



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

PETITION NO. 9 OF 2012

IN THE MATTER OF CHAPTER FOUR OF THE CONSTITUTION OF

THE REPUBLIC OF KENYA

AND

IN THE MATTER OF RULES 11, 12 ARTICLE 22, 23, 25, 26, 28, 29, 39, 47 AND 258 OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION & PROTECTION OF FUNDAMENTAL RIGHTS & FREEDOMS OF THE INDIVIDUAL HIGH COURT PRACTICE & PROCEDURE (FORMERLY SECTIONS 70 – 84 OF THE OLD CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF THE UNITED NATIONS CHARTER ON UNIVERSAL DECLARATION OF HUMAN RIGHTS

AND

IN THE MATTER OF CONTRAVENTION AND/OR ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS & FREEDOMS UNDER SECTION 70 TO 84 OF THE OLD CONSTITUTION OF THE REPUBLIC OF KENYA (CURRENTLY ARTICLE 22, 23, 25, 26, 28, 29, 39, 47 AND 258 OF THE NEW CONSTITUTION OF THE REPUBLIC OF KENYA

BETWEEN

HEZBON OMBWAYO ODIERO PETITIONER

VERSUS

THE MINISTER FOR STATE FOR PROVINCIAL ADMINISTRATION &

INTERNAL SECURITY1ST RESPONDENT

MINISTRY OF DEFENCE2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

MINISTRY OF HOME AFFAIRS 4TH RESPONDENT

JUDGMENT

The Petitioner Hezron Ombwayo Odiero was between 23rd August 1976 to 1st August 1982 employed as a military officer in the Kenya Armed Forces rising to the rank of Military Intelligence Sergeant in the Department of Defence. His career was however brought to an abrupt end when he was arrested on 1st August 1982 following an attempted coup. It is his contention that this was in breach and violation of his rights under Articles 22, 23, 25, 26, 28, 29, 39, 47 and 258 of the current constitution or Sections 70-84 of the old constitution. It is also his contention that his arrest and subsequent detention by the police and military as well as prison authorities was unlawful and amounted to cruel, inhuman and degrading treatment which caused him severe mental anguish and suffering. It also resulted in the loss of his employment which was unfair and unlawful in the circumstances. He therefore petitions for the following orders:-

- 1. A declaration that the actions of the agents of the state respondents and its employees, agents, servants of the military and police forces in Kenya under the directive of the respondents contravened his rights under Article 22, 23, 25, 26, 28, 29, 39, 47 and 258 of the constitution and sections 70 to 84 of the old constitution and further that the action of the respondents and their employees, the military, prison officers and police forces against the Petitioner is a contravention of the Petitioner's rights under articles 2, 3, 5, 8, 9, 10 and 13 of the United Nation Chapter (sic) on the provision to safeguard of fundamental rights and freedoms of individuals.**
- 2. Declaration/order that the respondents be held jointly and severally liable for the unlawful illegal and criminal actions of the police, prison warders and military forces as agents of the respondents against the Petitioner.**
- 3. Order that the respondents compensate the Petitioner for violation of his fundamental rights, inhuman and degrading treatment and the injuries resulting from mental stress and anguish, brutality and physical violence as a result of the actions of the police, prison warders and military forces of the respondents.**

3A. Punitive damages severally and jointly against the respondents.

3B. Proper and lawful discharge/clearance certificate(s) be issued to the Petitioner by the 2nd respondent.

- 4. Order that costs of and incidental to this petition be met by the 1st respondent, jointly and severally.**
- 5. That this honourable Court be pleased to make such further or other orders as may be necessary in the circumstances."**

The Petitioner's case is contained in his affidavits (supporting and supplementary) which he adopted as his evidence in chief. It is his case that as a military officer he maintained a high sense of discipline and devotion in his duties; that on 4th October 1982 the Ministry of defence by use of its senior officers made false allegations that he was one of the unruly/rebellious military officers who organized and staged an attempted coup and/or mutiny against the government on 1st August 1982; that this culminated in his arrest and subsequent unlawful detention by the military and police officers in violation of the law and without due process as provided under articles 70 to 84 of the old constitution now Articles 22, 23, 25, 26, 28, 29, 39, 47 and 258 of the current constitution. He states that between 1st August 1982 when he was arrested to October 1982 he was detained at Kamiti Maximum Prison, Naivasha Maximum Prison, Lang'ata Barracks, King'ong'o Prison and again at Naivasha and Kamiti Prison before he was released. At paragraph 6 of the supplementary affidavit he deposes that during all these movements he was treated inhumanely, physically abused, starved to near death and kept in horrible degrading conditions in tiny dark rooms without ventilation; that he was even compelled to defecate and urinate in a small container in tiny cells of the police stations and Nyayo torture house chambers in violation of his rights under the aforesaid articles of the constitution. He further deposes that on other occasions he was given rotten or raw food, particularly raw cabbage, in very small quantity and was also forced by the police and prison

warders to sleep in a pool of water in cells infested by bedbugs and fleas and was further detained in the Nyayo House Dark Chambers for a period of 2 years and 8 months (paragraph 11).

Regarding his discharge certificate he states that the same was issued to him unprocedurally at the Naivasha Maximum Prison and without him being afforded an opportunity to read, verify and sign it as required by law hence making it impossible for him to be employed elsewhere. He also deposes that it was issued to him by an unauthorized Airforce Officer which was a violation of his right. He contends that his dismissal was unlawful and unfair. He further deposes that these violations were reported widely in both the print and electronic media and published in books all over the world and as such acquired a notoriety. To date he has not been compensated for the illegal, unlawful, inhuman and degrading treatment and hence this petition.

At the hearing of the petition the Petitioner narrated how he was charged before a Court Martial at Lang'ata Barracks and how he was instructed by defending officer Major Maloba to say yes to everything. He stated that this defending officer was one of his tormentors in the prison and he could not therefore say no. Once he said yes to everything the Judge Advocate took it that he had pleaded guilty to the charges and sentenced him to 18 years imprisonment. He stayed in prison for four years before he was forced to thumb print an appeal filed on his behalf by prison authorities. Following the appeal his term was reduced to the four years he had already served. He was released from prison on 7th October 1986. When he went to the D.O.D. He was not allowed in yet all he wanted was to thumb print his certificate of discharge as without the thumb print it amounted to nothing. Although he later got a favourable letter from Brigadier Sumbeiywo it did not help matters as he could not get employment. Asked why he did not file this petition earlier he explained and even produced a document to show that it was because he was a refugee. He also stated that he had no proof of the injuries he sustained as no doctor could have dared to treat him. He urged this Court to grant him the orders sought.

In a replying affidavit sworn by Colonel Paul Mwangemi Kindochimu and which is dated 9th October 2013, the respondent denied that the arrest of the Petitioner was without proper cause and contended that it was due to commission of actual crimes. They also deny the alleged torture, cruel or inhuman treatment and contend that any detention, arrest and confinement of the Petitioner was lawfully executed by state security organs whose responsibility was to deal with the Petitioner given his involvement in the failed coup. It is also contended that the Ministry of Defence cannot be accountable for alleged happenings or tribulations in civilian prisons which were under the lawful control of another state department. It is further deposed that the Petitioner's dismissal was a lawful sentence or punishment under the Kenya Armed Forces Act – now repealed and that the Petitioner has not shown or disclosed the identity of the unauthorized Airforce Personnel who signed his discharge that was handed to him unprocedurally. The deponent further states that the Petitioner participated in an illegal coup by obeying illegal orders of fellow mutineers and that having been dismissed from the service the Petitioner was not and is not entitled to any payment of terminal dues.

No witness attended to give evidence for the respondents. Submissions were however received from both sides.

The issues for determination would be whether the arrest, detention, trial before the Court martial and subsequent discharge of the Petitioner violated his rights as alleged in paragraphs 3, 3A, 3B and 3E of the Petition; whether he is entitled to the reliefs sought and whether the respondents should bear the costs of this petition.

In his submissions Counsel for the Petitioner states that by this Petition his client is not challenging the conviction or sentence imposed upon him by the Court martial which according to him was based on the Petitioner's own plea of guilty. He states that the Petition is for a declaration that the horrid treatment the Petitioner was subjected to while in detention in the various prison facilities before being arraigned in the Court martial was unlawful and a violation of his rights and fundamental freedoms. This submission clearly negates the averments in paragraph 3 of the Amended Petition which states:-

"That on or about the 4th day of October 1982, the Ministry of defence by use of its senior

officers made false allegations against the Petitioner that he was one of the unruly/rebellious military officers who organized, stage managed and conducted/carried out an attempted coup and/or mutiny against the Republic of Kenya in (sic) the 1st day of August 1982 which culminated into the arrest and unlawful detention of the Petitioner among other military officers"

By stating that the Petitioner does not challenge the conviction because it arose from his own plea of guilty it means that the Petitioner is admitting that fact. This in effect means that he concedes that his arrest was lawful. Indeed this is the case because his Advocate's next submission is that what is being challenged is the horrid treatment which the Petitioner was subjected to while detained in the various prison facilities before his trial, the manner in which he was arraigned and his subsequent discharge from the Armed Forces.

Again this in effect means that he is not challenging his arrest contrary to the averment in paragraph 3A that he was unlawfully arrested at Eastleigh Airforce: The above being the position the issue for determination is whether he was subjected to cruel, inhuman and degrading treatment which of course would be a violation of his right. It is also submitted that he was not arraigned before the Court martial within the time limited by the constitution then and even now. It is submitted that whereas he was arrested on 1st August 1982 it was not until 8th October 1982 that he was arraigned before the Court Martial and that no explanation or justification was given for that delay and this was a violation of his rights. It is also submitted that the Petitioner did not get a fair hearing within the meaning of Section 77(9) of the Constitution which provided for the full benefit of the arbitral structures provided for by the law for determination of such a trial and again for being arraigned on a charge which made reference to a non existent unit of the Armed Forces. This Court shall therefore also determine whether or not his right to personal liberty was violated.

On quantum it is urged that this Court do award the Petitioner a sum of Kshs.15,000,000/= on the three different heads of violations. On this Counsel relied on the following decisions:-

1. ***Said Fondo Kalume V. The Attorney General [2013] eKLR.***
2. ***David Gitau Njau & 9 Others V. Attorney General [2013] eKLR.***

This Court shall also make a determination on whether the Petitioner is entitled to damages and if so how much?

On the issue of supposed limitation this Court is urged to follow the decision in ***Wachira Weheira V. Attorney General [2010] eKLR.***

Section 74(1) and (2) of the Constitution as read with Section 70 provided as follows:-

"74. (1) No person shall be subject to torture or to inhuman or degrading punishment or other treatment.

(2) Nothing contained in or done under the authority of the law shall be inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in Kenya on 11th December 1963."

The kind of inhuman and degrading treatment complained of by the Petitioner is not such as would fall under sub-section (2). He complains of cruelty and torture: beatings by police and prison officers, starvation and being kept in tiny cells that had no ventilation and being forced to sleep in a pool of water. At paragraph 3B he alleges to have even been detained in the Nyayo House Torture Chambers. Paragraph 5 is even more explicit that he was detained there for two (2) years and eight (8) months. This is not the punishment that was lawful in Kenya on 11th December 1963. State Counsel Mr. Mutai has submitted that the Petitioner did not adduce any evidence to support the allegations of torture and inhuman and degrading evidence: that no medical evidence was tendered, and further that the Ministry of

Defence cannot bear responsibility for the alleged happenings. Earlier he had submitted that a coup did in fact take place. The allegations of torture and degrading treatment and the Petitioner's evidence on this were not controverted. As was held in *Samwel Rukenya Mburu V. Castle Breweries NBI HCCC 1119 OF 2003* cited with approval in *Gitau Njau & 9 Others V. Attorney General [2013] eKLR*:

"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.'

In the *David Gitau* case Lenaola J dismissed the Respondent's submission that the Petitioners may have been involved in a mutiny and observed that torture is not permissible or excusable under any circumstance. I agree with him and find that the rights of the Petitioner were violated in so far as he was beaten, kept in dark cells without ventilation and starved and/or given rotten or raw food and for that he is entitled to compensation. I must however observe that his allegation of being detained in the Nyayo Torture Chambers for 2 years and 8 months were not proven. His own narration of the places and prisons he was detained at rules out this.

The Petitioner also complains that his right to be brought before a Court of law or even the Court Martial within the time limited by the law was violated. It is correct as submitted by Counsel for the Petitioner that Section 72(3) of the Constitution required a person suspected of committing a crime to be brought before a Court within 24 hours of his arrest. Section 72 of the Armed Forces Act under which the Petitioner was arrested and subsequently charged states:-

"(1) The allegations against a person arrested under Section 70 or 71 shall be investigated without unnecessary delay and as soon as practicable thereafter either proceedings shall be taken to deal with the allegations or he shall be released from arrest.

(2) Whenever any person subjected to this Act is arrested or remains in custody for more than eight days without his being tried by a Court Martial or dealt with summarily:

(a) a special report on the necessity for further delay shall be made by his commanding officer to the prescribed authority in the prescribed manner; and

(b) a similar report shall be made to the prescribed authority and in the prescribed manner every eight days until a Court Martial sits or the offence is dealt with summarily or he is released from arrest."

The only exception is where the person arrested is in active service. The Petitioner was arrested on 1st August 1982. His charge sheet is dated 4th October 1982 and the proceedings show that the Court Martial first sat on 8th October 1982. Clearly therefore the time limited by Section 72 of the Armed Forces Act was breached and having stayed in custody for more than eight days without his being tried by a Court Martial the law required that a report be made as provided under Section 72(2) which report was never made. In the absence of these reports it is my finding that his right to personal liberty between the date of arrest and the date of arraignment was violated. I am however not persuaded that the defect in the charge sheet (reference to a non-existent unit) amounted to violation of his right. He seemed to have understood the charge and it has not been demonstrated that the defect occasioned him any prejudice. The allegation that the Petitioner was not given the benefit of the arbitral procedures which resulted in an unfair trial does not hold as once it was decided to charge him before the Court Martial that was done.

Regarding his allegation of an unfair discharge, as stated earlier it was submitted that the Petitioner's conviction by the Court Martial is not being challenged. It is submitted that the reason for that is because it arose from his own plea of guilty. It follows therefore that the subsequent discharge of the Petitioner from the Armed Forces cannot be faulted. It has not been demonstrated that he was prevented from appealing or seeking a review of the decision to so discharge him. It has shown therefore that his discharge was unfair or unlawful.

As for the certificate of service he himself has annexed one to his supporting affidavit. He has also exhibited a letter from one Brigadier Sumbeiywo which is in very favourable terms. I am not therefore persuaded that he could be entitled to any other.

The issue of limitation was not raised by the Respondents and I shall therefore not make any pronouncement on it.

To conclude I find that the Petitioner's rights under Sections 74 and 77 of the Constitution were violated. The Respondents shall accordingly be held jointly and severally liable for the unlawful, illegal and criminal actions of the police, prison warders and military forces and having so stated and taking into consideration that the violations were part of the same transaction I enter judgment for the Petitioner against the Respondents jointly and severally for a sum of Kshs.5,000,000/= (Five Million Shillings) noting that the circumstances of his case are not much different from those in ***Said Fondo Kalume V. Attorney General [2013] eKLR*** where the Petitioner was awarded a similar sum. In line with the decision in ***Benedict Munene Kariuki & 14 Others V. Attorney General H/C Petition NO. 722 of 2009*** I shall not award exemplary or punitive damages. The Petitioner shall also get the costs of this petition.

Signed, dated and delivered at Kisumu this ...28th... day of ..January..2016

E. N. MAINA

JUDGE

In the presence of:-

Mrs Onyango for Ragot for the Petitioner

Mr. Mutai for 1st Respondent

N/A for 2nd Respondent

N/A for 3rd Respondent

N/A for 4th Respondent