



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 372 OF 2016

HEZRON NDARERA ONCHIRI.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

1. Through his petition dated 24th August, 2016, Hezron Ndarera Onchiri Service No. 021980 seeks compensation for alleged torture and unlawful imprisonment arising from the events of the failed coup of 1st August, 1982. He has named the Attorney General as the Respondent.
2. The Petitioner's case as per his *viva voce* evidence is that on 1st August, 1982 he was deployed as a security officer at the main gate of Nanyuki Airbase. He had worked for the Kenya Airforce for a period of seven years by that time.
3. The Petitioner testified that while at the gate an alarm went off and people went to check what was happening. He, nevertheless, remained at the gate. In the evening Kenya Army officers went and told them to surrender. They were taken in trucks to Kamiti where they were held in a room full of water and tortured.
4. The testimony of the Petitioner is that from Kamiti he was taken to Naivasha Maximum Prison where the torture continued. They were later taken to Industrial Area. His evidence was that they were taken round for over one year before being taken to the court martial where he was convicted and sentenced to twelve months imprisonment. He went home after his release.
5. The Respondent's case was stated by Major Daniel Muu Kiama who swore a replying affidavit on 15th March, 2016. The witness also testified as DW1 in support of the Respondent's case. The Respondent's case is to the effect that the court martial proceedings have been destroyed, and witnesses had either died or left service. Further, that the Petitioner was discharged on the grounds that his services were no longer required.
6. It is the Respondent's case that the Petitioner's claim that he was denied the right to appeal was incorrect. The Petitioner also contends that the petition having been filed more than 30 years after the alleged violation is an afterthought, an abuse of the court process and tainted with inordinate delay. Additionally, owing to the delay, the court martial proceedings have since been destroyed and critical witnesses have either died or left service.
7. The Petitioner filed submissions dated 31st January, 2019 whereas the Respondent filed submissions dated 12th April, 2019.
8. Submissions were made at length on behalf of the Respondent explaining why the petition should be dismissed for inordinate delay. It is the Respondent's position that this petition was filed in 2016 over 34 years after the event occurred in 1982. According to the Respondent, although there is no limitation of time for filing constitutional petitions, delay of filing the suit compromises the respondents' right to put forth a plausible defence hence violating the right to a fair trial as protected by Article 50 of the Constitution.
9. Counsel for the Respondent submitted that it is therefore the duty of the Petitioner to explain the delay in order for the court to determine whether the delay is reasonable. Cases cited in support of this proposition are **Wamahu Kihoro Wambugu v AG., Petition No. 468 of 2014**; **Mugo Theuri v AG** (citation not provided); **Ochieng Keneth Kogutu v Kenyatta University & 2 others, High Court Petition No. 306 of 2012**; **Wellington Nzioka Kioko v Attorney General [2018] eKLR** ; **Monicah Wangu Wamwere v Attorney General [2016] eKLR** ; and **Gilbert Guantai Mukindia v Attorney General [2019] eKLR**.
10. The Respondent submitted that the delay had robbed them of an opportunity to put forward a plausible defence hence imperiling their right to fair hearing as guaranteed by Article 50 of the Constitution.

11. Although the Petitioner did not offer any reason for the delay in his petition and supporting affidavit nor filed a further affidavit to rebut the Respondent's replying affidavit, counsel for the Petitioner submitted that the Petitioner and others had filed their claims in 1995 vide HC Misc. Application No. 293 of 1993 and HCCC No. 548 of 1995. Another reason for the delay can be gleaned from the submission that:-

“Your Lordship all this happened under one political party KANU which was father and mother as it was known and whoever was to have any political opinion which was against KANU was to be dealt with by the secret agents of the Government taken to Nyayo House Chambers where they became known as Nyayo House Torture Chambers where people opposed to the Government were tortured.” (sic).

12. The Respondent brushed off the explanation by submitting that even if the allegation was true that the Moi Government was hostile and the courts were controlled by government, the Petitioner has not explained why he failed to file the petition after the alleged hostile government left power in 2003 or immediately after the promulgation of the 2010 Constitution.

13. It should be observed from the outset that the Petitioner has not offered any explanation in his pleadings for the delay in filing the petition. His attempt to do so through submissions adds no value because submissions are not pleadings. See – **Daniel Torotich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR.**

14. Even assuming that the explanation offered in the submissions was to be accepted by the court, I would still find the explanation unconvincing. As correctly submitted by the Respondent, the late President Moi left power in 2003 and this petition was filed thirteen years later. The democratic space was greatly expanded after the promulgation of the 2010 Constitution. The Petitioner did not explain why it took him over five years from 2010 to file his petition.

15. The Petitioner also submitted that he was a party to two other cases. There was no explanation about the outcome of those cases and no explanation was offered as to why the Petitioner sued again having sued the Respondent earlier.

16. An unexplained delay in filing a constitutional petition can be a ground for the dismissal of the petition. A plethora of authorities speak to that point. Apart from the authorities cited by the Respondent, other decisions on the issue are **Lt. Col. Peter Ngari Kagume & 7 others v Attorney General [2009] eKLR; Kanyitta Nderitu v Attorney General & another [2013] eKLR; Joseph Migere Onoo v Attorney General [2015] eKLR; and Nairobi High Court Petition No. 16 of 2018 Alphonse Kipkemoi Somongi v The Hon. Attorney General.**

17. In the circumstances of this case, I find myself in agreement with the Respondent that there has been unexplained inordinate delay in this matter thereby denying the Respondent an opportunity to put up a plausible defence. For that reason alone the petition should be dismissed.

18. As to the facts of the case, the Petitioner talked of inhuman treatment, and conviction and imprisonment by a court martial. Not a single document was produced to support the allegation. The Petitioner did not call any witness to support his case. There is therefore no evidence on record to support his claim that he was indeed a member of the Kenya Airforce and was tortured and dismissed as a result of the 1st August, 1982 failed coup.

19. In **Gilbert Guantai Mukindia** (supra) it was observed thus:-

“32. While it is understandable that owing to the difficult moments of the time he may not have got any documents from the Defence Forces, thereafter established, documents are not the only way to prove a fact. Oral evidence serves that same purpose many times. On the evince adduced, I have asked what was so difficult in the Petitioner bringing any person who knew him to have been recruited into the service and that he was so arrested. I have in mind, the uncle he was with in Nairobi when he left to go and report to the police, the chief he said he reported to for six weeks, his parents and spouse, any of his village mates with whom he attended the recruitment drive and even the colleagues with whom he was recruited and or detained. He surely had a big reserve of potential witnesses to call. He chose not to call any yet it was critically important for the court to believe his evidence that he was a serviceman who was arrested and incarcerated on account of the attempted coup of 1982.”

20. The inordinate delay in filing the suit has even worked against the Petitioner. He completely failed to adduce evidence in support of his claim.

21. In essence, this petition is without merit. The same is dismissed with no order as to costs.

Dated, signed and delivered at Nairobi this 5th day of March, 2020.

W. Korir,

Judge of the High Court