Ofisi & 7 others v Attorney General (Judicial Review Application 92 of 2014) [2022] KEHC 11869 (KLR) (Judicial Review) (31 March 2022) (Judgment)

Neutral citation: [2022] KEHC 11869 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW APPLICATION 92 OF 2014

J NGAAH, J

MARCH 31, 2022

BETWEEN

BOAZ OWASE OFISI ..... 1ST PETITIONER

ROGERS ODIKARA OKANGA ..... 2ND PETITIONER

HARUN IRUNGU MWANGI ..... 3RD PETITIONER

PETER MATULU NDWIKO ..... 4TH PETITIONER

DANIEL OTIENO OGOL ..... 5TH PETITIONER

PAUL KIPKOECH CHERUIYOT ..... 6TH PETITIONER

JULIUS NYANGU NZUKI ..... 7TH PETITIONER

JOSEPH KIPKURUI ROTICH ..... 8TH PETITIONER

AND

ATTORNEY GENERAL ..... RESPONDENT

JUDGMENT

1. Vide a petition dated March 6, 2014 and filed in this honourable court on March 7, 2014, the petitioners have prayed for the orders that: -

   "1. A declaration that the circumstances under which the petitioners were arrested, detained, tortured, tried and/or convicted following the attempted coup d'état of August 1, 1982 constituted a breach of petitioners' rights as provided for in section 70(a) of the repealed *Constitution* of Kenya and articles 28,29,48,49,50 and 51 of the *Constitution* of Kenya 2010.

2. A declaration that the period between August 1, 1982 and March 30, 1983 when the petitioners were arrested and subsequently purportedly discharged from the said Force constituted a continued period of continued breach of applicants' rights to liberty guaranteed under section 72 of the repealed *Constitution* of Kenya and articles and article 39 of the *Constitution* of Kenya 2010.

3. A declaration that the detention of the petitioners in various detention centres is grossly inhuman and degrading conditions between the periods of August 1, 1982 and March 1983 amounted to cruel and inhumane treatment and was a breach of section 74 of the repealed *Constitution* of Kenya and article 28,29 and 39 of the *Constitution* of Kenya 2010.

4. A declaration that the failure of the Kenya Armed Forces (Kenya Defence Forces) to pay the petitioners any form of benefits upon their purported discharge from the said Force constituted cruel inhumane treatment and was in breach of section 74 of the repealed *Constitution* of Kenya and article 43 of the *Constitution* of Kenya 2010.

5. A declaration for payment of damages consequently upon the above declarations and/or such orders, writs or directions for the purpose of enforcing and securing enforcement of the provisions herein above disclosed as having been breached in relation to petitioners.

6. A declaration that there was no power vested constitutionally in the 82 Air Force to terminate the Applicants and the purported terminations were illegal and *void ab initio*.

7. Or any other orders as this honourable court shall deem just to grant in the circumstances."

2. The petition is supported by affidavits sworn by the respective petitioners on March 6, 2014. However, the 5th petitioner is said to have died while this petition was pending for determination. The 6th and 8th petitioners, on the other hand, chose to withdraw their petitions.

3. Boaz Owase, the 1st petitioner, swore that he was recruited as a serviceman in the Kenya Air Force on February 21, 1977. He was discharged on August 1, 1982; at the time of his discharge, he had risen to the rank of a corporal. He alleged that he was dismissed by an illegal entity known as "82 Air Force" and subsequently was tried by a court martial at Langata Army Barracks before he was detained at Kodiaga Maximum Prison for 3 years; he was at this facility from August 1, 1982 to October 28, 1985.

4. At the time of the attempted coup, Owase was engaged at Eastleigh Airbase as an air traffic controller. On the material date, he heard of the coup from the radio. He was arrested when he reported at Ruaraka Police Station. He was taken to Kamiti Maximum Prison and later transferred to Naivasha Maximum Prison. He swore that he was detained in a dark cell for several days. At Naivasha prison, in particular, he was detained in a waterlogged cell. He also swore that he was denied food and medication.

5. It is his case that the Government violated his rights by illegally searching and stripping him in public; by subjecting him to physical and mental torture; by barring him from communicating with his relatives or legal representatives; and, by dishonourably dismissing him from service without a pension or terminal dues. He also deposed that as a result of the torture and inhuman conditions in prison he was exposed to he was ailing. He claimed further that his earnings amounting to Kshs 12,543,402.20/ = had been withheld.

6. On his part, Rodgers Odikara Okanga, the 2nd petitioner, swore that he served in the military from April 24, 1980 to August 1, 1982 when he was discharged in circumstances similar to those under which Owase was discharged. Like Owase, he was also based at Eastleigh air base where he was engaged as a private aircraft technician. On August 1, 1982, he got information that the Government had been

overthrown by the armed forces and that all service men were required to report back to their bases or report to the police stations closest to them. He reported to the barracks but he could not be allowed in since he was not in uniform. He opted to report to Mathare Police Station where he was arrested and taken to Kamiti Maximum Prison. At Kamiti, he was detained for 14 days and later taken to Naivasha Maximum Prison where he was detained for another 14 days. He swears to have dishonourably been discharged from duty on August 1, 1982.

7. Mr Okidara alleged that he was tortured and forced into signing a statement, apparently incriminating him and was further tricked by an army captain into pleading guilty when he was eventually charged at the Langata barracks court martial. He was jailed at Shimo la Tewa Prison where he served for six years prison term.

8. He was denied food, water and was locked up in waterlogged cells. He could not access medication. His right to dignity and privacy were violated when officers from the Department of Defence stripped him naked in public. He was also subjected to cruel and inhuman treatment, mental and physical torture and was held in communicado. He could neither communicate to his relatives nor his lawyers. He was dismissed from service by an entity he referred to as "82 Air force". His earnings and pension amounting to Kshs 10,200,207/= were also withheld.

9. Harun Irungu Mwangi was conscripted into the military on March 1, 1971. He was based at Nanyuki airbase. He deposed that on July 31, 1982, he was at a friend's house in Nanyuki town. He went back to the barracks on the morning of August 1, 1982. It is then that he heard that there had been an attempted coup to overthrow the Government. He was detained at Nanyuki prison for three days before he was moved to Kamiti and Naivasha prisons. Like the other two petitioners, he alleged that he was detained in waterlogged cells; he was deprived of food and water and he could not access medical facilities. He alleged that he was currently ailing as a result of the physical and mental torture he had been subjected to. He was unlawfully dismissed from service. He claimed Ksh 10,882,445/= being the earnings he would have been entitled to together with his pension had he worked to the retirement age.

10. The 4th petitioner, Peter Matulu Ndwiko, swore that he served in the Kenya Airforce since March 28, 1966 to August 24, 1982 when he was unlawfully discharged. At the time of discharge, he was a senior sergeant and was then based at Eastleigh Air base. He was never charged but was detained without trial. On August 1, 1982, he was arrested and taken to Kamiti prison where he remained until August 24, 1983. He was locked up in a dark waterlogged cell and deprived of food and water. He was also stripped naked and had his anal area searched. He was discharged from service without any particular reason. He claimed the sum of Kshs 5,294,212.20 in withheld earnings.

11. The 7th petitioner, Mr Julius Nyangu Nzuki, swore that he too was an army officer at the material time. He was recruited on September 2, 1977 and was dismissed without any or any lawful cause in January 1983. He was never tried of any offences. Prior to his dismissal, he had been arrested on August 1, 1983 and taken to Kamiti prison and later to Naivasha prison. He was subjected to inhuman and degrading conditions in those prisons. Like the rest of the petitioners, he was detained in solitude in dark cells drenched with water. Besides the inhuman and degrading treatment, this petitioner claimed that his earnings amounting to Kshs 9,819,851/= had been withheld.

12 The respondent opposed the petition and, in that regard, filed a replying affidavit sworn on July 14, 2014 by Lieutenant Colonel Paul Mwangemi Kindochimu. Kindochimu swore, *inter alia*, that he was employed as Staff Officer 1 at the Kenya Defence Headquarters. He denied that the petitioners were Kenya Air Force servicemen and that he was not aware that they were members of VOCA Welfare Association as alleged. He also denied that the petitioners were illegally arrested, tortured

either as alleged or at all. Neither were they placed under solitary confinement, interrogated or illegally discharged from service.

13. Nonetheless, he swore that the petitioners were discharged in accordance with law. He defended the proceedings against the petitioners who were charged before the court martial. It was also his case that under section 86(4) of the *Constitution* of Kenya (repealed), the rights claimed by the petitioners were limited to the extent that they were members of the armed forces.

14. In any event, he contended that the petitioners had failed to demonstrate how the alleged illegality of the 82 Air Force contributed to the alleged infringement of their fundamental rights and freedoms. It was further deposed that the 1st ,2nd and 6th petitioners participated in the attempted coup by arming themselves with self-loading rifles and ammunition and they were both convicted for mutiny contrary to section 25(2) of the *Armed Forces Act* and sentenced to 3 and 6 years in prison respectively.

15. The 5th petitioner is also alleged to have participated in the attempted coup by arming himself with a sub-machine gun and ammunition and disarming a police officer and ordering the release of prisoner. He was tried, convicted and sentenced to 10 years in prison. The 7th petitioner was also charged, convicted and dismissed from service for arming himself with a G3 rifle and ammunition.

16. It was argued that the Ministry of Defence is not responsible for the alleged ailments that the petitioners or any of them was suffering from and further that the personnel of the armed forces dismissed from service for participating in a mutiny or any subversive acts are not entitled to service benefits. It was urged that the reliefs sought by the petitioners are unjustified and baseless and that the petition should be dismissed for want of merit.

17. One of the questions that has arisen and which by its very nature ought to be resolved in limine is whether this honourable court has jurisdiction to entertain this suit. Citing the decisions in the *Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd*, Civil Appeal No 50 of 1989 [1989] eKLR; *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others*, Civil Appeal No 290 of 2012 [2013] eKLR and *Consolidated Bank of Kenya v Arch Kamau Njendu t/a Gitutho Associates* [2015] eKLR the learned counsel for the respondent questioned the jurisdiction of this court and urged that since the petitioners are alleging breach of their constitutional rights and freedoms, they ought to have instituted this suit in the Constitutional and Human Rights Division.

18. I do not find much substance in this argument because, as its name suggests, the Judicial Review Division of the High Court is nothing more than an administrative arrangement meant to, among other things, facilitate efficient disposal of disputes lodged in the High Court. And as far as I gather, this case was lodged when both the Judicial Review Division and the Constitutional and Human Rights Division were one division. It is only after the creation of Judicial Review Division that the petition was transferred to this Division.

19. The petition might as well have been retained in the Constitutional and Human Rights Division but, regardless of which of the two divisions ultimately disposed of the petition, the jurisdiction to dispose of it is rooted in article 165(3) of the *Constitution*. The High Court referred in article 165(1) would include all the divisions created under it to exercise the jurisdiction with which it has been clothed under article 165(3). The divisions, as noted, are created for convenience purposes, and not to create or to redistribute jurisdiction amongst them.

20. The respondent's argument fallaciously implies that the creation of divisions in the High Court confers to or deprives from certain divisions of the court jurisdiction that has been expressly provided by article 165(3) of the *Constitution*. Needless to say, such an argument is not only legally untenable but it is also contrary to the express provisions of the *Constitution*.

21. The next question is whether the petition is time-barred.

22. According to the respondents, while there is no limitation period within which one may agitate for his rights under the *Constitution* through court action, such action must be filed without what the learned counsel for the respondent has described as 'inordinate delay'. He has also urged that where the delay is what one may consider as inadvertent, it is the claimant or the petitioner who bears the burden to prove that indeed the delay assumes that character and to this end the learned counsel for the respondent relied on the cases of *Wellington Nzioka Kioko v Attorney General* [2018] eKLR and *Daniel Kibet Mutai & 9 others v Attorney General* [2019] eKLR. In the latter decision, the court is said to have held that delay is an anathema to fair trial yet fair trial is one of the fundamental rights under article 50 of the *Constitution*. Delay is also an abuse of the court process and contrary to the constitutional principles espoused in article 159 that requires justice to be administered without delay.

23. The respondent invited this honourable court to take note of the fact that as early as 2003, persons alleging violation of their constitutional rights during the reign of the late President Moi approached courts for redress of their grievances. Counsel cited the cases of *Stanley Waweru Kariuki v Attorney General*, Petition No 1376 of 2003, *Harun Thungu Wakaba v Attorney General*, Nairobi Miscellaneous Application No 1411 of 2004; *Oduor Ongwen & 20 others v Attorney General*, Petition No 777 of 2008 as among those cases in which litigants took steps, at the opportune moment for appropriate reparations.

24. According to the respondent, the petitioners have not discharged the burden of explaining the inordinate delay in filing their petition.

25. In answer to this question of delay, the learned counsel for the petitioners urged that not many cases touching on violations of human rights and freedoms arising from the crackdown after the 1982 attempted coup were filed against the then government until after it exited from power in the year 2002. The victims of the crackdown feared the reprisals if they dared take action against the Government which they are alleged to have attempted to overthrow. Counsel cited the case of *Peter Tony Wambua & 17 others v Attorney General* Constitutional Petition No 427 of 2008 where it was acknowledged that those suspected to have been involved in the coup attempt were ostracized, denied access to many social amenities and employment. That their explanation that they were barred from seeking counsel until change of the political regime was accepted as sufficient reason for the delay in filing their petition. The court proceeded to interrogate their claims on merit.

26. The petitioners' petition was filed in 2014, more than three decades after the attempted coup. This is, no doubt, a long time but considering the reason given for the delay in filing such cases which reason has been acknowledged by this honourable court in its previous decisions as plausible, it would be prejudicial to the petitioners if their petition was thrown out merely for the reason of the delay in filing it. It has also been acknowledged that there is no express provision, either in the repealed *Constitution* or the 2010 *Constitution* that sets time within which a person may lodge a claim arising from a violation of a constitutional right. See *Denish Ogumbe Osire v Cabinet Secretary, Ministry of Defence & another* [2017] eKLR). Logically, and by necessary implication, it would follow that a constitutional petition for claim arising out of violation of constitutional rights cannot be defeated on the basis of limitation of time for the simple reason that no law sets such limitation.

27. I agree that fairness demands that due regard must be had to the respondent's position and, in particular, the court must, in exercising its discretion to determine a petition on merits where the question of lapse of time has been raised, consider such factors as the possibility of the loss of evidence or memory due to passage of time, the inability to find witnesses for the same reason and such similar factors. In other words, the respondent should not be left prejudiced if the court exercises its

discretion in favour of the petitioner and hears the petition on merits despite what one may, in ordinary circumstances, consider as inordinate delay in the filing of the petition.

28. Turning back to the present petition, I have carefully read the affidavit of Lieutenant Colonel Paul Mwangemi Kindochimu which, as noted earlier in this judgment, was sworn in response to the petition. Nowhere in that affidavit has the deponent suggested that the respondent has been prejudiced in any way because of the delay in filing this petition. It has also not been suggested that the respondent could not effectively oppose the petition either because the evidence has been lost or because the necessary witnesses cannot be located due to lapse of time. Instead, the respondent has put forth what I would consider as a vigorous and robust defence denying the petitioners' claim. Both the claim and the defence deserve interrogation on merits and for this reason I will exercise my discretion in favour of the petitioners and consider the petition on its own merits.

29. Speaking of merits, the respondent denied in the replying affidavit sworn by Lieutenant Colonel Kindochimu that the petitioners ever served as servicemen in the Kenya Air Force. But other depositions made in the same affidavit betray this denial. For instance, the deponent has sworn as follows:

> "10. That the petitioners were discharged/dismissed in accordance with the provisions of the *Armed Forces Act* cap 199 of the Laws of Kenya.
>
> 37. That the 1st, 2nd, 5th, 6th and 7th Petitioners were dismissed from service after being lawfully tried, convicted and sentenced by Courts Martial and that personnel of the armed forces dismissed from service or discharged from service for participating in a mutiny or any subversive acts are not entitled to service benefits and the petitioners are well aware or ought to be aware of this.
>
> 38. That all other petitioners were discharged from service because of participating in the attempted coup and as such they are not entitled to service benefits."

30. The petitioners could not have been dismissed or discharged from the Kenya Air Force if they were not members of that Force in the first place. It follows that, even going by the respondent's own affidavit, the question whether the petitioners were servicemen in the Kenya Air Force ought not to arise and is therefore not an issue.

31. The primary question upon which the petitioners' petition hinges is whether their constitutional rights were violated and if so whether they were violated in the manner they have alleged. As to whether they are entitled to damages as a result of the alleged violations is a question whose answer is dependent on the answer to the question whether their rights were violated and if so, the nature and extent of the violations.

32. By their own admission, the charges related to mutiny were preferred against the 1st and 2nd petitioners in the court martial in the wake of the 1 August 1982 attempted coup. They were jailed for 3 years and 14 years respectively.

33. Although they deposed in their respective affidavits that they were tricked into pleading guilty to the charges related to the mutiny, there is no evidence that they took any action against their conviction and sentence. Under the repealed *Armed Forces Act*, cap 199, they had the alternative of seeking review of their convictions and sentences or appealing altogether to this honourable court to quash their convictions and set aside their sentences.

34. Unlike actions for declaration of constitutional rights and reparations which, as explained later in this judgment, were not easily accessible for fear of reprisals from the state power at the time, the avenues of appeal and review from convictions in the court martial were always open irrespective of the political

regime that existed at the time. A casual perusal of law reports from this honourable court shows that the reports are replete with appeals and applications for review of the proceedings and decisions of court martial in the wake of August 1982 mutiny. The 1st and 2nd petitioners had nothing to lose in taking the available options considering that they had already been convicted, in any event.

35. As far as their petition is concerned, there is nothing in the 1st and 2nd petitioners' affidavits or even their oral evidence in court that suggests that they were not properly charged and convicted by a court of competent jurisdiction.

36. And even in these proceedings, apart from seeking a declaration that the circumstances under which they were arrested, tried and convicted violated their rights under section 70(a) of the repealed *Constitution* and articles 28,29,49, 50 and 51 of the *Constitution*, the 1st and 2nd petitioners have not demonstrated how the charges to which they pleaded, their trial, conviction and sentences were contrary to the provisions of the *Armed Forces Act* which is the law under which they were charged.

37 In the absence of any evidence to the contrary, the court is entitled to assume that the 1st and 2nd petitioners were properly charged and convicted.

38. As far as the 3rd, 4th and 7th petitioners are concerned they gave evidence and by which I am persuaded that soon after the attempted coup, they were detained for various periods without trial and were eventually discharged from service for the reason that their services were no longer needed.

39. As far as the question of torture, both physical and mental, is concerned no evidence was produced to support these allegations. I am minded that it was held in the *Denish Gumbe Osire versus Cabinet Secretary, Ministry of Defence* case (*supra*), that where the petitioners are unable to retrieve medical records or other documentary evidence from the facilities in which they were held to prove their case, courts would proceed on the assumption that where allegations of fact are made and they are not controverted, those facts must be taken to be true notwithstanding the absence of documentary proof.

40. In this case, however, there is no evidence that the petitioners made any attempts to obtain the necessary documentary evidence to prove their allegations. More importantly, the respondent vehemently denied the allegations of torture or any other form of cruel treatment of the petitioners. In the face of these denial the court cannot proceed as if the petitioners' case is made up of uncontroverted facts. For the sole reason that there is no material upon which I can make a finding that the petitioners were tortured, their claim for damages on the basis that their constitutional rights were violated and, in particular, that they were tortured as a result of which they are physically indisposed, in one form or the other, would fail.

41. But there is evidence that the petitioners were discharged from the Kenya Air Force. Each one of them produced a certificate of service showing that they were service men in the Force until they were discharged severally between 1982 and 1983. Harun Irungu Mwangi's certificate of service, for instance, showed that he was enlisted in the armed forces on 1 March 1971 and was discharged from service on August 1, 1982. He was in the employment of the armed forces for more than 11 years and at the time of his departure he had attained the rank of a sergeant. The certificate is dated November 9, 1983 and the reason given for the discharge is indicated as 'service no longer required'.

42. Peter Matulu Ndwiko's certificate of service shows that he was recruited in the army on March 28, 1966. He was discharged on August 1, 1982 at the rank of senior sergeant. He had served for more than 16 years. The certificate indicates that he was also discharged because his services were no longer required.

43. Finally, the certificate of service in respect of Julius Nyangu Nzuki shows that he was recruited in the army on March 3, 1978 and was discharged on February 28, 1983 having worked for close to 5 years. His rank at the time of departure was senior private. Like his two colleagues, the reason for his departure was that his services were no longer required.

44. These three officers had their services in the army effectively terminated for no apparent reason. I say so because if they were suspected to have participated in the mutiny, as Lieutenant Kindochimu alleged in his affidavit, nothing stopped their employer from having them prosecuted in a court martial like the rest of the officers who were thought to be culpable of the aborted coup. Again, the reason indicated in the certificate as 'services no longer required' cannot be said to be a reason at all.

45. Besides being dismissed without any or any valid reason, the petitioners claimed that they were detained without trial before they were eventually released and discharged from service.

46. The respondent did not unequivocally deny that the petitioners were detained without trial. As far as this question is concerned, he deposed as follows:

> "14. The rights claimed by the petitioners to the extent permissible by section 86(4) of the 1969 *Constitution* (repealed) were limited in so far as it relates to the Armed Forces; their enjoyment was not absolute.
>
> 15. That in any event, any detention, arrest, confinement of the petitioners as alleged was lawfully done by the state security organs whose responsibility was to deal with the petitioners for their involvement in the attempted coup of August 1, 1982."

47. The respondent did not cite any law upon which the petitioners could validly be detained without trial. It follows that the petitioners' detention and termination of their services without any justifiable cause violated their constitutional rights under section 72 and 74 of the 1969 *Constitution*. Section 72 of the *Constitution* provided for protection of the right to personal liberty such that, under this provision, no person would be deprived of his personal liberty except as may be authorised in certain prescribed circumstances. It was never proved that the 3rd, 4th and 7th petitioners' detention without trial fell under any of the prescribed exceptions.

48. Section 74, on the other hand, provided for protection from inhuman and degrading treatment as well as torture. Being detained without trial and unlawfully deprived of income or means of earning such income would, in my humble view, amount to inhuman and degrading treatment.

49. Would the 3rd , 4th and 7th petitioners be entitled to damages? My answer to this question is in the affirmative but with the caveat that:

> "The primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration. (see Court of Appeal decision in Gitobu Imanyara & 2 others v AG [2016] eKLR)."

50. As far as quantum of the damages is concerned the Court of Appeal has said in *Koigi Wamwere v AG* [2015] eKLR that "the award of damages is not an exact science" and that no monetary award can erase the scarring of the soul.

51. Again, in *Major General Peter M Kariuki v AG* [2014] eKLR the Court of Appeal has held that no two cases are similar and that the award of damages in every case depends on the peculiar circumstances of each case. The award of damages should not, however, be excessive.

52. Taking all these factors into account and doing the best I can, I would award a global sum as general damages to the three petitioners as follows:

    (i) Harun Irungu Mwangu is awarded Kshs 3 million;

    (ii) Peter Mutua Ndwiko is awarded Kshs 3.5 million; and,

    (iii) Julius Nyangu Nzuki is awarded Kshs 2 million.

53. Besides the award of damages, the petition also succeeds in terms of prayers (1) (2) and (6) of the petition to the extent that the detention of the 3rd, 4th and 7th petitioners without trial and subsequently their discharge from service for no apparent reason constituted violation of their constitutional right to liberty and right to livelihood under sections 72 and 74 of the 1969 *Constitution*.

54. The successful petitioners shall have costs of the suit. It is so ordered.

DATED, SIGNED AND DELIVERED ON 31 MARCH 2022

Ngaah Jairus

JUDGE