



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CIVIL CASE NO. 22 OF 2010**

**RACHEL OJIJO.....PLAINTIFF**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....DEFENDANT**

**JUDGMENT**

The Plaintiff, **RACHEL OJIJO** has brought this action to court, in her capacity as the Administrator of the Estate of the late **DANIEL TOM ODERO OJIJO**.

1. The deceased was the father of the Plaintiff.
2. It was the Plaintiff's case that on or about January 1987, her father, Daniel Tom Odero Ojijo, was arrested by two regular police officers.
3. The reason for his arrest was that the said Daniel Ojijo was allegedly a member of the outlawed **MWAKENYA**.
4. Following his arrest, Daniel was allegedly detained incommunicado at the Nyayo House Torture Chambers.
5. His wife and family only became aware of his whereabouts after the local newspapers published particulars of persons who had been arraigned in court because they were allegedly members of Mwakenya.
6. According to the Plaintiff, the deceased (Daniel) was convicted for being a member of Mwakenya, and he was sentenced to 5 years imprisonment.
7. It was the Plaintiff's case that during the time when her father was in detention, he was tortured, subjected to gross inhuman treatment and kept incommunicado for a long period.
8. She also said that the deceased suffered bodily injuries at the hands of the security agents.
9. The Plaintiff's further case was that during the time when her father was imprisoned, the Government Security Agents took away his moveable and immovable property, causing his family to suffer economic loss.
10. The Plaintiff asserted that as a result of the father's loss of liberty and dignity, coupled with the gross inhuman treatment, bodily injury and torture, he contracted chronic diseases which weighed him down to his grave in 1997.
11. The Plaintiff averred that the arrest, detention, prosecution and imprisonment of her father, were actuated by malice, as they were carried out without any reasonable or probable cause.
12. She attributed his tribulations to his perceived or presumed political stand or relations.
13. In her view, if her father had not undergone the sufferings at the hands of the Government Security Agents, he would still be alive and healthy.
14. The Plaintiff said that the illegal arrest, detention and imprisonment of her father constituted a violation of his fundamental rights under **Sections 72, 73, 74, 75, 77, 78, 80 and 81** of the **Constitution of the Republic of Kenya**.

15. Therefore the Plaintiff prayed for compensation in respect to the wrongs done to her father. She asked the court to find that the Estate of the deceased was entitled to compensation for;

*a) Wrongful Detention and Imprisonment;*

*b) Loss of Earnings from the time of arrest in January 1987, to the time of his death in 1997;*

*c) General Damages;*

*d) Interest on the respective sums awarded as compensation.*

16. During the trial, there was only one witness, the Plaintiff.

17. The Defendant did not call any evidence.

18. In her evidence, the Plaintiff testified about the arrest of her father. She said that her father was arrested by two police officers, who told him that they had been looking for him because he was a member of the clandestine organization called Mwakenya.

19. Daniel was blindfolded and then driven to an unknown destination.

20. An unidentified Good Samaritan phoned the Plaintiff's mother, and told her that Daniel had been taken away by persons who were unknown to the Good Samaritan.

21. The Plaintiff's mother swiftly went to Nairobi, but she was unable to trace her husband.

22. It was only after the daily newspapers carried a story about the imprisonment of Daniel that his family became aware of what had transpired.

23. Meanwhile, after Daniel's arrest, some persons who identified themselves as Officers from the Criminal Investigations Department visited his home.

24. At the home, the officers found only the house-help.

25. Nonetheless, the officers conducted a search at the house, scattering everything and leaving the house in a mess.

26. The Plaintiff testified that the officers walked away with some books and documents which they found inside the house.

27. According to the Plaintiff, her father was kept in Nyayo House for 2 weeks. Whilst there, he was placed in water, which contained chemicals.

28. The water made his skin itchy.

29. Meanwhile, the deceased was being interrogated by different people who asked him about how he was related to Jaramogi Odinga.

30. When he said that he did not have any relationship with Jaramogi, the deceased was perceived to be tough headed.

31. He was therefore driven to an unknown destination, where he was stripped of his clothes and then lowered into a deep hole which was full of termites.

32. The termites bit him for over half an hour.

33. On the next day, the deceased was tortured in a dark room.

34. Eventually, the deceased was jailed for three years.

35. By the time he came out from prison, the deceased was miserable, sickly, dehydrated, malnourished and ill-looking.

36. The Plaintiff and her siblings were unable to recognize him, as he looked very different from their father, as they had known him.

37. But even after he had served the prison sentence, the police continued arresting the deceased. Therefore, he was very much traumatized.

38. Sleeping became a problem to him, because whenever he heard footsteps at night, he was convinced that the police had come to pick him up.

39. Dr. Olel, a friend of the deceased provided medical treatment to him, and he got better.

40. However, the Plaintiff testified that her father died in 1997, due to the injuries which he had sustained whilst he was in the hands of the Government Security Agents.
41. During cross-examination the Plaintiff conceded that her testimony was based on information which her father had told her about.
42. She also admitted that her father died some ten years after he had been released from prison.
43. During that period of 10 years, the Plaintiff's father did not file a suit against the government, to seek compensation.
44. As the Plaintiff was sure that her father was aware of his legal rights, the Plaintiff ought to have tendered some explanation for her father's failure to institute proceedings against the Government.
45. In this case, the evidence tendered by the Plaintiff was about matters which the Plaintiff had been told of, either by her father or by her mother.
46. For instance, when the Plaintiff testified about an un-named Good Samaritan who told her mother about some unknown people who had gone away with the Plaintiff's father, such testimony is wholly hearsay.
47. By providing the court with information whose sources were not verifiable, the Plaintiff was not advancing her case.
48. In her submissions, the Plaintiff says that her father was arrested by two plain-clothes police officers, yet the Good Samaritans who allegedly told the Plaintiff's mother about the arrest of the deceased, had said that the people who went away with him, were unknown.
49. In the event, it is not clear why the Plaintiff came to the conclusion that her father was arrested by plain-clothes police officers.
50. Even when some officers from the Criminal Investigations Department conducted a search at the deceased's house, the Plaintiff was not present. She told the court that it was only the house-help who was present.
51. In effect, the testimony concerning the search and the carting away of some books and documents, was merely hearsay.
52. The medical doctor who treated the Plaintiff's father is still alive. Therefore, it should have been possible to have him give evidence about the injuries sustained by the deceased.
53. However, the doctor was not called as a witness. In the event, the Plaintiff failed to provide the court with first-hand information of either the injuries sustained by her father or even how the said injuries had a bearing on how the deceased passed away.
54. Medical records and other evidence tendered by medical personnel who may have provided medical attention to the Plaintiff's father, could have proved the assertions of the injuries sustained by the deceased.
55. In the absence of such evidence, I am unable to hold that the deceased was physically tortured and injured.
56. However, there is clear evidence that the deceased was arrested and was later charged before a court of law, for the offence of being a member of an unlawful society, contrary to **Section 6(a)** of the **Societies Act**.
57. I so hold because the Plaintiff made available the Charge Sheet and the proceedings before the **Chief Magistrate's Court Nairobi**, in **Criminal Case No. 1832 of 1987**.
58. A perusal of the record of the proceedings does not reveal any impropriety.
59. The plea was properly taken and the accused admitted the facts which were read out to him. The said facts support the particulars of the offence which he had been charged with.
60. The Plaintiff has not asserted that the accused was compelled, either through threats or through any other means, to plead guilty to the offence.
61. Nonetheless, it is crystal clear that the Plaintiff's father was arrested, (according to the Charge Sheet), on 9<sup>th</sup> February 1987. I so hold because that fact is backed by documentary evidence.
62. By the Plaintiff's own testimony, she was very young when her father was arrested. She was not present during the said arrest. And she has not produced evidence to demonstrate that the deceased was arrested on or about 15<sup>th</sup> January 1987.
63. The record of the proceedings before the Chief Magistrate's Court reveals that the deceased took plea on 24<sup>th</sup> April 1987.
64. In effect, the accused was held in custody for a total of 73 days, from the time he was arrested until the time he was taken to court.
65. Pursuant to the provisions of **Section 74(1)** of the **Constitution of Kenya**;

***“No person shall be subject to torture or to inhuman***

***or degrading punishment or other treatment.”***

66. The Defendant held the deceased in custody for 73 days before taking him to court.
67. Such a prolonged period of delay, before taking the deceased to court constituted inhuman treatment.
68. It also constituted a violation of the constitutional rights of the deceased to personal liberty.
69. I am not surprised that the Defendant did not seek to justify the substantial delay in presenting the deceased before a court of law.
70. Meanwhile, the Plaintiff failed to prove the nexus, if any, between the arrest and incarceration of her father, to his inability to get employment after he was released from prison.
71. In the event, I find that the Estate of the late Daniel Tom Odero Ojijo is entitled to compensation for the unreasonable delay in taking him to court.
72. Having taken into account the quantum of damages awarded in;

***a) OTIENO MAK'ONYANGO Vs ATTORNEY GENERAL***

***& ANOTHER, HCCC NO. 845 OF 2003; and***

***b) ODUOR ONGWEN & 20 OTHERS Vs***

***ATTORNEY GENERAL PETITION NO. 777 OF 2008,***

73. I hold the considered view that the Plaintiff was not entitled to the sum of Kshs 20 Million, as she has claimed.
74. In all the authorities cited, the victims of state torture and inhuman treatment gave evidence of the manner in which they were tortured physically and psychologically.
75. Regrettably, the Plaintiff herein asserted but failed to prove the instances of torture that were allegedly visited upon her father.
76. It is for that reason that the compensation being awarded in this case is strictly in relation to only the inordinate delay in taking the deceased to court.
77. In my considered opinion, a composite award of Kshs 2,000,000/= is sufficient compensation, and I therefore award the said sum to the Plaintiff.
78. The said award shall attract interest at court rates, from the date of judgment.
79. The Plaintiff is also awarded the costs of the suit.

**DATED, SIGNED and DELIVERED at KISUMU this 29<sup>th</sup> day of January 2019**

**FRED A. OCHIENG**

**JUDGE**