



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT BUNGOMA**

**CONSTITUTIONAL PETITION NO. 15 OF 2014**

**(CONSOLIDATED WITH. 17/2014, 18/2014, 20/2014, 21/2014, 22/2014, 25/2014, 26/2014, 27/2014, 28/2014, 29/2014, 30/2014, 9/2016, 10/2016, 11/2016 AND 12/2016)**

**IN THE MATTER OF ARTICLE (84) 1 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL**

**RIGHTS AND FREEDOMS UNDER ARTICLE 29, 32 (1) 33, 49 & 77(2)**

**AND 79(1) OF THE CONSTITUTION OF KENYA, 1969**

**AND**

**IN THE MATTER OF ARTICLES 23,29,31,32 AND 39 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF PAST AND CONTINUING INFRINGEMENT**

**OF FUNDAMENTAL RIGHTS OF THE PETITIONER.**

**MOSES MANDU MAFUMBULA & 9 OTHERS.....PETITIONER**

**-VERSUS-**

**THE ATTORNEY GENERAL.....RESPONDENT**

**J U D G E M E N T**

By a petition dated 16<sup>th</sup> April 2014 and 12<sup>th</sup> August 2016, the petitioners sought declaratory orders that their constitutional rights were infringed on due to arrest and detention by the Kenya Police. The petitioners pray;

**1) A DECLARATION that the Petitioner's fundamental rights and freedom were contravened and grossly violated by the Respondent's police officers who were Kenyan government servants, agents, employees and in its institution on 12<sup>th</sup> January, 1995 and for one year in Kenyan prisons.**

**2) A DECLARATION that the Petitioner is entitled to the payment of damages and compensation for violations and contraventions of his fundamental rights and freedoms under the aforementioned provisions of the constitution.**

**3) General damages 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.**

**4) Any further orders, writs, directions, as this court may consider appropriate.**

**5) Costs of the suit, and interest.**

The petition is premised on the grounds that whereas the Respondent's police officers were entitled to arrest the Petitioner on suspicion of committing a recognizable criminal offence they had no lawful, legal or statutory power to torture the Petitioners, for 1 year at police cells and Kenya prisons. That the respondents actions were in total violation of their constitutional protection from torture or inhuman or degrading treatment as provided under section **74(1)** of the Constitution 1969 and or Article 29, Constitution of Kenya, **2010**.

That the Respondent's police officers stationed at various stations were entitled to arrest the Petitioner on suspicion of committing a cognizable offence, they had no lawful, legal or statutory power to keep him in their custody for more than 24 hours for a bailable offence hence the incarceration of the Petitioner for one year was contrary to the petitioner's right to personal liberty as provided under Section 72(1) read with Section 72(3) and 72(5) of the Constitution 1969. That whereas the respondent's police officers had power to arrest and charge the Petitioner with the criminal offence of taking unlawful oath to overthrow the government before a competent Court of Law as provided under Section **77(1)** of the Constitution.

That whereas the Respondent had power to escort the Petitioner to court, they had no Lawful, legal or statutory power to deny him communicating with members of his family, friends or advocates to organize with him his defense or to threaten him with death, detention without trial, charge of treason or to be returned to torture chambers for further tortures if he dared plead "Not Guilty" . This violated his right under Section **77(c)** and **77(d)** of the 1969 Constitution and or Article 29 of the 2010 Constitution.

That whereas the Respondent's Prison Officers had statutory powers to guard the Petitioner while in remand, they had no lawful, legal or Statutory power to hold him in segregation, solitary confinement, keep him semi- nude in tattered prison uniform and to feed him with badly cooked food which was a violation of his right to be protected from torture, inhuman and degrading treatment as provided by Section **74(1)** of the 1969 Constitution and or Article 29 of the 2010 constitution.

The petition is supported by the petitioners' respective supporting affidavits. The Petitioners therefore want to hold the government liable and to compensate them.

The respondent filed grounds of opposition dated 4-3-2016 and response to the petition dated 26-6-2017 stating in both pleadings;

***i. The allegations by the petitioners that they were arrested and tortured on various days by Kenya Police were denied and the petition is an afterthought and an attempt to evade the issue of lapse of time.***

***ii. That the supporting affidavits were misleading and lack of following the rule of law***

***iii. That the petitioners have failed to demonstrate their alleged arrest and interrogation by Kenya Police and that the Petition is based on hearsay and innuendo***

***iv. That the petitioners have failed to meet the threshold of a constitutional petition as set out and is mere jumble of matters meant to bring out speculative and emotive conclusions.***

The matter proceeded to hearing but three petitions; 16/2014,19/2014 and 24/2014 were withdrawn. These matter were then consolidated and this petition selected as the lead file. The petitioners adduced evidence in their respective petitions. The respondent relied on the filed grounds of opposition and did not call any witness. The Petitioners adduced their respective evidence as follows;

The 1<sup>st</sup> Petitioner, **MOSES MANDU MAFUMBULA**, testified on his own behalf in Petition 15/ 201 . He relied on the supporting affidavit dated 16-4-2014. He testified that on 14-1-1995 he was arrested and taken to various police stations and subjected to numerous weeks of torture and remanded in police custody for over a year. He was subsequently arraigned in court on the charge of murder in Kakamega court. He also stated that he was arrested alongside George Waluku and Moses Mironi and were released together. On cross examination he confirmed that he had no documentation to prove the alleged arrest, detention or proof to show that the alleged torture ever occurred. He was also unable to remember the criminal case number save that he was arraigned in court.

The 2<sup>nd</sup> Petitioner, **JOSEPH MURUNGA WAFULA**, testified on his own behalf in Petition 17/2014 in which he alluded that at the time of his arrest he was a teacher at Waranga Primary School. He stated that on 2-1-1995 at around 11 am, police officers came and talked to the head teacher and called aside to answer some of their questions.

He stated that despite his protests the police alleged that he was a member of February Eighteenth Revolutionary Army (Hereinafter **FERA**), arrested and taken to Chebukule Police Station and then to Kapsokwony and Kimilili Police Stations. He was later taken to Webuye where he stayed for 7 days, returned to Kimilili and then back to Webuye. He stated that he was detained for 15 days before he was charged in a court of law where he pleaded guilty and sentenced for 6 months. He further stated that he had been tortured while in police custody.

On cross-examination he confirmed not having any documentation showing he was employed as a teacher or a copy of OB of the date of his arrest. He was recalled on **13-11-19** where he stated that he was detained and not jailed. He confirmed that he was in custody for 1 and half weeks.

The 3<sup>rd</sup> Petitioner, **FREDRICK SAMBULA WAFULA**, testified on his behalf in Petition **18/2014** and stated that on **23/12/1995** while visiting his uncle, he met three police officers who arrested him. He stated that he was taken to Cheptais Police Station, then to Bungoma Police Station where he was held for two days after which he was taken to Kakamega Police Station where he was held for 4 days and

tortured in an unknown place for 2 and half months.

He stated that he was taken to Nairobi CID headquarters and ordered to write a statement; he was informed that he was a member of an unlawful party. He was eventually arraigned in court where he was represented by 6 advocates and remanded in Kamiti prison.

On 12-5-05 he was arraigned in Kakamega court and charged with murder. He was remanded in Kakamega prison for 4 months then in Kisumu prison for 2 months. He was later released under Section 87 (a) of the Criminal Procedure Code. He stated that he was not a member of FERA. He stated that he was arrested on **23-12-1994** and taken to court on **23-3-1995**.

On cross-examination he confirmed that he had no evidence to show he was arrested on those dates or the criminal case number or ruling of the court. He confirmed that had no medical reports to show that he was treated by a doctor as earlier stated.

The 4<sup>th</sup> Petitioner, **JUSTUS WAMALWA WAYELO**, testified in Petition 20 of 2014 and stated that on 12-1-1995 while at home, police officers arrested him alongside Moses Mungai and taken to Chebukabe police station; he was never informed by the police why he had been arrested. They were then taken to Cheptais then to Kapsokwony police stations. They were taken to Kimilili while others were taken to Webuye.

On 18-1-1995 while blindfolded he was taken to unknown place and questioned on his alleged membership of FERA. He stated that he was held for 41 days before being taken to Kakamega police station then to court where he was charged with murdering the former Bungoma town Mayor. He was subsequently released by the court. On cross examination he confirmed that he had no evidence to show he was arrested on those dates or the criminal case number or ruling of the court. He further confirmed that he had no medical reports to show he was treated by a doctor.

The 5<sup>th</sup> Petitioner, **PATRICK LOPONI**, testified in Petition 21 of 2014. He stated that he was arrested alongside several others and was remanded in police custody for 9 days and tortured during that time. He stated that he was arrested on 3 different occasions on suspicion of being a member of FERA.

On cross-examination he confirmed that he was first arrested in 1995 and the second time 2 weeks after release. He further confirmed that he had no evidence of his arrest and that the medical report he had filed was written on **2-11-2015**.

The 6<sup>th</sup> Petitioner, **HERMAN BIKETI**, testified in Petition 22 of 2014 and stated that he was arrested on 20-9-2015 at Kinonda area. Upon arrested, he was taken to Cheptais police station and remanded for 2 weeks. He stated that he was informed that his arrest was due to being a member of FERA. He further stated that while in police custody he was tortured. On cross-examination he stated that he had no evidence of his arrest or medical report to demonstrate he was tortured.

The 7<sup>th</sup> Petitioner, **LAWRENCE WEKESA BWONYA**, testified in petition 25 of 2014 and stated that he was arrested in 1995 and was in police custody for 3 months. He alleged that while in police custody, he was tortured and was never arraigned before court. He stated that his arrest was due to allegations of being a member of FERA. He said that due to his arrest and detention, his child died.

On cross-examination he stated that he had no evidence of his arrest or medical report showing injuries he sustained from alleged torture.

The 8<sup>th</sup> Petitioner, **CHARLES WANYONYI WAMOTO**, testified in petition 26 of 2014 and stated that he was arrested in 1995 and kept in police custody for 10 days accused of being a member of FERA. He further stated that he was arrested in 1995, charged and later released by the Court of Appeal. He claimed that while in police custody he was tortured that left him severely injured. He indicated that his legs were harmed by sprayed chemicals and that he does not have full eyesight.

On cross-examination he confirmed that he was first arrested in 1995 and was held in police cells for 18 days. He further confirmed that he had no evidence on record in relation to the case or the poor eyesight.

The 9<sup>th</sup> Petitioner, **MOSES MIRUNI**, testified on his own behalf in Petition 27 of 2014 and stated that he was arrested in January 1995 alongside Justus Wayelo. He was remanded in prison for a year and subsequently charged of being a member of FERA. He stated that he was held for 3 months in Nyayo House where he was tortured.

On cross-examination, he stated that he had no evidence of his arrest or incarceration in Nyayo House. He further confirmed that he had no evidence of the criminal case in Nairobi or his arraignment in court.

The 10<sup>th</sup> Petitioner, **JACKTON WEPUKHULU**, testifying in Petition 28 of 2014 stated that he was arrested while at home on allegations of being a member of FERA. He was placed in remand for 50 days and previously in police custody for 5 days. He further stated that due to the torture he became sterile.

On cross-examination he confirmed that he had no evidence of his arrest or his incarceration in remand prison. He also confirmed that he was never arraigned in court and that he was tortured in the police cells.

The 11<sup>th</sup> Petitioner, **FRANCIS WEKESA WAKOYA**, testified in petition 29 of 2014 and stated that upon his arrest alongside Moses Miruni, he was in police custody for 3 days then taken to court and charged with being a member of FERA. He subsequently stayed in remand for 5 years. He further stated that he had no documents in relation to the criminal case. He claimed that due to the torture he sustained severe injuries and was unable to work. That while in prison his parents died and cattle stolen.

On cross examination he stated that he was arrested by one Moriss Ombichi though he could not confirmed where he worked. He also confirmed that he had no evidence of when he was arrested or any medical report to confirm the alleged torture.

The 12<sup>th</sup> Petitioner, **GEORGE WALUKA**, testifying in Petition 30 of 2014 stated that he was arrested on **12-1-1995**. Upon arrest; he was taken to Lwakhakha police station ad stayed in police cells for 2 weeks. He stated that he stayed in torture chambers for 3 months before he was arraigned in court and charged with the offense of murder but subsequently released under section 87(a). He claimed that he was tortured by the police and seeks compensation for wrongful arrest. He confirmed not having any evidence of his arrest or a medical report to prove torture and any injuries sustained.

The 13<sup>th</sup> Petitioner, **CELESTINE WAKIMA WATI**, testified in petition 9 of 2016 by adopting the affidavit sworn on **12-8-2016** as his evidence in chief.

On cross examination he confirmed that he was arrested on **26-2-1995** and that he had not availed a copy of the OB showing his arrest. He also confirmed that he had no evidence to show he was transported to the various police stations as claimed or medical reports to show the injuries sustained during the torture by police.

The 14<sup>th</sup> Petitioner, **GABRIEL M. MWANGI**, testified in petition 10 of 2016 and adopted his affidavit dated **12-8-2016** as his evidence in chief. He claimed that he was arrested by special branch on **9-11-1997**.

On cross examination he confirmed he had no evidence to show he was arrested by police on **9-11-1997** or his detention in police cells for the 21 days as alleged. He further confirmed that he had no evidence that he attempted to request for a copy of the OB from the police.

The 15<sup>th</sup> Petitioner, **RONALD BIKETI MASOLO**, testified in petition11 of 2016 and stated that he resided in Cheptais and was a farmer. He adopted his affidavit dated **12-8-2016** as his evidence. He stated that he was arrested and put in police cells for 37 days and seeks to be paid general damages.

On cross examination he stated that he was taken to Bungoma police station and that he lacked any evidence to show his arrest. He confirmed that he filed this Petition in 2016 but he was arrested on **4-5-1995**. He also stated that he had no medical report to show the injuries he sustained from alleged torture by police.

The 16<sup>th</sup> Petitioner, **JASON KUNDU KIBORIT**, testified on his own behalf in petition 12 of 2016 adopting his affidavit dated 12-8-2016 as his evidence in chief. He further stated that he was arrested and detained in police custody for 20 days.

On cross examination he stated that he was arrested on 2-5-1995 and instituted this Petition on 12-8-2016. He also stated that he was arrested by the police and that he made no attempts to get documents showing his arrest. He also confirmed that he had no medical report because they were burnt during the killings in Mt. Elgon.

Directions were given for the parties to file their respective written submissions to the petition. The petitioners submitted through Counsel Kinuthia that the petitioners were held in various Kenyan prisons, segregated, held in solitary confinement and dehumanized. He submitted that by reason of the matters aforesaid, the petitioners' physical, psychological, economic and political opinion life was messed up and damaged which up to now affects them.

He submitted that a constitutional petition has no time limit. He submitted in spite of there being slight inaccuracies, the petitioners oral evidence was largely consistent with their affidavit evidence. On this issue, he relied in case of **Mwangi Mathenge V Attorney General[2012]eKLR**.

He submitted that it is the petitioners case that whereas the police were entitled to arrest them on suspicion of committing cognizable offence they had no right to torture them. He submitted that the torture amounts to violation of section 74(1) of the repealed Constitution and Article 29 of the Constitution of Kenya,2010. He relied on the case law in **David Gitau & 9 others Versus Attorney General[2013]eKLR**

The respondent submitted through state counsel Mr. Kuria that the petitioners are guilty of laches and are not entitled to any relief. He submitted on inordinate delay that the delay of 20 years before filing the claim should explained and that with no such explanation, the delay is not only inordinate but also unreasonable in the circumstance. He relied on **Peter Ngari Kagume & 7 others Vs The Attorney General[2009]eKLR**

He submitted that although there is no time limitation for instituting proceedings to enforce fundamental rights, such proceedings must be instituted as soon as reasonably practicable.

He submitted that the petitioners were under duty to avail tangible evidence of violation of their rights and freedoms, the petitioners allegations are merely hearsay and unsubstantiated.

He submitted that the petitioners' alleged violation of fundamental rights were never supported with tangible evidence. He submitted that it was incumbent upon the petitioners' to specifically plead and offer evidence of the alleged infringements relying on case law in **Anarita Karemi Vs Republic(1976-1980)KLR 1272**

Having considered the parties respective pleadings and submissions as filed.it is clear to my mind that the issues for determination in this petition are;

*i. Whether the petitioners are inordinate delay in filing the petition herein*

*ii. Whether there is violation of fundamental rights and freedoms of the petitioners herein*

*iii. Whether the petitioners are entitled to the remedies sought in the petition.*

On the first issue, it is no doubt the alleged violations occurred in the years between 1994 and 1997 and the petitions instituted between 2014 and 2016. The period is extremely long. Submitting on this issue, Mr. Kuria for the respondent while acknowledging that there is no time limit for instituting proceedings to enforce fundamental rights, such proceedings must be instituted as soon as reasonably practical.

In petition number 15 of 2014, the petitioner depones that he was arrested by police officers in 1995 and after a series of torturous acts, sentenced to death in 2003. He was released only after the intervention of Amnesty International, RPP and IMLU. This is a common thread running through all these matters. The petitioners were not in a position to institute proceedings earlier. It was not plausibly possible to institute the petition before such release.

As this court held in a case of similar facts in *Taiga Job Wanyanja & 16 others v Attorney General [2019] eKLR* on the issue of inordinate delay that;

***On this issue it is my finding and hold that where there is allegations of violation or fundamental rights by the state or its organs, a petition filed premised on the said violation cannot be limited by time unless it is demonstrated that the Petitioner slept on his rights for such a long time that the institutions of the Petition is an afterthought or amounts to an abuse of the court process. The court will be guided by the nature of the violations, circumstances but always bear in mind that state machinery can be used to intimidate or obstruct the petitioners to cover its misdeeds during that regime.***

***.....Violation of fundamental rights committed by State Agencies are usually done with approval of the sitting Government. There is always a scheme to conceal the same and conspiracy to intimidate any aggrieved party to seek redress by instilling fear, intimidation and cover-up.***

This court is in agreement with the learned state counsel on this issue however in light of the fact that the state deployed machinery to intimidate, destroy and cover up such atrocities, I am inclined to find that however the delay, the door of justice cannot be shut on the petitioners on a mere technicality such as this. I also find that the delay has been satisfactorily explained.

On the second issue, there is no doubt that there existed the bill of rights under the repealed constitution. The bill of rights now contained in chapter 4 of the 2010 Constitution was contained in chapter 5 of the 1969 constitution. The specific right protecting the rights of an arrested person was contained in Article 72(3). It provided;

***Any person who is arrested or detained-***

***(a) .....; or***

***(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.***

Under the current dispensation, the Section is contained in Article 49 of the constitution. The right not to be tortured or subjected to inhuman treatment under Article 29 was equally recognized under Article 74 of the old Constitution.

Having analyzed the contents of the repealed constitution vis-à-vis the current constitution, this court finds semblance of the Articles especially regarding the protection of fundamental rights and freedoms.

From the petitioner's affidavits and the submissions thereon, this court is satisfied that the petitioners have satisfied the minimum threshold in establishing that their individual rights were violated and infringed upon by the state as regards their arrest and the subsequent trial which did not meet the threshold for fair trial as enshrined under either the repealed or the current constitutions.

Having found as such, I will now embark on assessment of damages awardable to the petitioners bearing in mind that the exercise bestowed upon this court is discretionary. In *Gitabu Imanyara & 2 others v Attorney General (2016) eKLR*, the Court of Appeal held;

***.....it seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is "appropriate and just" according to the facts and circumstances of a particular case. As stated above 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. Public policy considerations is also important because it is not only the petitioner's interest, but the interests of society as a whole that ought as far as possible to be***

*served when considering an appropriate remedy.*

Having considered the peculiar circumstances of each of the petitioners in this petition noting that they were arrested at different points, times, held and tried in different stations I award compensation as follows;

- a) Moses Mandu Mafumbula Kshs 500,000/=
- b) Joseph Murunga Wafula Kshs 500,000/=
- c) Fredrick Sambula Wafula Kshs 500,000/=
- d) Justus Wamalwa Wayelo Kshs 500,000/=
- e) Patrick Loponi Kshs 500,000/=
- f) Herman Biketi Kshs 500,000/=
- g) Lawrence Wekesa Bwongo Kshs 500,000/=
- h) Charles Wanyonyi Wamoto Kshs 500,000/=
- i) Moses Miruni Kshs 500,000/=
- j) Jackton Wepukhulu Kshs 500,000/=
- k) Francis Wekesa Wakoya Kshs 500,000/=
- l) George Waluka Kshs 500,000/=
- m) Celestine Wakima Wati Kshs 500,000/=
- n) Gabriel M. Mwangi Kshs 500,000/=
- o) Ronald Biketi Masolo Kshs 500,000/=
- p) Jason Kundu Kiborit Kshs 500,000/=

Costs to the Petitioners.

**DATED and SIGNED at BUNGOMA this 30<sup>th</sup> day July, 2021.**

**S N RIECHI**

**JUDGE**