



Owour (Suing as Administrator and Legal Representative in the Estate of Ernest Owour Atieno) v Attorney General (Petition 108A of 2016) [2023] KEHC 21368 (KLR) (Constitutional and Human Rights) (15 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21368 (KLR)

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

PETITION 108A OF 2016

HI ONG'UDI, J

AUGUST 15, 2023

BETWEEN

THOMAS MBOYA OWOUR (SUING AS ADMINISTRATOR AND LEGAL REPRESENTATIVE IN THE ESTATE OF ERNEST OWOUR ATIENO) PETITIONER

AND

THE ATTORNEY GENERAL RESPONDENT

JUDGMENT

1. The Petition dated March 23, 2016 was filed by the petitioner under section 84(1)(2) & (6) of the 1969 Constitution, Articles 23, 29, 31, 32 & 39 of the Constitution of Kenya, 2010, and Rules 11 & 12 of the Constitution of Kenya (Supervisory Jurisdiction & Protection of Fundamental Rights & Freedoms of the Individual) High Court Practice and Procedure Rules, 2006 as read together with Chapter V of the Constitution (1969) (namely Sections 70 to 83).

The Petitioner's case

2. The petitioner filed the petition in his capacity as the Administrator & Legal representative of the estate of Ernest Owour Atieno He did this after obtaining a Limited Grant of Letters of Administration Ad Litem for purposes of filing a suit. The limited *grant ad litem* is dated January 27, 2014.
3. The petition seeks the following orders:
 - i. A declaration that the Late Ernest Owour Atieno's Fundamental Rights and Freedom were contravened and grossly violated by the Respondent's Special Branch Police Officers who were



Kenyan Government servants, agents, employees and in its institution in June 1986 to March 6, 1987 and for 4 years in Nyayo House Torture Chambers and thereafter in Kenyan Prisons.

- ii. A declaration that the petitioner as administrator of his estate is entitled to the payment of damages and compensation for the violations and contraventions of the deceased's fundamental rights and freedoms under the aforementioned provisions of the Constitution.
 - iii. General damages and exemplary damages and moral damages on an aggravated scale under S.84(2) of the Constitution of Kenya 1969 Articles 23 and 29 Constitution of Kenya 2010 for the unconstitutional conduct by the Kenyan Government Servants and agents awarded.
 - iv. Any further orders, writs, direction, as this Honourable Court may consider appropriate.
 - v. Costs of the suit and interest.
4. The petition is premised on the supporting affidavit of the petitioner sworn on March 23, 2016. It's the petitioner's case that the deceased worked as an administrative assistant with Kisumu Municipality town. That on an unknown date in June 1986 he was arrested by special branch police officers plus other government servants, and taken to Kisumu Police Station. He was later taken to Nyayo House Nairobi and subjected to inhumane treatment, on a daily basis.
5. He further deposed that on March 6, 1987 the deceased was arraigned before the Chief Magistrate Nairobi for plea taking. He pleaded guilty to the charge and was sentenced to serve four (4) years imprisonment. He states that the deceased was further tortured in the prison facilities, which was in contravention of the provisions of section 74(1) of the Constitution – 1969 plus Article 29 of the Constitution of Kenya 2010.
6. He deposed that as a result of the ill treatment the deceased's physical, psychological, economic and political life was messed up. That he suffered all this because of his political opinions which were different from those of the then KANU government.
7. It's his case that even though the special branch police officers had a right to arrest the deceased for commission of a cognizable offence they had no right to do the following:-
- i. Ordering him to strip naked and beat him mercilessly
 - ii. Keeping him in their custody for more than 24 hours for a bailable offence. The period he was allegedly incarcerated was 278 days.
 - iii. Arraigning the deceased in court at 5.30 p.m which was outside the court's sitting hours.
 - iv. Denying him communication with members of his family, friends or advocates. Further issuing him with threats.
 - v. Holding him in segregation, confinement in the prisons
8. With leave of the court the petitioner filed a supplementary affidavit dated March 9, 2022. He gave the following as reasons for not filing the suit in good time.
- i. That the deceased could not file the suit when the government that subjected him to torture was still in power.
 - ii. That upon change of government the same officers were in government.
 - iii. That they did could only file the suit after the 2010 Constitution when a new government came into power.



- iv. The deceased passed away in 1997 and letters of grant were issued in 2014. The delay was caused by the fact that the deceased had 8 wives and 15 children and coming to a compromise took time
9. He further deponed that efforts have been made to resolve human rights violation compensation by setting up of a Restorative Fund, and the Truth and Justice Commission. The government however seems undecided on the implementation of the same.

The Respondent's Case

10. The respondent only filed grounds of opposition dated May 5, 2016. They are as follows:-
- i. That the petitioner has brought the petition after unreasonable delay as the alleged constitutional violations happened over 30 years ago.
 - ii. That the petitioner has not produced any evidence to show the deceased was tortured: to corroborate his alleged constitutional violation.
 - iii. That the petitioner is a stranger to the averments in the petition.
 - iv. The petitioner lacks capacity to file this petition.
 - v. That in contravention of the principles espoused in Anarita Karimi Njeru case (1976 – 1980) KLR 1272 the petition filed herein is omnibus, imprecise and lacks sufficient detail of the alleged violation; and therefore it is incompetent.
11. The petition was disposed of by way of written submissions.

The Petitioner's Submissions

12. These are dated March 27, 2023 and filed by Kinuthia Wandaka & Co. Advocates. Counsel gave a brief background of the facts based on the petitioner's affidavits. He made mention of the Petitioner's statement which is not part of the documents filed herein.
13. In response to the respondent's claim of delay in filing the suit counsel cited the Case of *David Gitau Njau & 9 others v Attorney General* [2013] eKLR. He thus submitted that the question of limitation of time cannot be applied to claims based on violation of fundamental rights.
14. Counsel further submitted that the delay of 30 years in filing the suit is not inordinate, inexcusable and does not work to the petitioner's disadvantage. In support he cited several cases namely:
- i. *Lewis Wilkinson Kimani Waiyaki v. Hon. Attorney General* [2016] eKLR.
 - ii. *Wamwere & 5 others v. Attorney General* (Petitions 26, 34 & 35 of 2019 (consolidated) (2023) KEAC 3 (KLR) – Judgment on January 27, 2023. (Supreme Court).
15. In the case of Florence Wakiuru Muchiri case (supra) the Court held as follows:-

“Understanding of the jurisprudence on the issue of limitation is that courts will be reluctant to shut out a litigant on account of limitation of time unless there are obvious reasons to do so. In considering such delays, the court cannot avoid taking judicial notice of the immense difficulties which prevailed at the period of the alleged violations making it impossible for aggrieved persons to file cases of this nature against the government. In fact it is the promulgation of the *Constitution of Kenya* 2010 that opened the doors of justice thereby making it possible for aggrieved persons to institute cases of this nature.



This petition was filed on March 30, 2016, almost six years after the promulgation of the 2010 Constitution. I don't think that there is an inordinate delay in filing it. Considering the prevailing political situation which made it impossible for victims to file cases of this nature and bearing in mind the dictates of transitional justice discussed above, and in particular the need to uphold the strengthen the rule of law, and to hold the perpetrators of human rights abuse accountable, and providing victims with compensation, and the need to effectuate institutional reform, I find that I would be unfair to uphold the defense of limitation in this circumstances." (Emphasis is mine,

16. Counsel submitted that the petitioner's evidence in the supporting and supplementary affidavits has not been challenged since the grounds of opposition cannot in law be an answer to sworn evidence. He contends that the long duration of incarceration of 278 days confirms the inhuman treatment. On lack of evidence of torture he relied on the case of *Herman Mrine Nderi v The Attorney General* [2012] eKLR. His argument is that the incidents were never recorded, and were never witnessed. He relied on Sections 72 & 74 of the 1969 Constitution & Article 29 of the Constitution 2010 – to argue the petitioner's claims.
17. On what amounts to torture counsel relied on the cases of:-
- i. *David Gitau Njau & 9 others v Attorney General* [2013] eKLR.
 - ii. *Samuel Rukonya Mburu v Castle Breweries*, Nairobi HCC 1119 of 2003 where Visram J (as he then was) stated:

“Prohibition against torture, cruel or inhuman and degrading treatment implies that an “action is barbarous, brutal or cruel” while degrading punishment is “That which brings a person dishonor or contempt.””

Further that:

Torture is not permissible or excusable under any circumstances.”

18. Counsel finally submitted that the petitioner has proved his claim in respect of the deceased's estate and is therefore entitled to an award of compensation. Relying on the case of *Otieno Mak'Onyango v Attorney General & another* HCCC Misc Application No 845 of 2003 where an award of Kshs 20,000,000/= was made he asked for Kshs 30,000,000/= as damages, for the petitioner.

The Respondent's submissions

19. The respondent's submissions are dated March 8, 2023 and were filed by the Principal State Counsel Mr. Thande Kuria. Counsel submitted that the petitioner has not explained the reason for the delay of 30 years and why the deceased did not file the suit when he was alive. He argued that even though there is no limit in respect of filing Constitutional Petitions alleging the violation of fundamental rights and freedoms, the delay should not be inordinate. There should also be a plausible explanation for the delay. He relied on:-
- i. *James Kanyita Nderitu vs Attorney General & another* Petition No 180 of 2011 where the Court observed as follows:

“Although there is no limitation period for filing proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under section 84 of the Constitution, is entitled to consider whether there has been



inordinate delay in lodging the claim. The Court is obliged to consider whether justice will be served by permitting a respondent, whether an individual or the State in any of its manifestations, should be vexed by any otherwise stale claim. Just as a petitioner is entitled to enforce its fundamental rights and freedoms, a respondent must have a reasonable expectation that such claims are prosecuted within a reasonable time.”

20. He further relied on the Court of Appeal case Nairobi Civil Appeal No 268 of 2016 *Wellington Nzioka Kioko v Attorney General* 2018 eKLR – where the petitioner had filed his claim for violation of fundamental rights and freedoms thirty three years after alleged events. It is his contention that the claim by the petitioner is stale since it was brought on behalf of Ernest Owour Atieno who is deceased.
21. Additionally he submits that the petition was filed 19 years after the deceased’s death. That there is no explanation for failure by the deceased to file the suit since the retired Constitution protected fundamental rights and freedoms, and he could have moved the court under section 84 of the said Constitution. He dismissed the petitioner’s supplementary affidavit for not offering to the Court a satisfactory explanatory for the inordinate delay in filing this suit.
22. He further submitted that the petitioner lacked the capacity to institute this petition on behalf of a deceased person. It is his argument that under Articles 23 & 258 of the *Constitution* 2010 parties may file suits on behalf of others. However, the claim for violation of fundamental rights and freedoms of the individual under section 81(4) of the retired constitution is personal in nature and cannot survive the deceased.
23. Counsel submitted that the claim herein ought to have been ascertained in a court of Law before his death occurred. The reason being that the petitioner is not in a position to ascertain the facts of the case as human rights violations can only be sufficiently proved by the person who experienced them, unless a judgment had been pronounced. To support this argument counsel referred to the Court of Appeal – Nairobi. Civil Appeal No 256 of 2010 *Esther Wairimu Ndung’u & 2 others v Attorney General & 7 others* [2017] eKLR.
24. Counsel submitted that the petition has not been pleaded in a precise and concise manner as per the principles enunciated in the decisions of
 - (i) *Anarita Karimi Njeru v Republic* (1976 – 1980) KLR 1272.
 - (ii) *Mumo Matemu* [2014] eKLR
 - (iii) *Communication Commission of Kenya 5 others v Royal Media Services Limited & 5 others* [2014] eKLR Supreme Court.

In reference to the petitioner’s pleadings, newspaper cuttings, a letter from the Judiciary he argued that they did not place any nexus between the alleged violations of the petitioner’s fundamental rights and individual freedoms. That the letter from the Judiciary simply suggested that there were lawful court proceedings where the deceased was charged and prosecuted in a competent forum.

25. He further referred to the case of *Meme v Republic* [2004] eKLR where the Court stated:-

“Where a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution*, it is important that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.”



While citing the *Communication Commission of Kenya & 5 others* case (supra) he submitted that the petition as drafted did not disclose any cause of action against the respondent.

26. Counsel lastly urged the court to be persuaded by Justice Obaga's decision in Kitale Constitutional Petition No 7 of 2015 (formerly ELD ELC Petition No 1 of 2013). *Nicolaas Hendrick Claasen v. Commissioner of Lands & 4 others* [2016] where he observed as follows:

“The next issue for determination is whether a constitutional petition filed by a sole petitioner can survive his death. To answer this question, a look at the prayers in the petition is necessary.

Firstly, the deceased petitioner had sought a declaration that his constitutional rights under articles 21, 21(3) and 27 of the *Constitution* had been violated, secondly, he sought a declaration that the decision of the respondent to forcefully evict him from some thirteen parcels of land and distributing the same violated his rights under article 40(1) of the *Constitution*.

Basically, the deceased was seeking a declaration as to his rights which he alleged had been violated. These rights had not been ascertained and were personal to him. Black law dictionary 8th edition, defines the terms “declaration of rights” as an action in which the litigant requests a court's assistance not because any rights have been violated but because those rights are uncertain. The deceased's rights were yet to be determined as at the time of his demise, there is nothing therefore to be taken over by the applicant. The moment the deceased died before his rights could be ascertained, he died with those unascertained rights which were personal in nature. The unascertained rights of the deceased were not a chose in action which could be assigned to someone else.”

He thus urged the court to dismiss the petition.

Analysis And Determination

27. Upon consideration of the petition, affidavits, grounds of opposition both submissions and cited authorities I find the following issues to fall for determination:-
- i. Whether the petition has been pleaded with precision as required by the law.
 - ii. Whether the delay of 30 years in filing the petition is fatal.
 - iii. Whether the petitioner lacks the locus standi to file the petition.
 - iv. Has the petitioner proved his case to warrant the grant of the reliefs sought.

Issue No(i). Whether the petition has been pleaded with precision as required by the law.

28. The actions complained of were allegedly committed between 1986 – 1987 and four (4) years later after the conviction and imprisonment of the deceased – (Ernest Owuor Atieno) on whose behalf the suit is filed. The principle guiding parties in filing petitions claiming violation of constitutional rights and freedoms is well set out in the cases of Anarita Karimi Njeru (supra), Mumo Matemu (supra), Communication Commission of Kenya (supra). The principle established in the Anarita Karimi case (supra) is that a constitutional petition should set out with a degree of precision the petitioners compliant, the provisions infringed, and the manner in which they are alleged to be infringed. The Mumo Matemu case (supra) at paragraph 44 simply reaffirmed the principle in the Anarita case.



29. The respondent relied on the principle set in the above cases to argue that the petition herein does not meet the requisite threshold for a constitutional petition, as there is no evidence to support it.
30. Upon perusal of the petition as drawn I find that the petitioner has set out what his complaint is under paragraphs 6 – 16 of the petition. The allegedly violated provisions of the law are set out at paragraphs 18 – 22. The same also state how the said provisions have been infringed. The reliefs sought are set out at the end of the petition dated 23rd March 2016. The petition is further supported by the petitioner’s affidavit and a supplementary affidavit dated 23rd March 2016 and 9th March 2022 respectively. In view of the above I find that the petition meets the requisite threshold of a constitutional petition and I accordingly decline to strike it out on that ground.

Issue No (ii). Whether the delay of 30 years in filing the petition is fatal.

31. There is no dispute that this petition was filed thirty (30) years after the alleged violation of rights complained of took place. This is an issue that was raised in one of the grounds of opposition by the respondent. As a result the petitioner filed a supplementary affidavit with leave of the court. In the said affidavit he explained the reasons why neither him nor the deceased filed the petition within reasonable time. The respondent submitted that the explanation was not satisfactory.
32. The starting point is that there is no time limit to the filing of constitutional petitions in respect of claims of violation of human rights and freedoms. Does this mean parties can file such petitions whatever time they feel like doing so? On this point I am in total agreement with what Majanja J stated on this in the case of *James Kanyita Nderitu* (*supra*). I am guided by the Supreme court case of *Wamwere & 5 others* (*supra*) where the Court held that where there was delay in filing such a petition a petitioner ought to explain the reasons for delay to the satisfaction of the court.
33. In this case there is no dispute that there was inordinate delay and the petitioner was duly bound to give a satisfactory explanation for the same. This was done through the supplementary affidavit which is clear, on what transpired. There are two persons involved in this i.e. the petitioner and the deceased whom he purports to represent. For the moment I do not find the inordinate delay to be fatal.

Issue No (iii). Whether the petitioner lacks the locus standi to file the petition.

34. The Petitioner applied for and was on January 27, 2014 granted a Limited Grant of Letters of Administration ad litem Limited to filing of a suit only. He therefore filed this petition on March 30, 2016 on the basis of the Limited Grant Ad Litem. Can he then be said to lack locus?
35. The honourable Court granted him the authority to file the suit. It’s clear to me that in his application for the Limited grant ad litem he swore an affidavit explaining why he needed the grant. He must have also annexed the death certificate of the deceased. It is at that point that the issue of locus standi would have been considered and not now.

Issue No (iv). Has the petitioner proved his case to warrant the grant of the reliefs sought.

36. This petition was filed claiming violation of the deceased’s rights and freedoms as enshrined in the 1969 *Constitution*. The new *Constitution* 2010 has been cited because the suit was filed long after its enactment. The petitioner is a son of the deceased and so the violations complained of do not relate to him. He filed this suit in a representative capacity by virtue of the Letters of *grant ad litem* issued to him by Kimaru J (as he then was) on January 27, 2014.
37. The petitioner relied on Sections and Articles of the repealed and current Kenya Constitutions to state his case. The law then and now outlined and still outlines the Constitutional rights of arrested persons,



their security, right to movement etc. Counsel for the petitioner in his submissions cited in particular sections 72(1), 74 of the repealed *Constitution* and Article 29 of the 2010 *Constitution*.

38. They provide as follows

Section 72(1).

- (1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases, that is to say—
 - (a) in execution of the sentence or order of a court, whether established for Kenya or some other country, in respect of a criminal offence of which he has been convicted;
 - (b) in execution of the order of the High Court or any Court of Appeal exercising jurisdiction in Kenya punishing him for contempt of any such court or of another court or tribunal;
 - (c) in execution of the order of a court made to secure the fulfilment of any obligation imposed on him by law;
 - (d) for the purpose of bringing him before a court in execution of the order of a court;
 - (e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law of Kenya;
 - (f) in the case of a person who has not attained the age of eighteen years, for the purpose of his education or welfare;
 - (g) for the purpose of preventing the spread of an infectious or contagious disease;
 - (h) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community;
 - (I) for the purpose of preventing the unlawful entry of that person into Kenya, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Kenya or for the purpose of restricting that person while he is being conveyed through Kenya in the course of his extradition or removal as a convicted prisoner from one country to another; or
 - (j) to such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within Kenya or prohibiting him from being within such an area, or to such extent as may be reasonably justifiable for the taking of proceedings against that person relating to the making of any such order, or to such extent as may be reasonably justifiable for restraining that person during any visit that he is permitted to make to any part of Kenya in which, in consequence of any such order, his presence would otherwise be unlawful.
- (3) Any person who is arrested or detained —
 - (a) for the purpose of bringing him before a court in execution of the order of a court; or
 - (b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence,



- (1) No person shall be subject to torture or to inhuman or degrading punishment or other treatment.

29. Freedom and security of the person.

Every person has the right to freedom and security of the person, which includes the right not to be—

- (a) deprived of freedom arbitrarily or without just cause;
 - (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;
 - (c) subjected to any form of violence from either public or private sources;
 - (d) subjected to torture in any manner, whether physical or psychological;
 - (e) subjected to corporal punishment; or
 - (f) treated or punished in a cruel, inhuman or degrading manner.
39. It is the petitioner's assertion that all the above rights in respect of the deceased were violated by special branch police officers, represented by the respondent. Besides his averments in the supporting affidavit and the pleadings in the petition the petitioner has not placed any evidence before this court to support the allegations. He was personally not present during the alleged occurrences.
40. The newspaper cuttings (TMO-1a) annexed to the petition do not state anything about the claims of beatings, torture, eating of bad food and being stripped naked. If anything they confirm that:
- i. The deceased was a member of an unlawful political movement then.
 - ii. That the deceased had taken an unlawful oath in respect of the said movement.
 - iii. That the deceased was presented before the court when plea was taken in Nairobi Chief Magistrate's Court Criminal Case No 993 of 1987 – Republic v. Ernest Owuor Atieno
 - iv. That the deceased admitted the charge and was sentenced to serve four (4) years imprisonment on each of the two counts. He did not appeal against the conviction and the sentence. These documents did not therefore assist him in the petition.
41. I have keenly read through the petitioner's supporting affidavit and all the averments made by him. He has made averments to things he never witnessed but as though he witnessed them. He does not say when and how he came to know of all these happenings. Where was he and how old was he when all these were allegedly happening? Was it the prison officers who told him how his father was treated? It is true from the letter from the Judiciary (TMO-15) that plea was taken by the deceased before the Nairobi Chief Magistrate's Court on 6th March 1987.
42. There is however no evidence to confirm when he was arrested. The petitioner claims that it was in June 1986. He has not told the Court what steps the family took when they realized that the deceased was not at his place of work at Kisumu Municipality where he worked as an Administrative Assistant.
43. The deceased left prison after four (4) years which must have been in 1990. There is no evidence of him having taken any action in respect of all these allegations against the police. Nothing stopped him from filing a claim.



44. Whatever averments the petitioner has based his petition on were personal to the deceased. It is nowhere indicated that the deceased is the one who gave this information to the petitioner. There is no evidence of any affidavit or signed statement made by the deceased to confirm the material in the petitioner's petition and affidavit.
45. As was held by Obaga J in the case of *Nicolaas Hendrick Classen* (*supra*), the declaration as to the rights alleged to have been violated had to be established by the deceased. He never did so and he never filed any suit to make his claims. Things would have been different had he filed a petition with a supporting affidavit sworn by him detailing all these issues.
46. Sections 107, 108 & 109 of the *Evidence Act* (Cap 80 Laws of Kenya) provide as follows:

“Section 107.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person

Section 108.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Section 109.

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

47. In this matter the burden of proof fell on the petitioner to convince the Court that indeed the deceased was arrested in June 1986, incarcerated and tortured until March 6, 1987 when he was arraigned in Court, and was tortured while he was under prison custody. No scintilla of evidence was placed before this court to prove any of the said allegations.
48. Following the above analysis I find that the petitioner has failed to prove his case to the required standard. The petition lacks merit and is hereby dismissed. In view of the circumstances of the case I hereby order each party to bear his own costs.
49. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 15TH DAY OF AUGUST 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

