



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO 468 OF 2014**

**WAMAHIU KIHORO WAMBUGU .....PETITIONER**

**VERSUS**

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

**JUDGMENT**

**Introduction**

1. The petitioner has filed the present petition dated 18<sup>th</sup> September 2014 seeking damages for alleged violation of constitutional rights. He alleges that he was arrested at his home in Gatitu Market, Nyeri, on 9<sup>th</sup> July 1986, and was taken to Nyayo House where he was detained for a period of 21 days. He alleges that he was subjected to torture and other cruel and degrading treatment, in violation of his rights under sections 72, 74 and 76 of the former constitution. He therefore seeks the following orders from the Court:
  - i. *The Honourable Court be pleased to declare that Your petitioner's fundamental rights and freedoms under section 72(1)(2)(3)(4)(5) and (6) and 74(1) and 76(1) of the Constitution have been and were contravened by servants or agents of the Government of the republic of Kenya.*
  - ii. *That Honourable Court be pleased to declare that your petitioner is entitled to be compensated for the contravention of his fundamental rights and freedoms under the aforementioned provisions of the constitution.*
  - iii. *The Honorable Court be pleased to make other order(s) that it shall deem just.*
2. The petition is opposed. The respondent filed an affidavit in reply sworn by Senior Assistant Commissioner of Police, Philip Ndolo. The respondent argues, inter alia, that the petitioner is guilty of inordinate delay and should be dismissed.
3. The petition was heard by way of oral evidence, and the petitioner called two witnesses. There were no witnesses for the respondent.

**The Petitioner's Case**

4. The facts forming the basis of the petition can be gleaned from the affidavit in support sworn by the petitioner on 18<sup>th</sup> September 2014, and from the oral evidence of the petitioner and his two

witnesses.

5. According to the petitioner, a businessman based in Nyeri town, he was arrested sometimes on 9<sup>th</sup> July 1986 in his home in Gatitu village in Nyeri District while he was going about his business. The arrest was effected at around 4.00 p.m. by four people who took him to Buruburu Police Station in Nairobi. He later came to learn that the four persons were police officers attached to the Special Branch section of the Kenya Police Force, though they did not tell him whom they were or why they were arresting him.
6. The petitioner was held in Buruburu Police Station until 11<sup>th</sup> July 1986, but was not booked in the occurrence book as is the procedure. He avers that he was held incommunicado and was denied his right to inform his family of his whereabouts or to contact an advocate. He claims that he was blindfolded at around 6.00p.m on 11<sup>th</sup> July 1986, put in the back of a vehicle and driven to a place that was unknown to him, but which he came to learn later was Nyayo House in Nairobi.
7. The petitioner alleges that he was detained in a police cell at the basement of the building. At about 6.30p.m on the same date, he was blindfolded and led up an escalator to a place which he states he later came to know was the top floor of Nyayo House, where he found several police officers waiting for him. He was forced to strip naked and was asked questions by the officers, whom he alleges wanted him to confess that he had taken an oath to become a member of Mwakenya movement and was a political associate of Wanyiri Kihoro and Ngugi wa Thiongo, whom he states were then considered dissidents by the government for criticizing the government of the day.
8. The petitioner alleges that the officers beat him senseless during the interrogation, and that they took turns to hit him with their fists, kicks and with pieces of broken wood. Upon failing to extract a confession from him, they returned him to the basement cells where the ill treatment continued. He was held alone in the cell and was sprayed with water, as well as being threatened with death. He also avers that he was denied food, bedding or treatment, and he alleges that as a result he fell sick and came down with pneumonia. He relies in support on a letter dated 20<sup>th</sup> October 2012 as evidence that he was admitted at the Mt. Kenya Hospital between the 1<sup>st</sup> and the 10<sup>th</sup> of August 1986.
9. In his oral evidence, the petitioner confirmed the averments set out in his affidavit.
10. In cross-examination by Ms. Wawira for the respondent, the petitioner stated that he was arrested by 4 people, who were in civilian clothes and had a civilian car, from his house. He testified that he asked them for their identity but they produced a card which he was not able to read. It was his testimony that they initially told him that they were police officers, and that he came to know this when he was being arrested. He also reiterated his averment in his affidavit that he was not told until later why he had been arrested, and that he was not booked at the police station. He also maintained that he was blindfolded and taken to Nyayo House, and that he knew he was at Nyayo House as the blindfold was removed and he was in a lift.
11. The petitioner also testified that he was tortured by police officers who were not in uniform, and that he knew they were police officers as he could not be tortured by thugs. He had no documents to show that he had been held at Buruburu Police Station or at Nyayo House.
12. The petitioner further testified that he went to Mount Kenya Hospital immediately he was released on 30<sup>th</sup> July 1986, though he could not remember the exact date, and that he was admitted for two weeks. He did not have a discharge summary from the hospital, or a card, though he had a letter from the hospital dated 20<sup>th</sup> October 2012 which he produced in evidence. According to the petitioner, he was treated for leg blisters, and he also had pneumonia.
13. The petitioner admitted in cross-examination that he went to the hospital on 20<sup>th</sup> October 2012,

- about 26 years after the treatment. He maintained that his records were at the hospital, though he was not allowed to take them, and that he requested for the letter. He also conceded that the person who wrote the letter had not been called as a witness.
14. With respect to why he took a long time to file this petition, it was his testimony that he took long because the government was hostile, that he had been threatened and that he was not willing to suffer the ordeal that he had experienced. He also conceded that the government had got out of power 12 years before he filed the petition.
  15. In re-examination by his Counsel, the petitioner maintained that he had been blindfolded on the way but later learnt that he was at Nyayo House. He also testified that he was not in a position to get anything from the people who arrested him to show that they were police officers, but that he was locked up at Buruburu Police Station, which can only be done by police officers.
  16. With regard to the letter dated 20<sup>th</sup> October 2012, the petitioner testified that it was from a public government hospital and was given to him by the doctor in charge, a Dr. Okoth. It was also his testimony that most of the treatment notes are in the hospital, and that he could produce the hospital card though he was not carrying it with him.
  17. The petitioner's second witness was Philip Nduhiu Githambo, who testified that he was a farmer but had formerly been a police officer and had retired in 2006. He had made a statement dated 14<sup>th</sup> April 2015 which he adopted as his evidence and was cross-examined thereon.
  18. He stated that he was not related to the petitioner, though he knew him from their youth as they used to play together in the village, which he left in 1974. He did not produce anything to show that he was formerly a police officer, though it was his testimony that he was attached to several police stations.
  19. It was his testimony that he saw the petitioner at Nyayo House on 22<sup>nd</sup> July 1986 when he was under arrest. He did not know why he had been arrested and did not speak to him, nor did he know what had happened to him at Nyayo House.
  20. On re-examination by Counsel for the petitioner, he testified that he had been a police officer at Molo Police Station. He had seen the petitioner in the lift at Nyayo House, and that they were together in the lift, in which there were three other people, including the petitioner.
  21. The petitioner's third witness was Lawrence Munyari Kariuki. He had also written a statement dated 14<sup>th</sup> April 2015 in support of the petition which he adopted as his evidence before the Court.
  22. He testified on cross-examination that the petitioner was his neighbor whom he had known since they were children, and that he was with him when he was arrested. He testified that the petitioner was arrested by 4 people, who did not have a police car but who identified themselves as police officers.
  23. It was his testimony further that the petitioner was arrested on 9<sup>th</sup> July 1986. He stated that he did report that the petitioner had been taken away, nor did he try to find out what had happened to him. On re-examination, he testified that the petitioner had told him that he was taken to Nyayo House, and he was away for a month.

### **The Respondent's Case**

24. The respondent filed an affidavit in opposition to the petition sworn by Phillip Ndolo, a Senior Assistant Commissioner of Police and the Deputy Director of Operations in the Kenya Police Service on 22<sup>nd</sup> October 2014.

25. In his affidavit, Mr. Ndolo terms the petition misconceived, incompetent and bad in law. It is his averment that Buruburu Police Station does not have any jurisdiction over Gatitu village in Nyeri County. He therefore denies the petitioner's allegation that he was arrested in Nyeri and taken to Buruburu Police Station, noting that it does not add up. He also denies the petitioner's averment that he was arrested by 4 people, again observing that the petitioner does not disclose the names or the identity of the 4 people who allegedly arrested him on 9<sup>th</sup> July 1986.
26. It is his averment further that there are no records to show that the petitioner was ever arrested on 9<sup>th</sup> July 1986 and detained at Buruburu Police Station. He also denies the allegations by the petitioner in his affidavit that he was arrested and detained in Nyayo House, and that he was subjected to torture while in Nyayo House.
27. It is his further averment that the alleged cell at the basement of Nyayo House is alien to the Kenya Police Service, and he therefore denies the petitioner's allegation that he was held there. He maintains that the Kenya Police Service is professional in executing its statutory mandate competently and proficiently, is sworn to uphold the law, and it is not its policy to torture suspects in its custody in any manner.
28. With regard to the letter from the hospital relied on by the petitioner, Mr. Ndolo avers that it does not indicate the cause of the alleged 'pneumonia leg blisters' and therefore cannot assist this Court to reach a decision, noting that it was obtained twenty six (26) years after the purported treatment was sought by the petitioner.

### **Determination**

29. The petition before me raises two issues. The first is whether the petitioner has established a case of violation of his rights under the provisions of sections 72, 74 and 76 of the former constitution. If he has, the next question is what relief he is entitled to.
30. I have before me the averments of the petitioner that he was arrested at his home in Gatitu, Nyeri, on 9<sup>th</sup> July 1986, and was taken to Buruburu Police Station by four men whom he alleges were police officers. He was not booked at the station. He was taken two days later to Nyayo House, where he was subjected to acts of violence such as being beaten with fists, kicks and with pieces of broken wood. He alleges that he was denied food, medical treatment and bedding, that he was kept in a cell with water, and that he suffered pneumonia. He was released on 30<sup>th</sup> July 1986, and he alleges that he immediately thereafter sought treatment at the Mount Kenya hospital and was admitted for two weeks, and that he was treated for bruises and pneumonia.
31. The petitioner has produced a letter dated 20<sup>th</sup> October 2012 signed by a Dr. Okoth which states that he was admitted at the Mount Kenya Hospital between 1<sup>st</sup> and 10<sup>th</sup> August 1986. He did not produce a card or treatment notes from the hospital, or any other information that would assist in establishing his admission and treatment at the hospital. He did not also call the person who wrote the letter that he relies on, which was written, as the petitioner concedes, 26 years after the alleged admission.
32. With respect to his arrest and incarceration, he has the statements and oral evidence of his two witnesses, Mr. Philip Nduhiu Githambo and Lawrence Munyari Kariuki. The evidence of Mr. Githambo is that he was a former police officer from the petitioner's village, though no evidence was presented to the Court to support his claim that he was indeed a former police officer. He stated that he had known the petitioner since childhood, and that he saw him at Nyayo House on 22<sup>nd</sup> July 1986.
33. The second witness, Mr. Lawrence Munyari Kariuki, alleges that he was present when the petitioner was arrested. He did not report the arrest to anyone, nor did he try to establish what had happened to the petitioner. He alleges that the petitioner later told him what he had experienced at

the hands of the police.

34. The respondent has denied the claims by the petitioner and put him to strict proof thereof. Mr. Ndolo points out that Buruburu Police Station had no jurisdiction over Gatitu village in Nyeri, and also casts doubt on the document relied on to support the petitioner's allegation that he was treated in hospital. It is also the position of the respondent that the petition has been brought inordinately late, more than 26 years after the alleged events.

35. I have considered the pleadings and evidence of the parties, and their written submissions in support of their respective cases. In his submissions, the petitioner sets out his case as set out in his affidavit, with the additional submission that in the course of his arrest, the officers who arrested him searched his house in violation of his right under section 76(1) of the former constitution. He also submits that he has established that he suffered injuries, and was treated for the said injuries at Nyeri District Hospital. He asks the Court to be guided by its decisions in **High Court Misc. Civil Case No. 565 of 2005-Mugo Theuri vs Attorney General** and **High Court Misc. Application No. 1377 of 2003 - Simon Maina Waweru vs Attorney General** and to grant him damages of Kshs 5,000,000.

36. In response, the Attorney General submits, first, that there has been inordinate delay in filing this petition. He notes that the petition was filed 28 years after the alleged violation, and though the petitioner attributes the delay to a hostile repressive regime, the AG notes that there have been two changes of government, and he urges the Court to find the delay in filing the case unreasonable.

37. The AG argues, secondly, that the petitioner has failed to discharge the obligation to present before the Court material on the basis of which it can exercise discretion in his favour. It was submitted on behalf of the AG that the petitioner has failed to meet the requirement of section 107(1) of the Evidence Act. The respondent observes that the petitioner failed to present tangible evidence of his alleged arrest and harsh and cruel treatment, and observes that the document relied on was produced 26 years after the alleged events. The document does not indicate the source of the alleged leg bruises or pneumonia, and the petitioner did not bring the records officer from the hospital or the alleged maker of the document to testify. The respondent urges the Court to be guided by the decision of Nyamu J (as he then was) in the case of **Lt. Col. Peter Ngari Kagume & Others vs Attorney General Constitutional Appn. No. 128 of 2006**.

38. Section 107 of the Evidence Act provides as follows:

**(1) *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.***

39. The question is what is the evidence that the petitioner has placed before the Court in proof of the facts that he alleges? His averments are that he was arrested on 9<sup>th</sup> July 1986, taken to Buruburu Police Station, and later to Nyayo House. He was released on 30<sup>th</sup> July 1986, and his evidence is that he then went into the Mount Kenya Hospital for treatment for the injuries that he received.

40. The respondent has denied the allegations of the petitioner, and sworn an affidavit in opposition. The respondent has also challenged the evidence of the petitioner, noting that it was obtained 26 years after the alleged event, and that neither the records officer nor the maker of the document relied on was called as a witness.

41. Can the Court rely on the petitioner's evidence as establishing violation of his constitutional right? The petitioner's witnesses' statements in support of the petition sworn in April 2015 are to the effect that the petitioner was arrested in the presence of the second witness, Mr. Lawrence Kariuki, and his house searched, while the second witness, Mr. Phillip Nduhiu Githambo, who says he was a former police officer, states that he met the petitioner, in the company of four other people, in a lift in Nyayo House.

42. Bearing in mind that a lot in the present petition turns on the credibility of the evidence presented on behalf of the petitioner, I am troubled by several omissions in the evidence presented before the Court. I note, first, that the petitioner, in his own affidavit in support of the petition, makes no mention of the presence of a witness to his arrest, nor does he mention that he met someone that he knew in Nyayo House, It is noteworthy that the evidence of the two witnesses emerges seven months after the filing of the petition.
43. Secondly, with respect to the presence of the petitioner at Nyayo House, it would have been useful to the petitioner's case if the witness who claimed to be a police officer and was present in Nyayo House at the time of the petitioner's arrest had produced some evidence to support this claim. When asked during cross-examination what evidence he had to show that he was a police officer, Mr. Githambo testified that he did not have anything, but on re-examination stated that had a notebook given to him in the police force, though he did not have it with him.
44. Thirdly, the petitioner has produced a letter, written on 20<sup>th</sup> October 2012, as evidence of his having been hospitalized in 1986 as a result of the torture he was subjected to. The letter states as follows:

***TO WHOM IT MAY CONCERN***

***Ref. WAMAHIU KIHORO. ADMIN NO.1520***

***This is to confirm that Wamahi Kihoro was admitted in this hospital for 10 days from 1<sup>st</sup>-8-1986 to 10-8-1986. He was suffering from pneumonia leg blisters.***

***Any assistance accorded to him will be highly appreciated. Thanks in advance.***

***Yours faithfully***

***Dr J.B. OKOTH***

***MO I/C***

45. What is the Court to make of this letter in terms of evidential value? It is written in 2012, 26 years after the alleged events. There are no other records to support its contents, and neither the records officer at the hospital nor the maker of the document was called as a witness. It is impossible to place any credence on the document as evidence of injuries suffered as a result of mistreatment of the petitioner at the hands of officers of the state in 1986.
46. Then there is the period it has taken the petitioner to file this petition. It was filed on 18<sup>th</sup> September 2014, more than 28 years after the alleged events. The petitioner alleges that he did not file his claim because there was a repressive government in place. However, as pointed out by the respondents, there have been more than three changes in government in the twelve years or so preceding the filing of the petition. A large number of petitions alleging violation of constitutional rights have been filed as far back as 2003 and 2004 by persons who had been arrested, held in Nyayo House, tortured and jailed. Cases in point include the two decisions relied on by the petitioner in his submissions- that of **Mugo Theuri vs Attorney General** and **Simon Maina Waweru vs Attorney General**(supra). The delay may have been as a result of the petitioner's own doubts about the credibility of his claim. Whatever the reason, however, this is one of the cases in which I would agree with the reasoning of Nyamu J (as he then was) in the case of **Lt. Col. Peter Ngari Kagume vs Attorney General** (supra) when he stated:

***"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.”*

47. In the circumstances, I am constrained to find the present petition to be without merit, and to dismiss it but with no order as to costs.

**Dated Delivered and Signed at Nairobi this 28<sup>th</sup> day of January 2016**

**MUMBI NGUGI**

**JUDGE**

**Mr. Oluoch instructed by the firm of Ng’ani & Oluoch & Co. Advocates for the petitioner.**

**Ms. Wawira instructed by the State Law Office for the respondent.**