REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.114 OF 2018

IN THE MATTER OF ARTICES 22, 23, 25(a) AND ARTICLE 29 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 25(a) AND 29(c), 29(d) OF THE CONSTITUTION OF KENYA OF 2010

DOMINIC KINYANJUI KAMANGA.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

Petitioner's Case

1. The petitioner **DOMINIC KINYANJUI KAMANGA** through a petition dated 28th March 2018 seeks the following prayers:-

a) A DECLARATION that the Petitioner's Fundamental Rights and Freedom were contravened and grossly violated by the Respondent's Special Branch Police Officers and Nakuru CID Officers who were Kenyan Government servants, agents, employees and in its institutions from 2nd November 1993 for 3 days on 24th & 25th November 1993, on 14th June 1994 whereby he was tortured by being beaten on soles of his feet, his nails and hips were pierced using needles and sharp pins and he was beaten on his male organ.

b) A DECLARATION that the Petitioner is entitled to the payment of damages and compensation for the violations and contraventions of his fundamental rights and freedoms under the aforementioned provisions of The Constitution of Kenya

c) General damages, exemplary damages and moral damages on an aggravated scale under Article 23(3) of The Constitution of Kenya for the unconstitutional conduct by the Kenyan government servants and agents be awarded.

d) Any further orders, writs, directions, as this Honourable Court may consider appropriate.

e) Costs of the suit, and interest.

Respondent's Case

2. The Respondent was represented in the petition but did not file any response to the petition as per courts record.

History of the Suit

3. The petition proceeded by way of *viva- voce* evidence before Hon. Lady Justice Okwany, who was transferred to Commercial Division, before she could deliver the judgment. The file was forwarded to her to do the judgment but returned the same to the division on the grounds that she was no longer in the division. I consequently took over the matter to do the judgment and as I do so, I am aware that I did not hear the matter nor did I have an opportunity to see the witnesses. I will rely on the evidence as taken and on counsel rival submissions.

Analysis and Determination

4. I have perused the petition, petitioner's evidence and affidavit in support of the petition and counsel rival submissions and from the aforesaid the issues arising for determination are as follows:-

a) Whether the petitioner's petition is time barred?

b) Whether the petitioner has proved his claim as required?

c) What relief is the petitioner entitled to (if any)?

A) Whether the petitioner's petition is time barred?

5. The petition herein is brought pursuant to Articles 22, 23, 25(a), 29(a), 29(c), 29(d) and 29(f) of the Constitution of Kenya 2010. The petitioner in this petition seeks redress for alleged violations of his fundamental rights. The alleged violations as per petitioner's petition and affidavit in support occurred on 2nd November 1993, 24th November 1993, 25th November 1993, 14th June 1994, during which period the petitioner was subjected to torture by special branch officers, and other Government servants, agents, employees and institutions in 1996 and 1994 for several days at different police stations in Nakuru County.

6. The Respondent, who did not file any response to the petition, in its submissions, urges, that the filling of the petition after 25 years after the cause of action arose amounts to inordinate delay and points out, that a party who wishes to enforce his rights in court must do so within a reasonable time and must be prompt.

7. In the case of **Wellington Nzioka Kioko vs AG (2018) eKLR** the Court of Appeal held that:-

"On the issue of delay, the learned Judge found that the petitioner was filing his claim 33 years after the cause of action relied on, She considered several persuasive decisions of the High Court for instance Wamahiu Kihoro Wambugu vs A.G .Petition No. 468 of 2014; Mugo Theuri vs. A.G, Ochieng' Kenneth Kogutu vs Kenyatta University and 2 others, High Court Petition No. 306 of 2012, and several others. The common thread running through those decisions is that whereas there is no time limitation in respect of constitutional petitions, the delay must not be inordinate and there must be plausible explanation for the delay. The learned Judge found that no justification for the delay of over 3 decades had been given in this matter. Can the Judge be faulted for that? We need to look at the logic behind limitation of actions generally in order to place this issue in proper perspective. When a person suffers a wrong at the hands of another and feels the need to redress the wrong, it is reasonable to expect that redress will be sought before the claim gets stale. This enables a person to preserve and adduce the evidence that is necessary to support the claim. It also accords the purported wrong doer an opportunity to address the grievance and if possible remedy it. That way both parties are spared the agony of losing important evidence, or even witnesses.

Memory is sometimes transient and it is important that a person adduces evidence when the memory of the incident complained of is still intact. There is also this idea of people moving on in life. If somebody wrongs you, you need to seek redress when the offending act still has an impact on your life, and when the evidence necessary to prove the wrong is still available. There is also the converse situation where the alleged wrongdoer should know that there is a claim against him which he needs to remedy. If a wrong is committed and then the person wronged waits for time on end before even notifying the other party, then a travesty of justice occurs because the claim might be made at a time when the offending party has forgotten about the incident and is no longer in a position to defend himself. There is of course a rebuttable presumption that if you don't seek redress within a reasonable time, there is a possibility that you have not suffered any loss from the act complained of. That would explain the maxim that equity does not aid the indolent.

For instance in a case like the one before us where the appellant was complaining about hallucinations, is it possible that you can hallucinate for over 30 years over the same thing and not find the need to seek redress sooner? It would also be prejudicial to the respondent to drag them back 3 decades in matters they may have presumed were long gone and buried."

8. In the case of **Stephen Njoroge Mburu Vs Attorney General & another [2019] eKLR** the learned Judge held that

"The court of Appeal itself has, however held in Wellington Nzioka Kioko v Attorney General [2018] eKLR (CA No 268 of 2016), which is binding on his court, that one has to explain the delay in bringing such a claim. I have perused the petition and the supporting affidavit. They do not explain why the petition was filed in 2017 when the infringements took place in 1991, about 26 years later. Had the petitioner explained the delay, the decision would perhaps have been different. For that reason this petition fails and is dismissed with no order as to costs."

9. In the instant petition there is no doubt from the petitioner, that the torture complained of occurred close to 25 years before the filing of the petition. I have perused the petition and the affidavit in support and found no explanation for the delay in filing the petition in 2018 when the infringement took place in 1993 and 1994. This is a period of 25 years after the cause of action arose. I am bound by the decision in **Wellington Nzioka Kioko vs Attorney General (2018) eKLR** being a decision of Court of Appeal. I therefore find the petition is inordinately delayed though there is no time limitation in respect of constitutional petitions. The delay is inordinate and has no plausible explanation. The delay of 25 years with all due respect without plausible explanation cannot be condoned. The petitioner has had all the time and opportunity to file the petition without undue delay but for unexplained reasons he failed to do so. The petitioner can blame no one but himself. The petitioner was given an opportunity to highlight on the petition and submissions but opted not to do so. Had the petitioner taken that opportunity the court may be would have considered the issue and perhaps the decision would have been different.

10. The court in dealing with similar claims warned of the dangers of allowing claims brought long after the fact without any explanation. In

the case of **Charles Gachathi Mboko vs. AG Civil Case No. 833 of 2009 (O.S)** the court stated:-

> **"It must however go on record that although this Court has been lenient on parties that seek redress for violation of fundamental rights in past political regimes, it is obvious that the Court's indulgence is being abused by parties that have slept on their rights and give no serious explanations for the delay. In subsequent matters, obviously that issue will be at the fore of the Court's consideration of any claim."**

11. In this petition the cause of action took place 25 years ago as pleaded in the petition and supporting affidavit. It is clear from the contents of the petition and supportive affidavit the petitioner was well aware of the police officers and government servants who allegedly tortured him by name and has not disclosed what would have stopped him from taking action against them. No evidence has been produced that he tried to institute suit or seek redress and was denied by anyone from doing so. This court should not be left to guess the reason for such long delay as without explanation the delay would be deemed to be inordinate and without justification.

12. The issue regarding the need to give explanation for delay where there is no time limitation in respect of constitutional petitions was considered in the case of **James Kanyita Nderitu vs. AG & Another, Petition No. 180 of 2011** where the court stated as follows:-

> **"Although there is no limitation period for filing 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 it manifestations, should be vexed by an otherwise stale claim. Just as a petitioner is entitled to enforce its fundamental rights and freedoms, a respondent must have a reasonable expectation that such claims are prosecuted within a reasonable time."**

13. I find in this petition the petitioner has not satisfied the court that his claim having been filed after expiry of 25 years should be allowed to proceed without having given plausible explanation for the inordinate delay of a period of 25 years from the date of the cause of action.

B) Whether the petitioner has proved his claim as required?

14. The petitioner gave evidence as **PW1** and called no witness. He adopted his supportive affidavit to the petition together with the exhibits as his evidence in support of his petition. To the supporting affidavit the petitioner has annexed exhibits **DKK-1A** and **1B,** copy of Finance Newspaper dated 31/1/1999 and East African Standard Newspaper dated 9/6/1994 and 13th December 1997; **DKK-A** the Daily Nations Newspapers dated 29th April 1994; **DKK-3** being copies of Daily Newspaper dated 20th July 1994 and 1st January 1995; **DKK-4A** a copy of Nation Newspaper dated 14th June 1994 and 15th June 1994; **DKK-BB** a copy of the Daily Nation Newspaper dated 15th June 1994.

15. On being cross-examined the petitioner stated that he was tortured and arrested on several dates and that there were witnesses to the torture but he was not told to avail them. He further averred he was tortured, lost consciousness and after his release he went to the hospital but he does not have any medical reports. He further admitted, that he does not have any medical reports for his current medical condition and that the only evidence he has is the newspaper cuttings.

16. Section 107 of the Evidence Act provides that whoever desires any court to give judgment as to any legal right or liability dependent on the evidence of facts which he asserts must prove that those facts exist.

Further **section 109 of the Evidence Act** provides:-

> **"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."**

17. The petitioner relies on Newspapers cutting in support of his claim. **Section 35 of the Evidence Act** provides that:-

> **"(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—**
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> **(a) If the maker of the statement either—**
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> **(i) Had personal knowledge of the matters dealt with by the statement; or**
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> **(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters."**

18. In determination of this matter I want to reiterate, that it is the duty of the petitioner to prove on balance of probabilities that his allegations in his petition are indeed true. The mere allegation of the facts or allegation of incarceration without producing documentary evidence in support do not amount to proving of the same. The petitioner other than alleging he did not produce any document to support his detention for the period alleged in the petition. The petitioner sought to rely on Newspaper cuttings and his oral evidence. Under Section 86(1) (b) of the Evidence Act it is provided that newspapers are one of the documents whose genuineness is presumed by the court. This

therefore makes the newspapers prima facie admissible in evidence. However the statement of fact contained in the newspapers is merely hearsay and therefore inadmissible in evidence in absence of the maker of the statement appearing before the trial court and deposing to have perceived the fact reported. In the instant case the petitioner did not call the markers of the newspaper's cuttings nor did they file an affidavit in support. Though the newspapers may be presumed genuine, the same remain inadmissible in evidence for failure to avail the markers to give evidence and produce the same deposing to have perceived the facts reported.

19. The above proposition was considered in the case of **Andrew Omtata Okoiti & 5 others vs. AG & 2 others (2010) eKLR** where the High Court addressed itself as follows:-

> **"This case however, can hardly go far because the Petitioners have solely relied on newspaper cuttings in discharging their evidentiary burden which approach is rather flawed. The probative value of such cuttings is not in line with the requirements of the Evidence Act and most importantly, their probative value points to the direction of hearsay, which then impugns their admissibility. Without diluting the existing principles on the discharge of evidentiary burden, an allegation of such weight cannot be founded on opinion pieces written by authors who most likely sourced their information from 3rd parties."**

20. The same proposition was considered in **Kituo Cha Sheria & another vs Central Bank of Kenya & 8 others Petition No. 191 of 2011** where it was held that:-

> **"As correctly pointed out by the Attorney General and the 1st respondent, the petition has its basis in a newspaper article and documents which have not been executed. Clearly, therefore, the primary documents that the petitioners rely on are of doubtful probative value, as submitted by the respondents in reliance on the case of Wamwere vs The A.G and Randu Nzau Ruwa and 2 Others –vs- Internal Security Minister and Another (2012) eKLR. If I may borrow the words of the court in the Ruwa case, with tremendous respect to the petitioners, these media articles, taken alone, are of no probative value and do not demonstrate any effort on the part of the petitioners to demonstrate violation of the Constitution by the respondents.**
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> **The first is a newspaper article from the Daily Nation of October 19 2011. The second is an unsigned, undated agreement referred to as a "Share Sale and Purchase Agreement". The third is the lease between Central Bank and Thomas De La Rue Kenya Limited entered into in 1992, while the fourth document is titled "De La Rue Currency and Security Print Limited Statement of Financial Position as at March 2009".**
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> **The petitioners have alleged violation of public procurement laws. On the basis of the documents before me, it is difficult to see how such violation occurred. There is no evidence that the alleged contracts had been entered into, and if they had, whether the process was indeed in violation of the law that regulations procurement."**

21. In view of the above mentioned authorities and the petitioner having not availed the markers of the newspapers cuttings to give evidence and depose to have perceived the facts reported, I find no basis to depart from the abovementioned decisions. I am further alive to the provision of Rule 10 (3) of the Constitution of Kenya *(Protection of Rights and Fundamental Freedoms)* Practice and Procedure Rules which provides:-

> **"Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom."**

22. From the aforesaid Rule and from its provisions, I find that the same do not depart from the requirements that only admissible documents should be the basis of any credible evidence. This however does not rule out which alleged oral evidence.

23. I nevertheless wish to consider the pleadings and the petitioner's evidence herein. I further find that it cannot totally be urged that there is paucity of evidence from the petitioner in support of the petition on the basis that nor documentary evidence was adduced in favour of the petitioner. The petitioner filed his petition with support of the supporting affidavit. The same was served upon the Respondent who opted to not to challenge the same by way of response and calling any witness. In view of the Respondent's failure to file response, I find that the petitioner's evidence is deemed as factual, unchallenged and sufficient to proof the petitioner's case in absence of any pleadings to the contrary and any witness evidence by the Respondent. The petitioner's evidence on his arrest and torture remains unchallenged notwithstanding none production of documentary evidence as alluded to by the Respondent. The court notes the incident occurred long time ago and it is not strange for a party who had such torture as the petitioner herein not to have kept such documents. It is not unbelievable that the petitioner could not produce a medical Report for a period of 25 years since torture notwithstanding having undergone medical treatment for injuries as a result of torture.

24. In the case of **Nrb Milimani Hccc 1243 of 2001 Trust Bank Ltd vs. Paramount Universal Bank Ltd & 2 others (2009) eKLR** the court stated:-

> **"The 2nd and 3rd Defendants closed their Cases without calling Witnesses. It is trite law that where a Party fails to call evidence in support of its Case, that Party's pleadings remain mere statements of fact since in so doing the Party fails to substantiate its Pleadings. The 2nd Defendant's and 3rd Defendant's Defence were unsubstantiated and remained mere statements. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged. In AUTAR SINGH BAHRA AND ANOTHER VS RAJU GOVINDJI HCCC NO. 548 OF 1998 (UR) Mbaluto J held:-**
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> **"Although the Defendant has denied liability in an amended Defence and Counter claim, no Witness was called to give**

evidence on his behalf. That means that not only does the Defence rendered by the 1st Plaintiff in support of the Plaintiff's Case stand unchallenged but also that the Claims made by the Defendant in his Defence and Counter claim are unsubstantiated. In the circumstances, the Counter claim must fail"

25. As the Respondent did not file any response to the petitioner's petition nor did it call any witness, I find that the evidence adduced by the petitioner is uncontroverted and therefore unchallenged. I accept the petitioners evidence. The fact that the Respondent cross-examined the petitioner and called no witness do not change the position as the only evidence tendered and on record for consideration is that of the petitioner.

26. The purpose of cross-examination in a situation where no defence has been filed and no witness is called is only to seek to rebut the issues raised during cross-examination by calling a witness but failure thereafter to call a witness leaves the petitioner's evidence unchallenged. From the failure to file response, availing witness by the Respondent to challenge the petitioner's petition and evidence, I find the petitioner's evidence on record to be factual, unchallenged and sufficient to proof the petitioner's case on balance of probabilities.

C) What relief is the petitioner entitled to (if any)?

27. In this petition I have found that the delay in filing the petition is inordinate delay which ought to have been explained but the petitioner has not in the pleadings, thus the petition and the supportive affidavit done so; but I will proceed that notwithstanding to consider the quantum of damages, I would have awarded had the petitioner given a plausible explanation for the delay in this petition. I have already found no explanation had been given.

28. The court has in myriads of decisions set out the principles to be applied in awarding quantum of damages of monetary compensation for violation of fundamental rights and has recognized monetary compensation as remedy in public law for enforcement and protection of fundamental rights. In the case **Civil Appeal No. 86 of 2013 Koigi Wa Wamwere vs. the AG,** court of Appeal stated as follows:-

"Given, however, the age of some of the older Authorities some of which we have referred to, which all range between Kshs 1.5 Million and 2.5 Million in damages, and considering that the violation of rights suffered by the Appellant fell under two distinct instances namely the torture at the macabre Nyayo House Cells and while held at Kamiti's Block G, which the learned Judge found and accepted, we think the sum of Kshs 2.5 Million awarded to him as the global General Damages was patently inadequate."

29. I find the petitioner suffered physical and psychological torture and had he succeeded, I would have considered an award of Kshs.2 million reasonable, fair and just in view of the violation of his fundamental rights and freedoms.

30. The upshot is that the petitioner's petition was inordinately delayed, and there is no plausible explanation of the delay. In view of the inordinate delay having not been explained and/or the delay lacking any plausible explanation, I find that the petition is inordinately delayed for a period of 25 years. For the aforesaid reason this petition is dismissed with no order as to costs.

Dated, signed and **delivered** at **Nairobi** this **21st** day of **November, 2019.**

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J .A. MAKAU

JUDGE