



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.198 OF 2013

BETWEEN

GABRIEL KOIGI WAMWERE.....1ST PETITIONER
JOHN NJOROGE WAMWERE.....2ND PETITIONER
ALICE WAMBUI WAMWERE.....3RD PETITIONER

AND

THE ATTORNEY GENERAL..... RESPONDENT

JUDGMENT

Introduction

1. The Petitioners allege that their fundamental rights and freedoms were violated by the Respondent when they had gathered sometimes in 1992 at Uhuru Park at a spot now known as “Freedom Corner.” They were there together with others agitating for the release of their brothers, Koigi wa Wamwere and Charles Kuria Wamwere, as well as other political prisoners who had been jailed for the political offences of treason, sedition and belonging to an unlawful organization.

2. They claim that while at the Freedom Corner, they were inhumanly and brutally battered with boots and batons, slaps, rubber whips, kicks and blows all over their bodies by the Kenya Police officers and officers of the General Service Unit, in violation of their right to protection against torture as provided for under **Article 29(d)** of the **Constitution**.

3. In their Petition dated 15th April 2013, they therefore seek the following orders:

(a) A declaration that the three Petitioners’ fundamental rights and freedoms from torture were each contravened and grossly violated by the Respondent’s Kenya Police officers and General Service Unit officers (G.S.U) who were Kenyan government servants, agents, employees and in its institutions on diverse dates and times on 3rd March, 1992 up to 19th January 1993.

(b) A declaration that the three Petitioners are each entitled to the payment of General damages, exemplary and moral damages and compensation for the violations and contravention of their fundamental rights and freedoms from torture under Article 23(3) of the Constitution 2010.

(c) General damages, exemplary and moral damages for torture for each Petitioner.

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

(e) Costs of the suit and interest.

The Petitioner's case

4. The Petitioners' case is as contained in their Petition as well as in the affidavits of Gabriel Kiarie Wamwere, John Njoroge Wamwere and Alice Wambui Wamwere all sworn on 15th April 2013. The Petitioners also gave oral evidence before this Court. The contents of all the three affidavits are the same. I will therefore summarize their depositions as hereunder.

5. That on 3rd March 1992 they were at Freedom Corner, in a tent, together with other persons, where they had camped peacefully agitating for the release of the following 53 political prisoners;

- | | |
|--------------------------------|------------------------------|
| (1) Hon. Koigi Wa Wamwere | (28) Wilson Awour Angonga |
| (2) Mirugi Kariuki | (29) Mwangi Aate Seikwo |
| (3) Rumba Kinuthia | (30) Charles Kuria Wamwere |
| (4) Harris Akong'o Arara | (31) Jethro Sakuo |
| (5) Sheik Aziz Said Rimo | (32) Charles Owuor |
| (6) Joseph Mwaura Kinuthia | (33) James Mawa |
| (7) James H. Gitau Mwara | (34) Daniel Muli |
| (8) Harun Thungu Wakaba | (35) Sabastian Kamau |
| (9) Geoffrey Kuria Kariuki | (36) David Gitundu |
| (10) Kibathi Muigai | (37) Kennedy Maina |
| (11) Harrison Githaiga Gicheru | (38) Dixon Jowe Aliech |
| (12) Loli Wambua Kamau | (39) Gibson Maina Kimani |
| (13) Stephen Mulili Kituu | (40) Milton Chege Kimani |
| (14) Philip Tirop Arap Kitur | (41) Samuel Mwangi |
| (15) Nduthu Karimi | (42) Boniface Mawa Matunda |
| (16) Kang'ethe Mungai | (43) John Kibe |
| (17) Peter Nguthu Mburu | (44) Mutiso Mwangire |
| (18) Joseph Mugero Wainaina | (45) Dickson Nabwire Namadoa |
| (19) Raphael Wambua Mutwili | (46) Effermont Ng'ang'a |
| (20) Peter Kamande Gitau | (47) Hassan Hussein Juma |

- (21) George Kamau Njenga (48) James Kisenge Musyoka
(22) Daniel Njuguna Kihunga (49) George Anyona
(23) John Ogola Ojiro (50) Augustine Njeru Kathangu
(24) Francis Gachie Nakitari (51) Odhiambo Pia
(25) Simon Gathi Mwaniki (52) Edward Okongo Oyugi
(26) Patrick Ngure (53) Isaiah Ngotho Kariuki
(27) Shadrack Masika Mariwa

6. They aver that while at Freedom Corner, they did not have any weapons and the only possessions they had were their clothes, blankets to keep themselves warm at night, water to drink and wash their faces, Bibles and hymn books to keep themselves busy. They also had a tent which was donated to them by a well-wisher and that other well-wishers, including the late Prof. Wangari Mathaai, gave them moral support, food, clothing and water as they waited for the Government, through the Attorney General, to respond to their Petition for release of the above named persons. They had earlier, on 28th February 1992, presented a Petition to the then Attorney General, Hon. Amos Wako, for the release of all the said political prisoners.

7. They further claim that their only demand was for their brothers and other political prisoners to be released, and if not, they were determined to camp at the Freedom Corner and starve to death in a hunger strike.

8. They have also averred that on the evening of the 28th February 1992 between 4.00pm and 9.45pm, while still at Freedom Corner, together with other persons, they claim that they were brutally battered with boots and batons, slaps, rubber whips, kicks and blows all over their bodies by 50 Kenya Police officers and General Service Unit officers and that they were left badly injured with some, like the late Prof. Wangari Mathaai, being taken to hospital, unconscious. They were also arrested and bundled into police vans and taken to their home district, Nakuru. They claim that the acts of the police aforesaid were a violation of their fundamental rights and freedoms, in particular, the protection against torture as well as inhuman and degrading treatment.

9. It is also their deposition that between one and five days apart, together with others, they returned to Nairobi and began a peaceful campaign and hunger strike, afresh, at the All Saints Cathedral compound. They were allegedly hosted at the bunker of the Church from 4th March 1992 to 19th January 1993 when the last political prisoners were released and when they returned to their home.

10. They also claim that while hosted at the Cathedral, the Kenya Police Officers and General Service Unit Officers continued to attack them in violation of their fundamental right and protection from torture as guaranteed under **Article 74** of the **Repealed Constitution**.

11. They have added that their physical, psychological, political and economic lives were messed up as they were tortured for expressing their fundamental rights and freedoms as was enshrined under the **Repealed Constitution** and that to-date they continue to suffer trauma.

12. It is the Petitioners' further case that the acts of being subjected to beatings by the State agents amounted to torture which was prohibited under the **Repealed Constitution** as well as under international human rights instruments to which Kenya is a party.

13. The Petitioners have now sought *inter alia* general damages, exemplary and moral damages of Ksh.12,000,000.00 for each of them.

The Respondent's case

14. The Respondent, the Attorney General opposes the Petition through the grounds of opposition dated 29th July 2013 which read as follows:

(i) That the Petition has been brought after inordinate delay. Over thirty years after the alleged violation was committed.

(ii) That no reasons whatsoever have been advanced to explain the long and inordinate delay.

(iii) That the Petitioner has not shown by way of evidence that the alleged acts of violation were committed and further that if they were indeed committed, that government was involved.

(iv) That the Petition filed herein is imprecise, it is based on generalities; and therefore fatally defective.

(v) That the Petition, as filed herein is an abuse of the court process.

15. He also filed written submissions and his case is that the Petition has been brought after inordinate delay i.e. over twenty years after the alleged violation was committed and no reasons had been advanced to explain the said delay.

16. It was his further submission that the Petitioners had not demonstrated that the acts they complained of indeed happened and that the State was responsible for the same. He added that newspaper cuttings do not amount to evidence as provided for under the **Evidence Act** and for the said submission he relied on the case of ***Tesco Corporation Ltd v Bank of Baroda HCCC No. 182 of 2007*** where it was held that newspaper cuttings cannot be admitted as evidence unless such evidence had satisfied the criteria established under **Section 35** of the **Evidence Act (Cap 80 Laws of Kenya)**.

17. It was the Respondent's further submission that the gathering at Freedom Corner was in violation of **Section 2** of the **Public Order Act (Cap 56 Laws of Kenya)** and the Petitioners had not notified the Regulating officer of the said meeting. That their illegal action cannot therefore be the basis for a claim under the **Constitution**.

18. As regards the quantum of damages in constitutional matters, the Respondent claimed that exemplary damages are not awardable in changed political circumstances and relied on the case of ***Benedict Munene Kariuki and others v The Attorney General Petition No. 722 of 2009*** in support of that argument.

19. In conclusion, the Respondent has urged the Court to dismiss the Petition for lack of evidence and merit.

Determination

20. The Petitioners have filed this Petition claiming that they were beaten with boots, slaps, rubber whips, kicks and blows all over their bodies by Kenya Police Officers and General Service Unit Officers while holding a peaceful demonstration at Freedom Corner of Uhuru Park and later while holed up at the All Saints Cathedral. They therefore specifically claim a violation of the right not to be subjected to torture and/or cruel degrading inhuman treatment.

21. In response, the State opposes their claim on three grounds. Firstly, that they have filed the claim too late in the day and therefore the State would be prejudiced as it does not have the means of defending the claim and/or proving its case. Secondly, that the Petitioners have not availed any evidence to substantiate their allegations and lastly, that the Petitioners were in any event engaged in unlawful action during the demonstrations.

22. I will first deal with the issue of inordinate delay and thereafter address the issue of proof of claims such as the ones before me. If I find that the Petitioners have placed sufficient material before the Court to enable it determine their claim against the State, I will then proceed to determine their claim of violation of their protection against torture and/or cruel, inhuman treatment and thereafter determine the appropriate relief. If not, the matter ends there.

Whether there is inordinate delay in filing the Petition.

23. I do not know any law or a particular provision of the **Repealed Constitution** that provided for a limitation of period within which a claim for enforcement of the Bill of Rights could be filed. Indeed in ***Dominic Arony Amolo v Attorney General Misc Applic No. 494 of 2003*** the learned Judge expressed himself thus;

“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 action enunciated under the Limitation Act, Cap 22.”

24. This and other Courts have followed the above decision faithfully over the years and to my mind therefore, the law does not impose limitations for filing of proceedings to enforce fundamental rights and freedoms as enshrined under the Bill of Rights. However, I also understand that there must be a justification as to why a Petition had not been filed as early as the alleged breach occurs. That is why in the case of ***Charles Gachathi Mboko v Attorney General (2014) e KLR*** I opined that the Court’s indulgence may be abused by parties seeking redress for violation of their fundamental rights without explaining long delays in instituting such claims. I restate that opinion in this case.

25. In stating so, I note that the facts relied upon and giving rise to the claims in the Petition before me occurred between 3rd March 1992 and 19th January 1993. When asked why it took close to over twenty years to file their claim, the Petitioners claimed that justice is currently being done for those who suffered in the past regimes which fact was not true in yester years but while it is true that there is no limitation of time in the filing of constitutional law cases and while it is also true that the Judiciary has over the last few years been robust in providing redress for human rights atrocities that occurred in previous regimes, I am of the view that Courts ought to examine each of the claims made, keenly, and only those that have been substantiated should be addressed the delay notwithstanding.

26. In that context, I shall then proceed to determine the Petition on the basis of the evidence presented by the Petitioners.

Whether the Petitioners’ fundamental right and protection from torture, inhuman and degrading treatment was violated.

27. **Section 74(1)** of the **Repealed Constitution** protected the right not to be subjected to torture and other cruel and degrading treatment thus;

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

28. Under **Article 25(a)** of the **Constitution 2010**, the above right is inherent to all human beings and should never be derogated from. **Article 29(d)** and **(f)** of the **Constitution** also provides thus;

“Every person has the right to freedom and security of the person, which includes the right not to be—

(a) ...

(b) ...

(c) ...

(d) *subjected to torture in any manner, whether physical or psychological;*

(e) ...

(f) *treated or punished in a cruel, inhuman or degrading manner”.*

In addition, the law on protection against torture and other degrading and inhuman treatment is consistent under all international human rights instruments. For example, **Article 5** of the **United Nations Universal Declaration of Human Rights (“UDHR”)** states that **“No one shall be subjected to torture or to cruel, in-human or degrading treatment or punishment.”** Further, since the adoption of the UDHR on December 10, 1948, this provision has been reproduced in several other international human rights instruments, the **International Covenant on Civil and Political Rights (“ICCPR”)**, **The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment**, **The European Convention on Human Rights (ECHR)**, **The American Convention on Human Rights (AmCHR)**, **the Inter-American Convention to Prevent and Punish Torture and the African Charter on Human and Peoples Rights (Banjul Charter)**. It is therefore clear that torture is prohibited in all its forms and elements.

29. Having stated the law as above, it was the Petitioners’ claim that they were tortured by officers of the Kenya Police and General Service Unit and that they were beaten all over their bodies with batons, rubber whips and they were also tear gased.

30. However, despite all the claims made against the State, the Petitioners failed to adduce any tangible evidence to prove any of the said allegations. At the hearing, the 1st and 2nd Petitioners who testified as PW1 and PW2 alleged that after they were beaten, they went to hospital but admitted that they did not have any documents to prove that fact.

31. How then is a Court of law to believe them? The law is clear that a party that seeks to rely on a fact bears the burden of proving that fact. In that regard, **Section 107 (1)** of the **Evidence Act (Cap 80 Laws of Kenya)** states as follows;

Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence 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.

32. In making the above finding, I recall that in *Margaret Wanjiru & 5 Others v Attorney General Petition No. 210 of 2013*, this Court stated as follows;

“Even if I was for a moment to assume that due to passage of time, they would not be able to acquire the requisite documents to prove that they sought the medical attention, the Petitioners still had other ways of proving their case. Why did they not for instance have other witnesses testify on their behalf? I believe it would not have been difficult for them to have the women with whom they were with at the Freedom Corner testify for them and that would have corroborated their testimony. I am also of the view that it was possible for them to get a witness (es) from the All Saints Cathedral Church where allegedly they kept camp from 4th March 1992 to 19th January 1993, a period close to one year. Certainly, they must have been at the Church’s compound with the approval and knowledge of the Church’s leadership.”

33. I shall repeat the same questions in the present case and further, the words of Nyamu J (as he then

was) in *Col Peter Ngari Karume & 7 Others v Attorney General (supra)*, when he expressed himself as follows, are still relevant today;

“Turning to the alleged violation as aforementioned, it is incumbent upon the petitioners to avail tangible evidence of violation of their rights and freedoms. I have gone through the petitioners’ affidavits which have horrifying allegations. The Respondent has denied all those allegations. The allegations of violations could be true but the court is enjoined by law to go by the evidence on record. The Petitioners’ allegations ought to have been supported by further tangible evidence such as medical records, witnesses’ or rather oral evidence capable of being subjected to cross examination to test its veracity. The Petitioners did not provide such evidence except the averments of what transpired to them.”

He concluded on that issue as follows;

“It is most probable that in the prevailing circumstances then, the petitioners were subjected to physical beating, torture, detention without trial among other violations but the court is deaf to speculation and imaginations and must be guided by evidence of probative value. When the court is faced by a scenario where one side alleges and the rival side disputes and denies, the one alleging assumes the burden to prove the allegation. I have gone through the entire court record and there is absolutely nothing to support the allegations made by the petitioners.”

I am in agreement with the learned judge and as this Court stated in *Margaret Wanjiru & 5 Others v Attorney General (supra)*, this Court will not tire in reminding the victims of historical injustices such as the Petitioners that this is a Court of law which operates within the parameters of the law and nothing else. It is not enough for them to come to Court and make serious allegations against the State and the violations meted upon them and fail to substantiate them with the very least of evidence to bolster their assertions.

34. In addition to the above findings, I note that the Petitioners adduced the “**Society Magazine Issue No. 4 of 23rd March 1992**” which ran a story captioned; ‘**State Tyranny**’ and produced as annexure ‘GKW I’, as evidence. Sadly, I am unable to admit the same as evidence because under **Section 35** of the **Evidence Act** as interpreted in *Tesco corporation Ltd v Bank of Baroda (K) Ltd Civil Case No. 182 of 2007*, a newspaper cutting is not credible under the provisions of **Section 35** of the said **Evidence Act** and even if I was to assume for a moment that it was to be admitted, I am still not able to see any evidentiary and probative value it has on the Petitioners’ case - See *Margaret Wanjiru & 6 Others v Attorney General (supra)*. I say so because while it is true that the magazine has a story on a number of women who were at Freedom Corner on the 3rd March 1992 seeking release of their sons and husbands, I do not know the nexus between them and the Petitioners, including the 3rd Petitioner, as there is no reference to any of them.

35. I should now turn to a bigger flaw in the Petition and the evidence in support thereof. Suppose in fact the Petitioners were indeed brutally battered as they have claimed. Would that action amount to torture and/or cruel, degrading and inhuman treatment under both the **Repealed Constitution** and the **Constitution 2010**? With respect, the answer must be in the negative.

36. The Supreme Court of Zimbabwe addressed the said violation in *Jestina Mukoko v AG (36/09) [2012] ZWSC 11 (20 March 2012)*, **Constitution Application No. 36 of 2009**, in the following terms;

“Inhuman treatment is treatment which when applied or inflicted on a person intentionally or with premeditation causes, if not actual bodily injury, at least intense physical or mental suffering to the person subjected thereto and also leads to acute psychiatric disturbance during interrogation: Ireland v United Kingdom [1978] 2 EHRR 167 para 167.

Degrading treatment is treatment which when applied to or inflicted on a person humiliates or debases him or her showing a lack of respect for or diminishing his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking the person’s moral and

physical resistance. The relevant notions in the definition of degrading treatment are those of humiliation and debasement. The suffering and humiliation involved must go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate or fair treatment: Woods v Commissioner of Prisons & Anor 2003(2) ZLR 421(S) at 432C-B.”

37. The above statements capture the essence of both torture and cruel, inhuman and degrading treatment and without saying more, even if the Petitioners had been mishandled as they have claimed, the threshold of the said violations cannot have been reached. Their claims in the above regard must therefore fail.

Conclusion

38. Having determined the principal claim in the Petition and having dismissed it, there is nothing more to say.

39. The Petition herein is dismissed. Let each Party bear its own costs.

40. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 20TH DAY OF JANUARY, 2017

ISAAC LENAOLA

JUDGE

DELIVERED AND SIGNED AT NAIROBI THIS 25TH DAY OF JANUARY, 2017

E. CHACHA MWITA

JUDGE