REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 292 OF 2015

JOHNSON GACHERU NGIGI..................PETITIONER

VERSUS

THE INSPECTOR GENERAL OF THE

NATIONAL POLICE SERVICE.........1ST RESPONDENT

THE ATTORNEY GENERAL...........2ND RESPONDENT

JUDGMENT

1. On 14th July 2015, the petitioner herein, who describes himself as a male adult of sound mind instituted these proceedings against the respondents, the National Police Service and the Attorney General of the Republic of Kenya, alleging various violations of his constitutional rights arising from certain events that took place in the year 1986.

2. In the said petition, the petitioner seeks enforcement of his fundamental rights and freedoms as contained in Sections 70(a), 72(3) 74(1) and 77 of the former Constitution which corresponds with Articles 27(1), (2), 28, 29(a) (d) (f), 31(c) (d) and 49(1) (f) of the current Constitution.

3. The petition is supported by the petitioner's affidavit sworn on 15th July 2015 and he seeks the following reliefs:-

> ***i. A declaration that the arrest of the petitioner without warrants of court and without disclosure of reasons at the time of arrest and his subsequent incommunicado detention in solitary confinement at Jogoo Police Station and at Nyayo House for a total of 32 days without charge was arbitrary, unlawful and in violation of his fundamental rights to personal liberty and the due protection of the law guaranteed by Sections 70(a), 72(1) and 77 of the former Constitution.***
>
> ***ii. A declaration that the search of the petitioner's house by police on 27th November 1986 without warrants was arbitrary, unlawful and in violation of his fundamental right to privacy and freedom from arbitrary search and entry guaranteed by Sections 70(c) and 76(1) of the former Constitution.***
>
> ***iii. A declaration that the incommunicado detention in solitary confinement that the petitioner was held at Jogoo Police station and at Nyayo House for 32 days 27th November 1986 to 29th December 1986 and the torture, beatings and ill treatment inflicted on him during interrogations and the extreme, inhuman and degrading conditions of custody were in violation of the fundamental rights and freedoms of the petitioner to human dignity, protection of the law, security of the person and freedom from torture, cruel, inhuman and/or degrading treatment or punishment guaranteed by Section 70(a), 74(1) of the former Constitution.***
>
> ***iv. General damages consequential upon the declarations of violations of the fundamental rights and freedoms of the petitioner in prayers (i) to (iii) above as may be assessed by this Honourable court.***
>
> ***v. Costs of the petition.***
>
> ***vi. Interest on all monetary awards.***

The petitioner's case

4. The petitioners case is that on 27th November 1986, he was lawfully engaged in his employment with the General Motors Company in Nairobi (hereinafter "GM") when he was arrested by the police officers who had no arrest warrants and who did not disclose the reasons for the arrest.

5. The petitioner states that at the time of the arrest, the government of Kenya had launched a crackdown on persons suspected to political dissidents operating under the political movement named *'Mwakenya'* that was opposed to the single party system (KANU) that was presided over by former President Daniel Arap Moi.

6. He further states that following his arrest, a search, without search warrants, was conducted at his Umoja Estate residence which search did not yield anything after which he was detained, incommunicado and in solitary confinement at Jogoo Police Station for 3 days before he was transferred to Nyayo House in blind-fold and handcuffs. He claims that while at the Nyayo House, he was subjected to extreme torture, brutal interrogations, inhuman and degrading treatment for 29 days after which he was released without any charges being preferred against him before any court of law. He further states that at the time of his release, he was traumatized, sick, emaciated and disoriented.

7. At the hearing of the petition, the petitioner testified that as a result of the torture and beatings he became weak and his face became swollen thereby prompting him to see a doctor upon his release from custody and that the doctor recommended that he takes one week sick off to enable him recover from the ordeal. He attached the sick off chit to the supporting affidavit as annexure "JGN1". He also attached annextures "JGN2" and "JGN3" to the supporting affidavit which were General Motor's internal memo and deliberations respectively to show that his employer was aware his arrest and incarceration by law enforcement officers.

8. In his affidavit in support of the petition the petitioner explained that he was not able to file this claim earlier because of his morbid fear for the Moi regime that orchestrated his arrest and detention and that even after the exit of former President Moi from power, he was not too sure that he would get justice before the courts since most of the judges were appointed during President Moi's tenure and it was only after the promulgation to the new constitution and the vetting of judges and magistrates that he got the confidence to file this petition in court.

9. On cross examination, the petitioner testified that he was first held at Jogoo Road Police Station for 3 days before being transferred to Nyayo House where he was held for 29 days. He stated that he did not have any documents to support his claim on torture save the doctor's sick off note marked "JGN1". The petitioner's case was also supported by the affidavit of his father, Benson Ngigi Ndegwa who confirms that petitioner was arrested in November 1986 on allegations that he was a member of the proscribed group known as *Mwakenya*. He further states that all his efforts to trace the petitioner whereabouts in all the police stations did not bear any fruit and it was only after one month that the petitioner showed up at his place of work looking frail, sickly, confused and haggard. The petitioner then informed him of his arrest, detention and torture at the hands of police officers.

10. The petition is further supported by the affidavit of Margaret Njoki Kinyanjui, who was the petitioner's colleague at General Motors Limited. She narrates the sequence of events that transpired on 27th November 1986 when the petitioner was arrested by police officers, while at his place of work. She also confirms that the petitioner did not report to work for about one month and only resurfaced on 11th January 1987 looking weak, sickly and confused.

11. At the hearing of the petition, the said Margaret Njoki also testified as the petitioners witness and confirmed the averments contained in her affidavit. On cross examination, she confirmed that the petitioner was her former colleague at General Motors where she then worked as a receptionist. She further confirmed that on 27th November 1986 police officers, who did not identify themselves to her, came to the reception where she worked and asked her to call the petitioner whom they then took away only to be seen one month later.

12. PW3 was Margaret Mukami Njoka. She testified that she is the petitioner's wife but that as at 27th November 1986, she was still dating the petitioner and that on 28th November 1986, she went to visit the petitioner at his house in Umoja Estate where she learnt, from a neighbour that the petitioner had on the previous day been brought to the house by police officers who searched the house before taking him away. She saw the petitioner in December 1986 after his release when the petitioner informed her that he had all along been held by the police at various place including Nyayo House. She confirmed that upon his release, the petitioner looked weak and was in a lot of pain. On cross examination, she stated that the petitioner was not a criminal.

Respondents' case.

13. The respondents opposed the petition through grounds of opposition filed on 4th September 2015 wherein they listed the following grounds:-

> ***1) The petitioner has not demonstrated how his constitutional rights were violated by the respondent.***
>
> ***2) That the petitioner has not proved to the honourable court that he was treated in a cruel inhuman and degrading manner.***
>
> ***3) That there is no evidence produced by the petitioner to prove that he was ever detained in any police station in Kenya.***
>
> ***4) That the petitioner has not proved any of the allegations in the petition therefore the same lacks merit.***
>
> ***5) The petition filed herein is totally incompetent, incurably defective, and bad in law and should be dismissed with costs to the respondent.***

14. The respondents did not file any replying affidavit or call any witnesses at the hearing of the petition which was further canvassed by way of written submissions.

Petitioner’s submissions.

15. Mr. Mbugua, learned counsel for the petitioner, submitted that while the petitioner and his witnesses tendered sufficient evidence on the harrowing experience that the petitioner went through following his arrest and incarceration by police officers, the respondents did not file any replying affidavit or call any witness to controvert the petitioner’s case. Counsel submitted that the petitioner’s case that the petitioner case was therefore proved to the required standards and remained unchallenged. He maintained that the grounds of opposition filed by the respondents could not be deemed to be an answer to the issues raised in the petition and the supporting affidavits.

16. Counsel submitted that under the current constitution there is no limitation period for filing cases regarding the enforcement of fundamental rights and freedoms. It was submitted that the petitioner explained, in greater detail, the reasons for his delay in filing the petition. Counsel further submitted that once the petitioner through oral evidence discharged the burden of proof regarding his unlawful detention for 31 days, the burden then shifted to the respondents to justify the detention.

17. On the allegation of torture, counsel submitted that the same could be proved through oral or documentary evidence and added that in the instant case, the petitioner tendered both oral and documentary evidence to show that he was tortured and further, that even though the respondent claimed that the medical evidence/document was scanty, its authenticity was not in doubt. It was the petitioner’s case that it was not a mandatory requirement that the petitioner presents a medical document to prove torture as the very definition of torture does not entail only physical injuries but can include severe pain and suffering. It was submitted that the petitioner presented consistent evidence to show that he was detained by the respondents and that he was therefore entitled to the orders sought in the petition.

Respondent’s submissions

18. Mr. Moimbo, learned counsel for the respondent, submitted that under the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules (Mutunga Rules)* it was not a mandatory requirement for the respondent to file a replying affidavit to the petition as Rule 20 of the said Rules allows a party to file an affidavit, submissions, grounds of opposition or present oral evidence in response to a petition.

19. Counsel submitted that the reason given by the petitioner for the late filing of the petition was not plausible considering that the Moi regime, that the petitioner allegedly dreaded, ended in the year 2002 yet the instant petition was filed in 2015, more than 10 years after Moi left power. For this argument counsel relied on the decision on the case of **Maurice Oketch Owiti vs The Attorney General** [2016] eKLR in which the court rejected similar reasons for delay in filing a petition. Counsel also cited the Court of Appeal decision in the case of **Wellington Nzioka vs Attorney General [2018] eKLR** wherein the court held that it is not enough to come to court and claim fear of the regime and that the petitioner must provide a plausible reasons for such delay.

20. On the allegation of detention and torture counsel submitted that Sections 107 and 108 of the Evidence Act place the burden of proof on the petitioner to establish his case on a balance of probability, and that the instant case did not meet the expected threshold of proof.

Petitioner’s rejoinder to the respondent’s submissions.

21. Mr. Mbugua, learned counsel for the petitioner submitted that the *ratio decidendi* in the 2 cases cited by the petitioner was that the delay should be explained and that in the instant case, the petitioner had given his reasons for not filing his case earlier than 2015.

22. Counsel urged the court not to set a limitation period for filing of cases for enforcement of fundamental rights and freedoms that are anchored on the Constitution as the setting of such time limits is the function of Parliament through legislation.

Determination

23. I have considered the pleadings filed herein, the parties’ submissions together with the authorities that they cited. I find that the main issues for determination are as follows:-

> ***a) Whether the petitioner’s claim is viable having been filed more than 29 years from the date of the cause of action.***
>
> ***b) Whether there was a violation of the petitioners rights and;***
>
> ***c) Depending on the answer to (b) above the remedies available to the petitioner if any.***

24. Starting with the first issue, it was the petitioner’s claim that the violation of his rights occurred in the year 1986 and the petition was filed 29 years later in 2015. The question which then arises, as I have already stated, is whether this court can entertain a petition filed 29 years down the road.

25. The answer to the above question can be discerned from the different positions taken by various courts on whether a petition for enforcement of fundamental rights, filed several years after the date of the cause of action, should be entertained. The position adopted by the courts is that the question of delay in institution of cases are to be determined on a case by case basis the main consideration being the justification or the reasons advanced for filing suits after such extended delays. In the case of **Maurice Oketch Okwiti -vs The Attorney General** (supra) the court observed as follows after analyzing previous decisions over the question of delay:-

> ***“It is evident from the above cited authorities that courts have expressed dissatisfaction in the filling of petitions alleging violations of fundamental rights and freedoms after a considerable length of time has lapsed since the alleged violations***

occurred. The principle that emerges is that a court must examine each case and gauge the length of time taken before presenting such petitions, and the reason for the delay. A court is also entitled to consider whether justice will be served by permitting a respondent, whether an individual or the State in any of its manifestations, to be vexed by an otherwise stale claim."

26. From the outset, however, it must be noted that the Constitution does not set a time limit within which a claim based on violation of fundamental rights and freedoms may be instituted. This position is based on the fact that a claim under the Constitution is neither a claim in tort nor contract so as to require the application of the Limitation of Actions Act (Cap 22 Laws of Kenya). On this point, I am guided by the decision of Hayanga J. in the case of **Dominic Arony Amolo** [2003] eKLR wherein the learned judge observed as follows:

" I therefore, think and I so hold that Section 3 of the Constitution excludes the operation of Cap 22 with regards to claims under fundamental rights and further that fundamental rights provisions cannot be interpreted to be subject to the legal heads of legal wrongs or causes of actions enunciated under the Limitation Act, Cap 22."

27. This court takes judicial notice of the fact that following the promulgation of the new Constitution 2010, courts have been swarmed with what one can call, an *avalanche* of cases, some dating back to several decades, arising out of allegations of violations of constitutional rights and fundamental freedoms by the previous regimes especially the Moi Regime of the 1980's. Several claimants who felt aggrieved by the atrocities of the past regimes found solace in the new Constitution and seized the opportunity to institute claims for enforcements of their rights following the said past violations. Courts have therefore been grappling with the lingering question on the issue of limitation of time in regard to such suits and have made findings some of which I will highlight in this judgment as follows:-

28. In the case of **Ochieng Kenneth K' Ogutu vs Kenyatta University & 2 others Petition No. 306 of 2012**, the court observed as follows:-

"[35] As I conclude this matter, I will address the issue of delay in filing this petition. The respondent has argued that the petitioner is guilty of inordinate delay and I am inclined to agree with it. The events complained of took place more than 12 years age. There is nothing before the court that explains or justifies the delay in coming to court to vindicate his rights. The petitioner's counsel submitted that he was so traumatized that he could not come to court before, but I can see no basis for this submission. While the petitioner alleges that he was arrested and charged, and that he served 15 days before his fine was pad, I cannot see any basis for alleging that he was so traumatized that it has taken him 12 years to recollect that he had a claim against the respondents. While the reason for delay in cases such as those involving the Nyayo House torture cases may be acceptable , at least for a time, that they were not able to file claims because of the politically repressive climate then prevailing, there is no such justification in this case. Even had I found that the facts demonstrated a violation of the petitioner's rights (which I have not), I would have had difficulty in excusing the 12 years' delay in this matter."

As regards the effect of such delays the court noted thus**:**

"[36] There is great danger that parties are abusing the constitutional protection of rights to bring claims before the court whose sole aim is enrichment rather than vindication of rights. A delay of 10 years or more before one comes to court to allege violation of rights is clearly not justifiable. As Nyamu J observed in <u>Abraham Kaisha Kanzika and Another vs Central Bank of Kenya</u> (supra): " Even where there is no specified period of limitation it is proper for the court to consider the period of delay since the accrual of the claim and the reasons for the delay. An applicant must satisfactorily explain the delay. In this case a delay of 17 years is inordinate and it has not been explained. The prosecution of the claimant took 6 years and although he gives this as the reason for the delay he has not explained the balance of eleven years."

The court thereafter concluded that:

"In my view failure by the constitutional court to recognize general principles of law including, limitation expressed in the Constitution would lead to legal anarchy or crisis. It would also trivialize the constitutional jurisdiction in that applicants would in some cases ignore the enforcement of their rights under the general principles of law in order to convert their subsequent grievance into a "constitutional issue" after the expiry of the prescribed limitation periods."

29. In the case of **Joan Akinyi Kabasellah & 2 Others vs Attorney General Petition No, 41 of 2014,** the court held :

"[24] Nonetheless, I take into account the views of the court with regard to limitation in respect of claims for enforcement of fundamental rights. In a line of cases such as Dominic Arony Amolo vs Attorney General, Nairobi High Court Misc. Civil case No. 1184 of 2003 (OS) [2010] eKLR, Otieno Mak'Onyango vs Attorney General and another, Nairobi HCCC No. 845 OF 2003 (unreported, courts have consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights.

[25] I note also the sentiments of the court in James Kanyita vs Attorney General and Another, Nairobi Petition No. 180 of 2011 that " <u>Although there is no limitation period for filling 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 an otherwise state claim."</u>

[26] In the present case, I am satisfied that no prejudice has been occasioned to the respondent by the filing of the present claim."

30. The issue of delay in filing a petition was also considered in the case of **Joseph Migere Onoo –vs- Attorney General Petition No. 424**

of 2013 wherein he court held:-

> ***"[39] The principle that emerges from the cases cited above is that a court must always consider whether the delay in filing a petition alleging violation of constitutional rights is unreasonable and prejudicial to a respondent's defence.***
>
> ***[40] In the present case, the acts complained of took place some 29 years ago, and the petition was filed 27 years after the alleged events. No explanation has been proffered for the delay, or to explain or justify the institution of proceedings at this point in time. The petitioner contended himself with maintaining that there is no limitation in petitions such as this."***

31. The principle that emerges from the above decisions is that while there is no time limit within which a petition alleging a violation of constitutional rights can be instituted, courts have frowned upon the filing of such cases after the lapse of a considerable length of time and emphasized the need to examine each case and be satisfied that a reasonable explanation has been made for such delays. In essence, therefore, the mere fact that the Constitution does not impose a time limit for the filing of cases seeking the enforcement of constitutional rights does not give litigants the *carte blanche* to sit on their laurels for years on end only to institute claims long after the occurrence of the events complained about. Of critical importance is that there must be a plausible justification for the delay.

32. Turning to the present case, I note that the petitioner explained that he did not file his petition earlier because he was traumatized following his detention and feared to challenge the Moi regime that had detained him. He further explained that even after the exit of President Moi from power in the year 2002, he still did not have confidence that the judiciary had the independence to dispense justice in his case as most of the then sitting had been appointed during the Moi era and that it was only after promulgation of the Constitution 2010, the formation of the Truth Justice and Reconciliation Commission and the vetting of the Magistrates and Judges that served under the old Constitution that he realized that Kenya had truly changed and that he could get justice for the unlawful arrest, detention and torture meted out on him in 1986. The petitioner further explained that the first lawyer he engaged to handle the matter in 2012 informed him that his case stood no chance of success in view of the fact that he lacked the police records to prove his case and that it was only after consulting his current lawyers and obtaining his employment records from General Motors that he was advised that his case stood a chance before the Constitutional Court.

33. On their part, the respondents argued that the reasons advanced by the petitioner for the delay in filing the claim were not only lacking, feigned and lame, but were also unreasonable and prejudicial to the respondent's case since the alleged arrest and detention took place more than 30 years ago and it was therefore practically impossible for the respondents to retrieve records dating 30 years back. The respondents maintained that no proper explanation had been advanced by the petitioner to justify the delay in filing of the case.

34. I have considered the rival submissions on the parties on the subject of delay. I am satisfied that the petitioner offered a plausible reason for his delay in filing the petition. This court takes judicial notice of the fact that public confidence in the justice system and the observance of the Rule of Law was heightened by not only the promulgation of the new constitution, but also by the vetting of the Judges and Magistrates and the setting up of the Truth Justice and Reconciliation Commission. This public confidence is clearly evident from the upsurge in the number of Constitutional Petitions that have been filed since the promulgation of the 2010 Constitution that led to the setting up of the Constitutional and Human Rights Division, in which this court sits, to handle such constitutional Petitions. I therefore find no reason to doubt the explanation given by the petitioners for the delay in filing the case.

35. Turning to the 2nd issue which is the proof of violation of rights, I note that the respondent did not file any response to counter the petitioners claims. The respondents merely alleged, during submissions that the petitioner did not offer cogent, documentary evidence to prove that he was detained and tortured for almost a month. On his part, the petitioner, both through oral evidence presented during the hearing and in his affidavit in support of the petition, gave a detailed and compelling account, under oath, on how he was arrested, detained and tortured for over one month. The petitioner's evidence was not impeached even on stinging cross examination by the respondent's counsel. He produced documents to show that he was, upon his release from detention, given one week sick off from duty and a memo to show that his absence from his work place was due to his arrest and detention. Needless to say, the petitioner's witnesses, especially PW2, testified that she witnessed the petitioner's arrest first hand as the same was effected at the GM premises in broad daylight during working hours.

36. As I have already stated in this judgment, the respondents did not present any evidence or deny the petitioner claim under oath and this in my humble view, shows that the petitioner's allegations remain unchallenged and are therefore true. I find that the respondents' claim that they were not able to get records dating back to 30 years was not supported by any tangible proof. I therefore find that the petitioner's evidence is credible and I have no reason to doubt it. I further find that while it would have been desirable for the petitioner to produce documentary proof of the allegation of torture and detention in the hands of the respondents, the failure to produce such documents was not fatal to his case as his averments of facts, under oath were not contradicted by the respondent. In any event, I have already found that the petitioner produced documents from his employer that he confirmed that he was arrested and detained for at least 1 month.

37. The next issue for determination is whether the various acts enumerated by the petitioner as seen in the petition and the supporting affidavit amounted to violation of fundamental rights and freedoms as alleged. The petitioner claimed that his right not to be subjected to torture, cruel, inhuman and other degrading treatment as envisaged under Section 74(1) of the repealed constitution was violated during the detention period. The said Section 74(1) of the repealed Constitution stipulates as follows:

No person shall be subject to torture or to inhuman or degrading punishment or other treatment.

38. The petitioner stated that during his incarceration following his arrest, he was stripped naked, subjected to through beating, kicked around, taunted and locked up naked in filthy water - logged solitary cells for days on end in a failed attempt to extract a confession from him over his alleged involvement in the activities of a proscribed political grouping.

39. Black's Law dictionary, 10th edition, defines torture as follows:

The infliction of intense pain to the body or mind to punish, to extract a confession or information, or to obtain sadistic pleasure.

40. The European Court of Human Rights has defined torture and inhuman treatment in the **Greek Case 1969 Y.B. Eur. Conv. on H.R. 186 (Eur. Comm'n on H.R** in the following terms;

> "***The notion of inhuman treatment covers at least such treatment as deliberately causes suffering, mental or physical, which, in the particular situation is unjustifiable. The word "torture" is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be de-grading if it grossly humiliates him before others, or drives him to an act against his will or conscience."***

41. The issue of what amounts to torture and cruel, degrading treatment has also been defined in **Samwel Rukenya Mburu vs Castle Breweries, Nairobi HCC 1119 of 2003**, per Visram J (as he then was) as:

> "***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 dishonour or contempt"***

42. Guided by the above definitions I find that that in the circumstances of this case, the petitioner was subjected to torture, cruel and degrading treatment contrary to Section 74(1) of the repealed Constitution. This court finds that the respondents' assertion that the petitioner needed to furnish proof of torture was misguided as it was not expected that the state would give the petitioner any document or certificate, for that matter, to show that he had been detained without trial for 32 days.

43. The petitioner's case was that he was arrested and detained from 27th November 1986 and released several days later on 29th December 1986 without any charges being preferred against him. He therefore claims that his detention was illegal, without any justifiable cause and amounted to a violation of the fundamental rights to personal liberty as enshrined under Section 72 of the repealed Constitution which stipulates as follows:

> ***No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases –***
>
> > ***(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 the Court of Appeal punishing him for contempt of that court or of another court or tribunal; (c) in execution of the order of a court made to secure the fulfilment of an 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; Protection of right to personal liberty. 20 of 1987. 4 of 1988, s.5. Rev. 2009] Constitution of Kenya 57***
> >
> > ***(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 a visit that he is permitted to make to a part of Kenya in which, in consequence of the order, his presence would otherwise be unlawful.***
>
> ***(2) A person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.***
>
> ***(3) A 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, 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, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death,***

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. 58 Constitution of Kenya [Rev. 2009

(4) Where a person is brought before a court in execution of the order of a court in any proceedings or upon suspicion of his having committed or being about to commit an offence, he shall not be thereafter further held in custody in connexion with those proceedings or that offence save upon the order of a court.

(5) If a person arrested or detained as mentioned in subsection (3) (b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall, unless he is charged with an offence punishable by death, be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

(6) A person who is unlawfully arrested or detained by another person shall be entitled to compensation therefor from that other person.

44. Having regard to the aforesaid provisions of 72 of the repealed Constitution it is clear that it was a requirement that an arrested person be produced in Court within twenty four hours where he was suspected of committing a normal criminal offence and within fourteen days where the offence was punishable by death. The Constitution was also clear that it was upon the respondents to show that they complied with this constitutional requirement. The reason for limiting one's liberty through arrest was for purposes of producing him or her in Court to be dealt with in accordance with the law, thereby checking on arbitrary arrest and unlawful detention of people in violation of their human rights to liberty.

45. The import of section 72 (3) of the repealed Constitution was the subject of discussion by the Court of Appeal in the case of ***Albanus Mwasia Mutua v Republic*** [2006] eKLR where the Court addressed that issue and held that there was gross violation of the appellant's constitutional right guaranteed by ***section 72(3) (b)*** because he was not brought before the Court within the time required by the Constitution after his arrest. The Court also observed that ***"it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place".***

46. From the facts of the case and the evidence on record, it is not in doubt that that the petitioner's right to liberty was violated. The petitioner has demonstrated on the balance of probability that he was not only arrested and held in solitary confinement from 27th November 1986 until 29th December 1986, but he was also not arraigned before any court of law to face any charges. The respondents did not tender any explanation for their actions save for the claim that they are unable to trace their records which claim, as I have already found, was not proved through any tangible evidence.

47. The petitioner further claimed that his fundamental right to privacy and freedom from arbitrary search and entry guaranteed under sections 70(c) and 76(1) of the former Constitution was violated. He testified that his house at Umoja Estate was searched by the respondents' agents, without search warrants, in their unsuccessful quest to retrieve alleged seditious publications. Once again, this claim by the petitioner was not controverted by the respondents and I therefore find that the petitioner's right under section 76(1) of the former Constitution was infringed. My finding is bolstered by the provisions of Section 118 of the Criminal Procedure Code which stipulates that:-

Where it is proved on oath to a Court or a Magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the Court or a Magistrate may by written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and, if the thing be found, to seize it and take it before a Court having jurisdiction to be dealt with according to law."(Emphasis added)

48. In the instant case the respondents did not establish that they had a search warrant to search the petitioner's residence and I am therefore satisfied that was conducted in total disregard to the petitioner's right and freedom from arbitrary search.

Reliefs

49. Having found that the petitioner's rights were violated, I now turn to determine the last issue for determination which is the remedies available to the petitioner in the circumstances of this case. Apart from prayers for declaration of violation of rights, the petitioner also sought general damages consequential upon the declarations of violation of rights. The petitioner submitted that he should be awarded damages for each of the enumerated violations of fundamental rights separately as appears in the prayer or a limpsome figure. The petitioner prayed for an award of kshs 8,000,000/- cited the case of **Denish Gumbe Osire vs Cabinet Secretary Ministry of Defence & Another [2017] eKLR** wherein an award of kshs 10,000,000/- was made to the claimant was detained and tortured for 86 days.

50. Reliance was also placed on the decision on the case of **Jennifer Muthoni Njoroge and 10 Others vs The Attorney General, Petition [2012] eKLR** wherein an award of kshs 3,000,000/- was made for violation of constitutional rights against torture, unlawful pre- arraignment detention of 30 days.

51. In determining the appropriate relief for the violation of human rights where violation is actually proved, the court can award compensation while bearing in mind the fact that human rights are invaluable, are for enjoyment and not violation. It is noteworthy that there can be no sufficient redress for violation of human rights and fundamental freedoms through monetary compensation. Courts are alive to the fact that no monetary value can be attached to the violated human rights and therefore only make awards in compensation as a consequence of infringement of human rights and fundamental freedoms to deter future violations, but not to repair the already violated rights and fundamental freedoms. Through the act of compensation, Courts send a message to the would be violators of human rights that Courts will

not let go such violations without some form of reparation.

52. In deciding what award to make, the Court will consider factors such as the torture, if any, inflicted on the Petitioner, the length of time the Petitioner was held in unlawful custody, decided cases on the issue and what would be fair and reasonable award in the circumstances of the case. See **Jeniffer Muthoni Njoroge & 10 others v Attorney General** (supra).

53. Bearing in mind the violation of the petitioner's rights as I have already found in this judgment, I find that an award of kshs 4,000,000/- as general damages will be adequate compensation to the petitioner for the said violation. In arriving at this award, I am guided by the decisions made in **Koigi Wamwere v Attorney General** [2015] eKLR where the Court of Appeal enhanced an award of 2.5 million to 12 million; **Eliud Wefwafwa Luucho & 4 others** (Petition No.121 of 2016 consolidated) where the Court awarded Kenya shillings 5 million to each petitioner, **Francis Mwangi Munyiri v Attorney General** (petition No. 400 of 2014) where Kshs. 5 million was awarded and **Jamlik Muchangi Miano v Attorney General** [2017] eKLR where again an award of Kshs. 5 million was made.

54. In conclusion, I find that the instant petition is merited and I allow it in the following terms :

> ***i. A declaration that the arrest of the petitioner without warrants of court and without disclosure of reasons at time of arrest and his subsequent incommunicado detention in solitary confinement at Jogoo Police station and at Nyayo House for a total of 32 days without charge was arbitrary, unlawful and in violation of his fundamental rights to personal liberty and the due protection of the law guaranteed by Sections 70(a), 72(1) and 77 of the former Constitution.***
>
> ***ii. A declaration that the search of the petitioner's house by police on 27th November 1986 without warrants was arbitrary, unlawful and in violation of his fundamental right to privacy and freedom from arbitrary search and entry guaranteed by Sections 70(c) and 76(1) of the former Constitution.***
>
> ***iii. A declaration that the incommunicado detention in solitary confinement that the petitioner was held at Jogoo Police station and at Nyayo House for 32 days 27th November 1986 to 29th December 1986 and the torture, beatings and ill treatment inflicted on him during interrogations and the extreme, inhuman and degrading conditions of custody were in violation of the fundamental rights and freedoms of the petitioner to human dignity, protection of the law, security of the person and freedom from torture, cruel, inhuman and/or degrading treatment or punishment guaranteed by Section 70(a), 74(1) of the former Constitution.***
>
> ***iv. General damages in the sum of kshs 4,000,000/-.***
>
> ***v. Costs of the petition.***
>
> vi. ***Interest on (iv) and (v) above from the date of judgment till payment in full.***

Dated, signed and delivered in open court at Nairobi this 24th day of January 2019

W. A. OKWANY

JUDGE

In the presence of:

No appearance of parties

Court Assistant – Kombo