



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NANYUKI**  
**CRIMINAL PETITION NO. 2 OF 2015**

**KIMITI MUNGERE SAMWEL & OTHERS .....PETITIONER**

*versus*

**THE HON. ATTORNEY GENERAL.....RESPONDENT**

**JUDGMENT**

1. There are 28 petitioners in total in this petition. Of those 28 petitioners there are 5 who represent deceased persons. The petitioners seek **“a declaration that the physical and psychological torture visited upon them by the police upon their arrest as aforesaid amount to torture, inhuman and degrading punishment which was contrary to the provision of section 74(1) of the repealed constitution of Kenya; that the failure of the police to take all the arrested person to court within twenty four hours or unreasonable (sic) time was also unconstitutional contrary to section 72(8) of the repealed constitution.”** The petitioner additionally seek general damages for breach of the aforestated constitutional rights and freedoms.

2. The affidavit in support of that petition was sworn by the 24<sup>th</sup> petitioner Edward Muriu Macharia. Although he did not depone to what led to the petitioners’ arrest and being charged with criminal offence, it was stated in the body of the petition that from 18 to 22<sup>nd</sup> July 1993 all the petitioners were arrested in Ndurumo Location, within Laikipia County (then known as Laikipia District). They were arrested on the allegations that they had undertaken unlawful oathing and that they were fighting those who supported the then government of the day of KANU Political party. That the police tortured them at Kinamba police station while the police attempted to extract confessions from them. The 24<sup>th</sup> petitioner deponed in his affidavit that all the petitioners were charged before Nakuru Senior Principal Magistrate’s court in **Criminal Case No. 1481 of 1993** with the offence of unlawful oathing contrary to **section 61(a)** of the Penal Code. The petitioners, as deponed by the 24<sup>th</sup> petitioner, were released on bail by the said court on 3<sup>rd</sup> August 1997. He further deponed that after several attendance of court the petitioners’ case was dismissed for lack of evidence.

3. It is on that basis that the petitioners seek declaration from this court that their rights and freedoms as provide in the former constitution, specifically **sections 72 and 74 (1)**, were infringed. The deponent stated that there was no reasonable suspicion of them having committed any criminal offence or about to commit an offence to justify their arrest as required under **section 72(1)(e)** of the former constitution. The deponent stated that the petitioners believed their arrest was politically motivated and further that in breach of **section 72(3)(b)** which required an arrested person to be presented to court within 24 hours of arrest, the police even though they had arrested the petitioners between 18<sup>th</sup> to 22<sup>nd</sup> July 1993, failed to present the petitioners to court until 26<sup>th</sup> July 1993.

4. The Attorney General, the respondent did not file an affidavit in response to the petitioners’ claim.

Instead the respondent file preliminary objection dated 26<sup>th</sup> February 2016. In that preliminary objection the respondent raised the following objections:-

***(a) THAT the petition violates the fundamental principles of the law and hence fatally incompetent.***

***(b) THAT the issues raised are not within the ambit of constitutional jurisdiction and remedy as the relief is available within other ordinary provisions of the law.***

***(c) THAT the petition as drawn and filed is an abuse of the Constitutional provisions and procedure.***

5. To advance those preliminary objection the respondent in written submissions stated that the arrest and prosecution of the petitioners was not denied but that the petitioner's case terminated in 1997, some 22 years ago, and that the petitioners waited for 18 years to seek to vindicate their constitutional rights. Respondent relied on the case **PETER NGARI KAGUME & 7 OTHERS –V- ATTORNEY GENERAL [2009]eKLR** where the court looked at different jurisdictions where different time frames of enforcing fundamental rights are provided in the constitution, then stated:-

***“In view of the specified time limitation in other jurisdictions the court is in a position to determine what a reasonable period would be for an applicant to file a constitution application to enforce is or her violated fundamental rights. I do not wish to give a specific time frame but in my mind there can be no justification for the petitioners delay for 24 years. A person whose constitutional rights have been infringed should have some zeal and motivation to enforce his or her rights. In litigation of any kind, time is essential as evidence may be lost or destroyed and that is possibly the wisdom of time limitation in filing cases. I have carefully considered the case of DOMINIC ARONY alluded to earlier in this judgment where my learned colleagues in a bench of three judges awarded damages to the applicant who came to court to enforce his fundamental rights after about 20 years. With great respect, I wish to depart from their finding concerning limitation. In my view, a party who wishes to enforce his rights in court must do so within a reasonable time and must be prompt. In addition it would be in the interest of good public administration to adjudicate finally in such matters at the earliest time possible. The claim before me transcends nearly six (6) parliaments and two political regimes or administrations. Granted that one of the possible reasons for not coming to court was fear of the then regime surely such grave violations as alleged ought to have been instituted so as to test the regime, the courts and the pretence and the commitment of the then regime to adherence to democratic principles. In each phase of history it is a few brave people who have taken change of higher heights. The timid souls have had no place. Surely the applicants were soldiers and made of sterner stuff! If they sat on their rights for 24 years how would ordinary folks fair?”***

6. On the second and third limbs of the preliminary objection the respondent submitted that the court will have to, in this matter, determine whether the remedies the petitioners seek lie under the constitutional jurisdiction or under statute law. The respondent argues that the constitution was not a substitute for normal procedure where a claim of infringement can be founded on a claim under substantive law. In the respondent's view the petitioners' claim lay under the ordinary civil suit for damages. That the petitioners ought to have filed their claim for malicious prosecution. The respondent argues that the petitioners had by this petition sought to vindicate their right 'by a back door' instead of filing a claim for malicious prosecution. The respondent relied on the case **MOSES SAVALA KEYA t/a KPCO MACHINERY SERVICES & MILANO INVESTMENT LTD –V – GOVERNOR CENTRAL BANK MISC CIV APP. 1759 of 2004** where it was stated:-

***“In my view failure by a constitutional court to recognize general principles of law including limitation expressed in the constitution would lead to legal anarchy on 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***

*period.”*

7. The petitioners’ learned counsel in both his written submission and authorities provided to the court referred to and relied on the provisions of the 2010 Kenya Constitution.

### **ANALYSIS AND DETERMINATION**

8. The petitioners alleged that they were wrongly arrested without any reasonable cause and that on being arrested they were subjected to torture and further that they were held in police custody beyond 24 hours before being presented before court. Such acts no doubt amount to violation of the petitioners’ constitutional rights. As was rightly stated in the case **PETER NGARI KAGUME & 7 OTHERS –V- A.G.** (supra), that is:-

***“The constitution prohibits the torture of suspects or any person who is entitled to the fundamental rights and freedoms. If the petitioners were tortured, it was totally in contravention of their rights.”***

It follows that the respondent erred to submit that the petitioner ought to have filed an action for malicious damage.

9. The petitioners’ petition however will be defeated on two grounds.

10. On the first ground it is the finding of this court that the petitioners’ petition failed to meet the threshold of proof on a balance of probability. The petitioners had a burden to prove the allegations made in their petition. Section 107 of the Evidence Act, Cap 80, provides that, in many so words, that he who alleges must prove or he who invokes the aid of the law must first prove their case. That section provides:-

***“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 exists.”***

The petitioners’, in the least, were bound to show a prima facie case. The petitioners’ case will therefore stand or fall upon the evidence they adduced.

11. With the above in mind it is important to examine what the petitioners presented to court in support of their petition. Although the petitioners by their petition pleaded that they were arrested on suspicion that they had undertaken unlawful oathing and that after their arrest they were subjected to torture in attempt to extract confessions; the 24<sup>th</sup> petitioner’s affidavit in support of that petition is very scanty. The said petitioner simply stated that he and others (note he did not identify the others) on 26<sup>th</sup> July 1993 were taken to court and were charged through Nakuru SPM Criminal Case No. 1481 of 1993. That sometime in 1997 their case was **“dismissed for lack of enough evidence.”** The 24<sup>th</sup> petitioner then alleged that their constitutional rights under section 72 and 74 of the former constitution were violated. There is therefore no evidence under oath which stated that, **(i) the petitioners were tortured;** and **(ii) that they were detained in custody beyond 24 hours.** It is important to state that there are statements made by 5 petitioners 4 of them detailing the manner of their arrest and torture while one of them detailed how the deceased she represent in this petition was arrested and tortured. But those statements are just that; Statements. They were not made under oath and although the court by its directions issued on 31<sup>st</sup> May 2016 directed that the petition and the preliminary objection would be heard by both by affidavit and oral evidence the petitioners did not either adduce oral evidence nor did they present affidavits which clearly set out their claim against the respondent. It follows that the petition failed to establish a case on balance of probability against the respondent. The respondent through the written submissions only admitted that the petitioners were arrested, charged and acquitted. There was no admission on the part of the respondent of torture or prolonged detention of the petitioners.

12. Additionally petitioners number 9, 10, 11, 26 and 27 were representing those that had since died but

were allegedly arrested and charged alongside the other petitioners. There was no grant of representation evidencing that those petitioning on behalf of the deceased were so authorised under the law. It is only such a grant that would entitle those petitioning to represent the deceased. This is what is provided under **section 82(a)** of the Law of Succession Act cap 160. That section provides:-

***“82. Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-***

***a. To enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of death for his estate;***

13. It follows that petitioners number 9, 10, 11, 26 and 27 had no power to enforce the right of the deceased in this action and on that basis alone their actions fail.

14. The second ground which will lead to the failure of the petitioners claim is the prolonged delay in filing the petition. The matters to which the petition relates to occurred in 1993. The criminal case against the petitioners was dismissed in 1997. The present petition was filed in 2015. It follows that at the filing of this petition it was 22 years since the alleged torture took place and it was 18 years since the petitioners’ criminal case was dismissed. The petitioners undoubtedly slept on their right for a very prolonged period. With that inordinate delay there is every likelihood that justice will not be served. There are certain cases where parties petitioned the courts alleging violation of their constitutional rights but in so doing filed their petition after a prolonged period and the courts condoned the delay because they could not have filed their action during the repressive regime of one party state. In the case **NJUGUNA GITHIRU –V- ATTORNEY GENERAL 2016 eKLR** dealing with such case stated:-

***“Similarly, the court in Charles Gachathi Mboko vs Attorney General, Civil Case No 833 of 2009 (O.S.), warned against the dangers of allowing claims brought long after the fact without explanation. The court stated as follows:-***

***‘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 the 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.’***

In this case it cannot be said that since the year 2003 that this county has been under repressive regime to justify the petitioners’ delay in seeking redress. This is not to say that a claim based on fundamental rights and freedoms can be time barred. Far from it. I am in total agreement with the holding of the case. **DAVID GITAU NJAU & 9 OTHERS V ATTORNEY GENERAL [2013 EKLR** where the court stated:-

***“To my mind, I do not know any law or a particular provision of the Repealed Constitution that provided that a claim based on fundamental rights and freedoms has a limitation period within the claims ought to be filed. A claim made under the constitution is neither a claim in tort nor contract that would necessitate the application of the Limitation of Actions Act, Cap 22 Laws of Kenya. Further, a casual reading of the rules contained under the legal Notice No. 133 of 2001 (Constitution of Kenya (protection of Fundamental rights and freedoms of the individual) Practice and Procedure Rules, 2001 would show that they do no place any limitations on the citizens rights to institute a suit for the redress of violation of fundamental rights and freedoms under Section 84 of the Repealed Constitution. I therefore agree with the reasoning of Hayanga J while determining a preliminary issue in Dominic Arony Amolo (supra) that:***

***‘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.”**

15. It is however incumbent upon the petitioner to explain the delay in filing their petition even if the constitution does not expressly stipulate limitation period. This is because the petitioners had an obligation to make their claim within reasonable time.

16. Before concluding this judgment I will comment on the petitioners’ Learned Counsel reliance on the Constitutional Provisions of the Constitution of the year 2010 whereas the alleged violations occurred during the pendency of the former constitution.

In my view the 2010 Kenya Constitution was not retrospective and cannot therefore cover the violations that occurred before it was promulgated. I am of the view that the petitioners’ Learned Counsel erred to rely on the provisions of the 2010 constitution. I am wholly persuaded by the case **DUNCAN OTIENO WAGA – V- HON. ATTORNEY GENERAL [2012]eKLR** where the court expressed itself thus:-

*“The Constitution promulgated on 27<sup>th</sup> August 2010 brought with it a new legal structure which was effective from that date. Article 263 provides that the Constitution shall take effect on the date of promulgation while Article 264 provides that on the date of promulgation the former Constitution subject to the Sixth Schedule shall stand repealed.*

*The effect of Articles 263 and 264 is that the Constitution is not retrospective, it cannot invalidate, except by express provision, what was otherwise legal during the currency of the former Constitution (see Joseph Ihugo Mwaura V Attorney General Nairobi Petition on No. 498 of 2009 (unreported) and Du Plessis and Others – v - De Klerk and Another (CCT8/95) [1996]ZACC 10). The Constitution is only prospective and the acts occurring prior to the Constitution are, unless otherwise stated by the Constitution itself, to be judged by the existing legal regime that is, the former Constitution.*

*The facts giving rise to this claim occurred before 27<sup>th</sup> August 2010. The petitioner was employed in the police force in 1986 and his pension gratuity paid on 19<sup>th</sup> December 2008. The acts of discrimination upon which the petition is grounded occurred within this period. This means that it is the former Constitution that must be applied to judge his case”.*

In the end the petitioners’ petition fails for the reason set out above. The petition is therefore dismissed with no orders as to costs.

**DATED AND DELIVERED THIS 22<sup>ND</sup> DAY OF JUNE 2017.**

**MARY KASANGO**

**JUDGE**

**CORAM:**

Before Justice Mary Kasango

Court Assistant – Njue/Mariastella

For petitioners: .....

For the A. G.: .....

Language: .....

**COURT**

Judgment delivered in open court.

**MARY KASANGO**

**JUDGE**