neuro hearing loss for the left ear.
6. On 28<sup>th</sup> June 2011 the petitioner attended Kibera Law Courts as was indicated in the police bond. He was however informed by a clerk at the registry that his name was not among the charge sheets received by the court and was advised to follow up with the police.
7. On 30<sup>th</sup> June 2011, the petitioner went to Mbagathi Hospital and was referred for an X-Ray at Kenyatta National Hospital (KNH). The X-ray confirmed that he had sustained a fracture of the right patella. The doctor further confirmed that he had also sustained a blunt trauma on the left hip joint and skeletal and soft tissue injuries. He was put on medication and discharged.
8. On 8<sup>th</sup> July 2011, the petitioner was admitted at KNH for treatment of the fracture and was discharged on 28<sup>th</sup> July 2011. He continued attending physiotherapy sessions at the fracture clinic as an outpatient.
9. The petitioner stated that he incurred medical expenses totalling to Kshs. 48, 735 at KNH and Mbagathi Hospitals. On 14<sup>th</sup> October 2011, he underwent a further medical examination conducted by Dr. Wambugu P.M and paid Kshs. 3,500 for the examination.
10. The petitioner maintained that from the medical report, he will need future medical expenses of Kshs. 67,500 for the removal of a metal implant and physiotherapy sessions. The doctor further indicated that he had suffered 18 % permanent incapacity.
11. The petitioner asserted that at the time of the actions complained of, his arrest was booked in the occurrence book (OB). The police however refused to provide him with an extract of the OB and details of the arrest in violation of articles 35(1) and 49 of *the constitution*.
12. The petitioner asserted that his arrest without informing him reasons and detention without any charges being preferred against him was a contravention of articles 29 of *the constitution* and article 9 of the Universal Declaration of Human Rights (UDHR). It was also in contravention of his rights guaranteed under article 49(1)(a)(b) and (d) of *the constitution*.

### Oral evidence

13. The petitioner testified as PW1, adopted his supporting affidavit; further and annexures as his evidence. He told court that it was the police officer who wrote the statement he was shown and that the same did not reflect what happened. He further told court that he was neither booked in the occurrence book nor charged with the offence of resisting arrest.
14. In cross examination, he admitted that he was arrested because he had pushed a vehicle that hit another vehicle. He stated that when he was being examined at Mars Hospital, he did not inform the doctor that he had been involved in road accident. He told court that he was epileptic and had never been injured through a fall. He also told court that he did not complain about a broken shoulder when he was first treated. He never reported the beatings to any police station because it was the police who had assaulted him.
15. PW 2 Kinyanjui Njuguna, adopted his affidavit as his evidence before court. In the affidavit, he stated that on 22<sup>nd</sup> June 2011 at around 10.00 am, he received a call asking him to go to Kiserian police station



- to check on the petitioner. At the station, he was taken to the cell where the petitioner was being held. The petitioner had his right knee covered in a bandage and was bleeding.
16. On inquiring what had happened, the petitioner informed him that he had gone to his place of work and found a car parked at the spot. He pushed the car to create room. The car overran a stopper he had put behind it and hit another vehicle parked nearby. The petitioner waited for the owners of the vehicle to come so that they could settle the matter. A group of police officers went and forcefully took him to the police station.
  17. According to Mr. Njuguna, the petitioner informed him that he was attacked by police officers at the police station who severely beat him with batons. The same police officers also took him to hospital where his knee was bandaged.
  18. Mr. Njuguna further inquired from the police officers what the petitioner had done and was informed that he had caused an accident. He then requested them to release the petitioner on bail. After sometime, police officers called the owners of the affected vehicles who agreed to settle the matter amicably. He (Mr. Njuguna) paid for the damage occasioned to both vehicles. However, the police insisted that the petitioner would still be charged. They therefore released the petitioner on bond to attend court on 28<sup>th</sup> June 2011 at Kibera Law Court.
  19. According to Mr. Njuguna, he gave the petitioner money to go to Mars Hospital where the wound was dressed. The petitioner also went for further treatment at Mbagathi District Hospital and was later admitted at KNH for about three weeks.
  20. Mr. Njuguna stated that the petitioner went to Kibera Law courts but did not find his name among the charge sheets that had been registered at Kibera Law Courts.
  21. In cross examination, he admitted that he was not at the scene when the incident happened; that his affidavit contained what he saw at the cell and that when he went to the police station, he was led to where the petitioner was. He found him with a freshly washed and bandaged wound that was still bleeding. The petitioner had not been booked in the O.B but was only booked after his insistence.
  22. PW3 Martha Wanjiku Kamunyei also adopted her affidavit as her evidence. In the affidavit, she stated that on 22<sup>nd</sup> June 2011, she went to Kiserian Town at around 8.00 am to sell cloths. As she went around the town selling cloths, she saw the petitioner engaging in a scuffle with three people one of whom was in police uniform. The petitioner was escorted towards the police station.
  23. Ms. Wanjiku stated that after about one hour, the petitioner called and informed her that he had been locked up at the police station and needed assistance. She went to the police station and requested to see the petitioner. When the cell was opened, she saw the petitioner seated, blood coming out of the right knee. When she inquired what had happened, the petitioner informed that her that he had been assaulted by police officers. She then called PW2 and informed him what had happened to the petitioner.
  24. PW4, Dr. Peter Wambugu Mwangi who examined the petitioner on 14<sup>th</sup> October 2011, told the court that the petitioner's history was that on 22<sup>nd</sup> June 2011 at about 2. 00 pm he was assaulted by police officers within Kiserian police station. He was initially attended to at Mars Medical clinic and later at KNH. On examination, the petitioner had a fracture on the right patella bone, blunt trauma on the left hip joint and blunt trauma to the left ear with mild hearing loss. He was treated as an inpatient where the fracture was surgically managed.
  25. As at the time of examination, the petitioner complained of poor hearing in the left ear associated with excessive noises and stiffness of the right knee joint. The metal implants were still in place. Physical



examination on the left ear showed that the external ear and ear drum were intact. The right lower right limb had a slight limping gait. The petitioner had a surgical scar within which were palpable implants on the knee. The knee joint was stiff and swollen with wasted thigh muscles.

26. He formed the opinion that the injuries were consistent with blunt trauma and may have occurred during the assault. The petitioner had sustained skeletal and soft tissue injuries which caused him pain and prolonged immobility. The fractured patella was expected to unite after which the metal implants would have to be removed at an estimated all-inclusive cost of Kshs. 60,000. The petitioner was pre-disposed to osteo arthritis on the knee joint and the doctor assessed a degree of permanent incapacity of 18%.
27. The doctor confirmed that the petitioner had informed him that he suffered from epilepsy since his childhood. This was, however, unrelated the loss of hearing. The petitioner had also been assessed by ENT surgeons at KNH and had a specialist audiogram report indicating the problem to be of mild nature. At the time of examination, the petitioner was still undergoing follow up clinics
28. In relation to the stiffness of the knee joint, he was of the opinion that the petitioner would benefit from at least 10 sessions of physiotherapy at a cost of Kshs. 500 per session at KNH. He produced the medical report dated 14<sup>th</sup> October 2011 as an exhibit. He also confirmed that he had charged Kshs. 3,500 for the medical report and Kshs. 15,000 for his court attendance.
29. In cross examination, the doctor confirmed that he relied on the medical documents from KNH-(x-ray reports and audiogram); that the petitioner informed him that he had been assaulted by police officers and that he was not able to confirm when the petitioner had the last epileptic attack prior to the medical examination. On physical examination, the petitioner had no scars on the body except those at the knee joint.
30. According to the doctor, the alleged arrest took place about 3 months prior to the medical examination. Poor hearing was associated with excessive noises which could have been as a result of many factors, such as working environment that may not be associated with the assault. Blunt trauma could have been due to a fall. Metal implants removal could cost Kshs. 60,000 at a private hospital. Kshs. 5,000 cost for physio-therapy was attributed to KNH. He confirmed that the injuries were consisted with the history he had been given.

### **1<sup>st</sup> & 2<sup>nd</sup> respondents' case**

31. The 1<sup>st</sup> & 2<sup>nd</sup> respondents opposed the petition through a replying affidavit by Shadrack Barrack Wasika (Mr. Wasika). Mr. Wasike stated that on 22<sup>nd</sup> June 2011, the petitioner reported to his place of work within Kiserian Township near satellite supermarket and found a vehicle registration number KAJ 893 S parked at his spot.
32. The petitioner decided to disengage the vehicle's gear and interfered with it. As a result, the vehicle rammmed into another vehicle registration number KAG 212L which had been parked nearby. As a result of the impact, the two vehicles were damaged. The owners of the vehicles reported the matter at Kiserian police station. He later visited the scene and was shown the petitioner as the person who had caused damage to the vehicles.
33. Mr. Wasika stated that the petitioner was informed the reason for his arrest but became violent and attempted to run away. He however fell in a drainage and sustained some injuries. With the help of two police officers, PC Terer and PC Nderitu, they managed to arrest the petitioner and took him to the police station and charged him with malicious damage to property, resisting arrest and tampering with the motor vehicles which were booked in the OB.



34. Mr. Wasika confirmed that he took the petitioner to Mars Hospital because of the injuries he had sustained as a result of the fall. After treatment, he took the petitioner back to the police station. The petitioner and his relatives pleaded for leniency and accepted to repair the two vehicles. An agreement between the parties was prepared which they signed.
35. Mr. Wasika denied that the petitioner's rights were violated. He also maintained that the petitioner was not entitled to compensation.

#### **Petitioner's submission**

36. The petitioner filed written submissions and urged the court to allow his petition as prayed. He relied on the decision in *Grace Nzula Mutunga v Joyce Wanza Musila* [2017] eKLR for the argument that in the absence of evidence from the respondents to substantiate their claim, despite being afforded the opportunity to do so, their case remained unsubstantiated allegations.
37. The petitioner submitted relying on his testimony and that of his witnesses and annexures WMM-1, WM-4 and WM-8 that he had proved police brutality against him. He further relied on the decision in *Florence Amunga Omukanda & Another v Attorney General & 2 others* [2016] KEHC 3667 (KLR).
38. The petitioner argued that articles 25(a) and (c); 29 (c) (d), (f) and 50 of [the constitution](#) were violated because he was tortured and left with life threatening injuries. He was arrested without warrant and not being informed the reasons for the arrest. He was further detained in police cells incommunicado without being charged.
39. The petitioner placed reliance on *Mohamed Feisal & 19 others v Henry Kandie, Chief Inspector of Police, OCS, Ongata Rongai Police Station & 7 others; National Police service Commission & Another (Interested Party)* [2018] eKLR and to argue that he was, denied access to family members or legal representatives; held in solitary confinement; constantly subjected to abuse and was held in inhumane conditions in violation of his rights guaranteed to an arrested person under article 49 of [the constitution](#).
40. The petitioner again relied on the decision in *Edward Akong'o Oyugi & 2 others v Attorney General* [2019] eKLR for the proposition that before an arrest, search and a detention of a person, police officers must consider whether there are no less invasive methods which may be used to effect the arrest and detention in custody.
41. The petitioner maintained that when a person is arrested on allegations of committing an offence, his fundamental rights are not abrogated. He argued that the right not to be subjected to inhuman treatment includes the right to be treated with human dignity and all that goes along with it. He relied on *Moses Tengeya Omweno v Commissioner of Police & Another* [2018] eKLR.
42. The petitioner further relied on, among other decisions, *Li Wen Jie & 2 others v Cabinet Secretary, Interior and Coordination of the National Government & 3 others* [2017] eKLR for the argument that fundamental rights are owed to persons as a matter of human dignity and should be honoured no matter what form of government a particular community chooses to adopt.
43. On compensation, the petitioner proposed an award of Kshs. 15,000,000. He relied on the decisions in *Koigi Wamwere v Attorney General* [2015] eKLR; *Kenneth Stanley Njindo Matiba v Attorney General* [2017] eKLR and *Irene Wangari Gacheru & 6 others v Attorney General* [2017] eKLR.
44. The respondents did not call witnesses or file written submissions despite being given an opportunity to do so.



## Determination

45. Upon considering the petition and responses, two issues arise for determination, namely: whether the petitioners rights were violated and if so, whether he should be compensated and the quantum thereof.
46. The facts of this petition are largely undisputed. On 22<sup>nd</sup> June 2011 the petitioner was arrested by police officers and taken to Kiserian police station. This was after two vehicles were damaged as he attempted to push one of the vehicles to create room for him to arrange his tools of trade. In the course of arrest, he was injured and was taken to Mars Hospital for treatment. He was taken back to the stations and released after the petitioner and his relatives and the owners of the vehicles agreed to settle the matter amicably.
47. The disputed facts are that according to the petitioner, the injuries he sustained were as a result of police assault. He stated that police officers assaulted him at the police station for several hours using assorted weapons, including a baton and beat him on the arms, elbows and knees and head, leading to the injuries. The police on the other hand, maintained that the petitioner fell into a drainage and injured himself as he attempted to run away to avoid arrest.
48. I have considered the evidence on record. There is no dispute that only the petitioner and the police offices were present when he was arrested and taken to the police station. PW3 merely stated that she saw a scuffle between the petitioner and people who escorted the petitioner towards the police station. She did not say that she saw the petitioner run away. She also did not witness the petitioner's assault.
49. PW2 found the petitioner at the police station with the wound. He gave the money so that the petitioner could be taken to hospital. He together with the petitioner agreed with the owners of the vehicles to amicably sort out the matter and the petitioner was released on police bond.
50. Whereas the petitioner testified in this matter and called witnesses, the respondents only filed a replying affidavit but did not call evidence. Although the petitioner and his witnesses were cross examined, his evidence and especially how he was injured was not controverted.
51. The respondent's claim that the petitioner fell and injured himself while trying to run away from arrest remained but an allegation. In this respect, the court stated in *Grace Nzula Mutunga v Joyce Wanza Musila* [2017] eKLR that in the absence of evidence from a respondent to substantiate his claim, despite being afforded the opportunity to do so, his case contained in the statement of defence / response remains unsubstantiated allegations.
52. In the circumstances, I am inclined to agree with the petitioner that he was assaulted by police officers upon his arrest. This conclusion is fortified by the evidence of the petitioner ant that of PW2 and PW3 who went to the police station and found the petitioner in police cell bleeding. Further, the petitioner confirmed that the police took him to Mars Hospital for treatment a fact the is also contained in the affidavit of Mr. Wasike. The documents produced by the petitioner and the evidence of PW4, the doctor, also collaborated the fact that the petitioner was injured and had a fracture for which he was treated.
53. The doctor could not, however, confirm that some of the injuries such as partial loss of hearing were as a result of the assault given his observation that it could be a result of many other factors, including the environment in which the petitioner worked.
54. Article 244 of [the constitution](#) on the objects and functions of the National Police service, requires National Police Service to strive for among others, the highest standard of professionalism and discipline among its members and compliance with constitutional standards of human rights and



fundamental freedoms. These are virtues that police officers must strive for in the performance of their duties.

55. In that respect, police officers had no lawful and legitimate reason for assaulting the petitioner once they arrested booked in the station. Their action was not only intrusive and an uncalled-for, but also unlawful and a violation of the petitioner's right to dignity as an arrested and defenceless person. Police officers were under duty to accord the petitioner the highest regard for his human rights and fundamental which they failed to do so as required of them by *the constitution* and the law for which they must be held to account.
56. Regarding the contention that the police failed to inform the petitioner the reason for his arrest and detention, it is clear that the petitioner was aware why he was arrested and admitted as much during the hearing. On the allegation that the petitioner was held in police custody without being charged, it is plain from the evidence of both the petitioner and PW2, that parties had agreed to resolve the issue of the damage to the vehicles amicably and the petitioner was thus, released from police custody. I do not find merit in this complaint.
57. This court therefore finds and holds that police officers violated the petitioner's rights and fundamental freedoms when they unlawfully assaulted him upon arresting and booking him at the police station thus, acted outside their mandate as law enforcement officers.

### **Compensation and quantum**

58. Having determined that the petitioner's rights and fundamental freedoms were violated, the next issue is whether to award compensation and if so, what is the quantum.
59. Article 23(2) vests on this court, discretion to grant appropriate reliefs to vindicate violations of the rights guaranteed in the Bill of Rights. Once the court finds that a party's rights and fundamental freedoms have been violated, it has an obligation to grant an appropriate relief as required by Article 23(3) of *the constitution*. The essence of such relief is to ensure that the rights enshrined in *the constitution* and the Bill of Rights are protected and enforced. (*Fose v Minister of safety and Security 1997 (3) SA 786 (CC)*).
60. This position was emphasised by the Constitutional Court of Uganda in *Tinyefuze v Attorney General of Uganda (Constitutional Petition No. 1 of 1996) [1997] UGCC 3*, that "if a petitioner succeeds in establishing breach of a fundamental right, he is entitled to the relief in exercise of constitutional jurisdiction as a matter of course."
61. The court must consider whether an award damages as compensation towards that violation is the appropriate remedy.
62. The petitioner prayed for compensation of Kshs. 15,000,000. He cited the decision in *Koigi Wamwere v Attorney General [2015] eKLR*; *Kenneth Stanley Njindo Matiba v Attorney General [2017] eKLR* and *Irene Wangari Gacheru & 6 others v Attorney General [2017] eKLR*. In those decisions, the allegations of violations were far more serious. In the case of *Koigi Wa Wamwere* and *Kenenth Matiba*, the violations involved detention without trial for several years which was not the case with the petitioner. The petitioner was unlawfully assaulted and injured in the course of his arrest and while in police custody.
63. In the circumstances of this case, I consider an award of Kshs, 2,000,000 appropriate compensations for the violation.



64. The petitioner also sought special damages of Kshs. 48,000 being cost of treatment; future medical treatment of Kshs 60,000 and the costs incurred for medical examination and the doctor's court attendance. According to the doctor, the petitioner would require Kshs. 60,000 for removal of the metal implant and 10 physiotherapy sessions at Kshs. 500 per session. The petitioner also paid Kshs. 3,500 for the medical report and Kshs 15,000 for court attendance.
65. I have seen the receipts produced as well as considered the doctor's evidence on future medical treatment. I am satisfied that these damages have been proved and thus, allow special damages of Kshs. 133,000.

### **Conclusion**

66. In conclusion, I am satisfied that the petitioner's rights and fundamental freedoms were violated when the petitioner was unlawfully assaulted by the police while under their custody leading to bodily injuries. The petitioner had to undergo treatment for which he incurred cost.

### **Disposal**

67. For the above reasons, the court makes the following declarations and orders.
1. A declaration is hereby issued that police officers brutally and indiscriminately assaulted the petitioner thereby subjecting him to cruel, inhuman and degrading treatment in violation of his rights and fundamental freedoms guaranteed by *the Constitution*.
  2. The petitioner is hereby awarded general damages of Kshs. 2,000,000 against the respondents jointly and severally for the violation of his rights and fundamental freedoms.
  3. The petitioner is awarded special damages of Kshs. 133,000 against the respondents jointly and severally, being the cost of treatment and future medical treatment and doctors' fees.
  4. Damages in 2 above will attract interest from the date of judgment until payment in full
  5. Damages in 3 above will attract interest from the date of filing this petition until payment.
  6. Costs of the petition to the petitioner.

**DATED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF NOVEMBER 2024**

**E C MWITA**

**JUDGE**

