



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.204 OF 2013

BETWEEN

NJUGUNA GITHIRU..... PETITIONER

AND

THE ATTORNEY GENERALRESPONDENT

JUDGMENT

1. The Petitioner describes himself as an adult of sound mind and has instituted the present Petition against the Attorney General of the Republic of Kenya as the legal representative of the Government in civil proceedings alleging various violations of his constitutional rights by the State stemming from the actions of various State agents alleged to have occurred at the Nyayo Torture Chambers sometime in the year 1989.

The Petitioner's Case

2. His case is contained in his Petition dated 15th April, 2013 supported by his Affidavit sworn on the same date, a Supplementary Affidavit sworn by him on 18th June, 2014, and Written Submissions dated 27th July, 2015.

3. His case was that on 14th April, 1989, he was arrested at his Engashura home in Nakuru County and bundled into a waiting Police Land Rover and driven round for hours before being taken to Nyayo House Torture Chambers. On 15th April, 1989, he was taken in a lift to the 24th floor of Nyayo House where he was presented to a panel of about ten people led by a tall black man called James Opiyo who asked him to tell them all he knew about the Kenya Patriotic Front formed by one, Koigi Wa Wamwere and the late Mirugi Kariuki who were well known to him.

4. He averred that the hostile Special Branch Police Officers ordered him to strip naked and beat him mercilessly with slaps, rubber whips, broken chair pieces, kicks and blows until his whole body was covered in blood and the same was repeated for the eight days that he was held at Nyayo House. It was his contention that after each session of beating he would be returned to a dark cell flooded with cold water where pressurized water would be sprayed on him for several hours while he was naked.

5. He also deponed that he was locked in the small dark cell for eight days and kept without food for days,

a sleeping matt, blanket or drinking water for the period. Further, he was forced to do press-ups and rotate round using his finger pointed on the ground while the Special Branch Police Officers continued whipping him; and that between the date of his arrest on 14th April, 1989 and release, neither his family members, his lawyer, nor his friends knew where he was and they could not communicate with him.

6. According to the Petitioner, he was threatened with murder if he did not plead guilty to whatever charges the Special Branch Police Officers would prefer against him but he refused to do so. That on 23rd April, 1989 he was released with a threat that he would be picked up again if he dared associate himself with Koigi Wa Wamwere and the late Mirugi Kariuki.

7. The Petitioner contended therefore that as a result of the foregoing, his physical, psychological, economic and political rights and freedoms were grossly violated as he was tortured for being suspected of being involved in the affairs of the Kenya Patriotic Front which he alleges he did not know of and as a result of his friendship with Koigi and the late Mirugi. That he suffered and still does suffer torture, trauma and immense loss of earnings from his ordeal aforesaid.

8. For the above reasons, he urges the Court to grant him the following orders:

(a) A declaration that the Petitioner's fundamental rights and freedoms were contravened and grossly violated by the Respondent's Special Branch Police Officers who were Kenyan Government servants, agents, employees and in its institutions at Nyayo House Torture Chambers for eight (8) days from 14th April, 1989 to 22nd April, 1989.

(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 for a total of eight days.

(c) General damages, exemplary damages and moral damages on an aggravated scale under Article 23 (3) of the Constitution of Kenya, 2010 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.

The Respondent's Case

9. The Attorney General, while opposing the Petition and urging the Court to dismiss the same with costs for lacking in merit, filed Written Submissions dated 25th June, 2015.

10. The AG submitted that he did not call any witnesses because he had the disadvantage of inordinate delay in the filing of the Petition and the concerned officers have since either died or retired, and in any event, the impossibility of calling any witnesses should not be used as a red herring by the Petitioner to deny the Respondent the fruits of justice.

11. He further argued that the Petitioner made allegations of alleged torture during the time that he was incarcerated but there is not a shred of evidence, documentary or otherwise to prove that he ever visited a doctor after he was allegedly released. Further, that if he was hit by boots, batons, kicks and blows as alleged, then he would have suffered compound fractures and serious medical complications to warrant hospitalisation and that he would have been issued with treatment notes in that regard.

12. Accordingly, that the Petitioner has not placed any material before this Court to prove his allegations that he suffered physical injuries and for the above reasons, he prays that the Petition ought to be dismissed.

The Petitioner's Rejoinder

13. In his Supplementary Affidavit which he swore on 18th June, 2014, the Petitioner deponed that the issues of redress for violation of fundamental rights and freedoms which are also human rights fall under the doctrine of transitional justice where historical injustices may be redressed through a constitutional reference to a human rights Court. He contended that the AG and some members of the Executive have failed to comprehend that whole doctrine where historical injustices are redressed after the end of tyranny, undemocratic and unconstitutional governance.

14. The Petitioner alleged further that the **Constitution, 2010** and the **Repealed Constitution** did not limit the time for filing constitutional references and human rights cases founded on violation of fundamental rights and freedoms and that this Court and the Court of Appeal have in over 100 torture cases ruled that there is no limitation period envisaged in the Repealed and current Constitution, the Bill of Rights and in international human rights law which is the basis of his Petition. In this regard, he contended that the reasons why all Nazis (in the 1930s-1940s) and perpetrators of past violations of human rights in Argentina (1970s-1980s), Guatemala (1980s), El Salvador (1980s), Paraguay (1970s-1980s), Cambodia (1976-1979) and Rwanda (1994) are still being sued in National Courts in their respective countries and even Amnesty Laws struck down by constitutional Courts is because of the supremacy of the doctrine that there is no limitation to seek redress for past violations of human rights and fundamental freedoms.

15. That for the above reasons, the AG's defence should be dismissed.

The Parties' Submissions

For the Petitioner

16. The Petitioner, while placing reliance on the decision in **Rumba Kinuthia vs Attorney General, Nairobi HCCC No. 1408 of 2004**, submitted that specific denial of any facts or demand for disclosure of facts averred in a Supporting Affidavit would mean that those facts remain unchallenged, unrebutted and uncontroverted.

17. The Petitioner's argument was thus that there were at the moment, 62 similar cases decided by this Court and under the doctrine of stare decisis the findings in those cases on all identical issues of law and similar/ pleadings facts should be followed in these remaining cases. Further, that there is also a lot of evidential material produced over the Nyayo House Torture Victims among them, ***Never Again- A Profile of Courage***, published by **People Against Torture**, and ***We Lived to Tell- The Nyayo House Story (FES and CJE, 2004)*** all which give details which are also contained in the Affidavit in support of the present Petition.

18. It was his other submission that the fact of the existence of torture chambers at Nyayo House is now common knowledge and that he has a copy of a Court Order issued on 16th February, 2009 in Nairobi HC Misc App. No. 56 of 2005, James H. Gitau Mwara vs Attorney General, to preserve the Nyayo House Torture Chambers so that future trial courts could take the best evidence at the scene of the torture as for example on the matters deponed to in this Petition.

19. According to the Petitioner, whereas the Special Branch Police Officers were entitled to arrest him on suspicion of committing a cognisable criminal offence, they had no legal or statutory power to torture him and put him in their custody for more than 24 hours without charging him with a criminal offence before a competent court of law.

20. He further submitted that he suffered physical and psychological torture which manifested itself as follows: solitary confinement in small dark cells with no lighting; deprivation of basic needs such as water, food, hygienic conditions without access to washing/bathing facilities, clean clothes and limited access to toilet facilities, sleep deprivation for prolonged period/days and being sprayed with hose piped cold water and hot and cold air blown inside the dark cells and physical assault daily by the torturers on

the 24th floor of Nyayo House. The torturers were allegedly otherwise known as crocodiles and every night he would hear torture-screams and cries from neighbouring cells; he would be blind folded before and during interrogations; mock executions were conducted where a victim was told he was to be executed; he was hand cuffed, blindfolded, shackled and led from his cell at midnight, early dawn, and being driven around; he was being given badly half cooked ugali, beans, rotten cabbage or sukuma wiki and he was kept with mad prisoners or condemned prisoners in Kenyan prisons to physically and psychologically torture political prisoners.

21. He also submitted that the events narrated in his Petition were all in violation of **the Police Act, the Criminal Procedure Code, Sections 70 to 83 of the Repealed Constitution**, which are replicated under **Articles 19 to 40 of the Constitution, 2010** and various international human rights instruments.

22. While relying on **Dominic Arony Amolo vs Attorney General, Nairobi Misc App No. 494 of 2003**, he reiterated that claims for alleged violations of fundamental rights and freedoms under **Sections 70 to 83 of the Repealed Constitution** cannot be interpreted to be subject to the legal heads of legal wrongs or causes of actions under the **Limitations Act, Cap 22 Laws of Kenya**. He contended further that his claims are un rebuttable and he has given evidence of the degrading torture that he underwent and as such he ought to be compensated as was the case in **Harun Thungu Wakaba and 20 Others vs Attorney General, Nairobi HCCC No. 1411 of 2004**, where the Court ruled that in similar Nyayo House Torture Chambers cases, since no replying affidavits had been filed by the AG, the factual position put forward by the Plaintiffs stood unchallenged and that no further proof of those facts was required.

23. Accordingly that in **Nairobi, HC Misc Civil App. No. 1184 of 2003 (OS), Wachira Waheire vs Attorney General**, the Court further stated that the facts that the Plaintiff had stated under oath that he was held at Nyayo House where he was tortured and the Defendant had made no attempt to deny the said allegations under oath was an indication that the allegations were true. That similar assertions were made in **HCCC No. 3829 of 1994, James Njau Wambururu vs Attorney General** and he added that where there is proven evidence of torture, the Plaintiff is entitled to compensation.

24. Further, the Petitioner while praying for damages in regard to his alleged incarceration without being taken to court within 24 hours, relied on the decision in **Dr. Odhiambo Olel vs Attorney General, Kisumu HCCC No. 366 of 1995** where the Plaintiff was awarded general damages of Kshs 4.5 million for torture and detention for 17 days before being prosecuted in court.

25. In regard to exemplary damages, he submitted that these are supplementary to the normal damages available and they are given entirely without reference to any proved actual loss suffered. While relying on **Rookers vs Barnard 1964, AC 1129** he therefore argued that this head of damages is awarded where there is oppressive, arbitrary or unconstitutional action by Government servants.

26. He also reiterated that this Court is bound by the doctrine of transitional justice and that **Article 19 of the Constitution** addresses itself to past, present and future fundamental rights and **Article 20 of the Constitution** mandates this Court to adopt an open-door policy to human rights litigation and not the previous gate-keeper policy in which human rights litigation was checked by a narrow interpretation that favours the perpetrators or the State which was the liable party. That **Article 22 of the Constitution** also refers to all past human rights violations and fundamental rights and freedoms hence, claims for violations in 1992 and 1993 can still be properly filed by litigants.

27. The Petitioner also urged the Court to be guided by the decision in **Koigi Wa Wamwere vs Attorney General, Nairobi Civil Appeal No. 86 of 2013** in determining the quantum of damages he is entitled to which he averred should be both adequate and reasonable under the circumstances. In this regard, it was his submission that he should be awarded general damages of Kshs 4 million, and exemplary damages of Kshs 4 million, in addition to costs and interest thereon at court rates.

For the Respondent

28. The Respondent on his part submitted that the Petitioner is under an obligation pursuant to **Section**

107 of the **Evidence Act** to prove his allegations on a balance of probabilities but had failed to do so. In this regard, he placed reliance on the decision in **Lt Col Peter Ngari Kagume and Others vs Attorney General, Constitutional Application No. 128 of 2006**.

29. On the claim of damages sought by the Petitioner, the AG submitted that damages in constitutional matters are not meant to restore a person to the state they were in before the act complained of as is the principle in tortuous claims, but to give just satisfaction. He relied on the decision in **Maharaj vs Attorney General of Trinidad and Tobago, (No 2) PC [1979] AC 385** in support of that argument and submitted further that if the Court herein is inclined to grant the declarations sought, the Court should apply the principles considered by the court in the **Peter Ngari Kagume case (supra)**.

30. Finally, that the Court should not award exemplary or aggravated damages because an award should be of no greater sum than that necessary to achieve just satisfaction, and the quantum of damages should be moderate and normally on the lower side by comparison to tortuous awards.

Determination

31. The key question for determination is whether the Petitioner has made out a case for violation of his rights as alleged and whether he is deserving of the remedies he has sought. Before I do so, and before I determine the question raised by the Respondent that the present matter is time barred, I wish to state that the present Petition is only one in a series of Petitions where Parties have alleged torture at Nyayo House during the Single Party regime. One of the emerging and obvious problems with the latest petitions in that regard is that they are a cut and paste job with facts being reproduced in all the Petitions as if the Petitioners were one and the same notwithstanding that the circumstances of their alleged arrest, torture and incarceration are in fact different. While this Court has been lenient in the past because of the nature of the claims, it is becoming increasingly difficult not to see the prejudice the drafting of pleadings is causing to the Parties including the Petitioners themselves.

32. Noting however that the Respondent made no issue of that anomaly and none of the Parties addressed me on it, I will proceed to determine this Petition on its specific merits.

The Doctrine of Limitation of Time in Constitutional Petitions alleging violations of fundamental Rights and Freedoms

33. The question of limitations of time in regard to allegations of breach of fundamental rights have in many cases been raised by the State and that is why in **Joan Akinyi Kabasellah and 2 Others vs Attorney General, Petition No 41 of 2014** the Learned Judge observed that:

*“[24] Nonetheless, I take into account the views of the court with regard to limitation in respect of claims for enforcement of fundamental rights. In a line of cases such as **Dominic Arony Amolo vs Attorney General, Nairobi High Court Misc. Civil Case No 1184 of 2003 (OS) [2010] eKLR, Otieno Mak’Onyango vs Attorney General and Another, Nairobi HCCC NO 845 of 2003 (unreported)**, Courts have consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights.*

*[25] I note also the sentiments of the court in **James Kanyiita vs Attorney General and Another, Nairobi Petition No. 180 of 2011** that: ‘Although there is no limitation period for filling 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 its manifestations, should be vexed by an otherwise stale claim.’*

[26] In the present case, I am satisfied that no prejudice has been occasioned to the respondent by the filling of the present claim.” (Emphasis added)

34. Further, in **High Court Petition No. 306 of 2012 Ochieng' Kenneth K'Ogutu vs Kenyatta University and 2 Others**, the Learned Judge opined as follows:

“[35]As I conclude this matter, I will address the issue of delay in filing this petition. The respondent has argued that the petitioner is guilty of inordinate delay, and I am inclined to agree with it. The events complained of took place more than 12 years ago. There is nothing before the court that explains or justifies the delay in coming to court to vindicate his rights. The petitioner’s counsel submitted that he was so traumatised that he could not come to court before, but I can see no basis for this submission. While the petitioner alleges that he was arrested and charged, and that he served for 15 days before his fine was paid, I cannot see any basis for alleging that he was so traumatised that it has taken him 12 years to recollect that he had a claim against the respondents. While the reason for delay in cases such as those involving the Nyayo House torture cases may be acceptable, at least for a time, that they were not able to file claims because of the politically repressive climate then prevailing, there is no such justification in this case. Even had I found that the facts demonstrated a violation of the petitioner’s rights (which I have not), I would have had difficulty in excusing the 12 years’ delay in this matter.”

Regarding the need to explain apparent delays in instituting the said suits, he stated thus:

“[36]There is a great danger that parties are abusing the constitutional protection of rights to bring claims before the court whose sole aim is enrichment rather than vindication of rights. A delay of 10 years or more before one comes to court to allege violation of rights is clearly not justifiable. As Nyamu J observed in Abraham Kaisha Kanzika and Another vs Central Bank of Kenya (supra): “Even where there is no specified period of limitation it is proper for the court to consider the period of delay since the accrual of the claim and the reasons for the delay. An applicant must satisfactorily explain the delay. In this case a delay of 17 years is inordinate and it has not been explained. The prosecution of the claimant took 6 years and although he gives this as the reason for the delay he has not explained the balance of eleven years.”

The Learned Judge thereafter concluded that:

“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 or 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 periods.”

35. I also note that in **Joseph Migere Onoo vs Attorney General, Petition No. 424 of 2013** the Court summarised the emerging position regarding delays in filing constitutional references by stating that:

“[39] The principle that emerges from the cases cited above is that a court must always consider whether the delay in filing a petition alleging violation of constitutional rights is unreasonable and prejudicial to a respondent’s defence.

[40] In the present case, the acts complained of took place some 29 years ago, and the petition was filed 27 years after the alleged events. No explanation has been proffered for the delay, or to explain or justify the institution of proceedings at this point in time. The petitioner contented himself with maintaining that there is no limitation in petitions such as this.”

36. Notwithstanding the above position, I am also alive to the obita dictum in **Gerald Gichohi and 9 Others vs Attorney General Petition No. 487 of 2012** where it was stated that:

“It is true that the State today cannot shut its eyes for the failings of the past. It must pay the price for its historical faults. I must also agree with the Petitioners’ submission that the instant petition should be approached in the context of transitional injustices especially now that there is

a new dispensation under Constitution 2010. Time is ripe for addressing past injustices that included gross violations of fundamental rights and freedoms as witnessed in the past.”

37. In agreeing with the above decision, I must also agree with the Petitioner that the dictates of transitional Justice cannot be ignored. Transitional justice is a set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses, with Kenya being no exception. This Court in previous decisions has stated that these measures include criminal prosecutions, truth and justice commissions, reparations programs, and various kinds of institutional reforms. Having so said however, it is imperative for a Petitioner to demonstrate some justification for prolonged delays in instituting claims especially in light of the fact that the avenues and mechanisms for addressing such violations were already in existence after the change of the alleged oppressive regime of governance. I say so because as early as the year 2003, persons aggrieved by the acts of the Moi Regime approached the courts for redress pertaining to alleged violations of their constitutional rights and fundamental freedoms. These include **Stanley Waweru Kariuki vs Attorney General, Petition 1376 of 2003; Gitari Cyrus Muraguri vs Attorney General, Miscellaneous Case No. 1185 of 2003 (OS); Harun Thungu Wakaba vs Attorney General, Nairobi, Miscellaneous Application 1411 of 2004; Rumba Kinuthia vs Attorney General; Nairobi HCCC 1408 of 2004, Mugo Theuri vs Attorney General, HC Misc. Civil Case No 565 of 2005; David Njuguna Wanyoike vs Attorney General, Petition No. 729 of 2006; Oduor Ong’wen and 20 Others vs Attorney General, Petition No. 777 of 2008; Charles Gachathi Mboko vs Attorney General, Civil Case No. 833 of 2009 (O.S.); James Omwega Achira vs Attorney General, Petition 242 of 2009; Mwangi Mathenge vs Attorney General, Petition 240 of 2009; and Koigi Wamwere vs Attorney General, Petition 737 of 2009 among many others. The foregoing further indicates that the cases alleging violations by the oppressive regime have been filed from 2003 onwards and even before the promulgation of the Constitution of Kenya, 2010. Transitional justice cannot however be a matter ad infinitum or a process without end as the Petitioner seems to have argued. Whereas such a claim may not be extinguished, the need to explain inordinate delay is a necessary requirement even if there is in fact no limitation of time for filing constitutional Petitions as the authorities above have clearly shown. That is why in **Mombasa Civil Case No. 128 of 1962, Rawal vs Rawal [1990] KLR 275** the Learned Judge stated thus:**

“The effect of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time. It is not to extinguish claims.”

38. The point was even made more succinctly in **Abraham Kaisha Kanzika alias Moses Savala Keya t/a Kapco Machinery Services and Milano Investments Limited vs Governor Central Bank Of Kenya and 2 Others, Misc Civ Appil 1759 of 2004** where the Court observed thus:

“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 or crisis. It would also trivialize the constitutional jurisdiction in that Applicants would in some case 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 limitations periods...”

39. 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 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.”

40. On the doctrine of laches in Common law, in **Smith vs Clay [1767] EngR 55, (1767) 3 Bro CC 646, (1767) 29 ER 743**, Lord Camden LC stated that:

‘A Court of Equity has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this Court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the Court is passive, and does nothing.’ Equity would not countenance laches beyond the period for which a legal remedy had been limited by statute, and that where the legal right had been barred, the equitable right to the same thing was also barred: ”Expedit reipublicae ut sit finis litium’, is a maxim that has prevailed in this court at all times, without the help of parliament.”

41. Having so said, and applying the above principles to the present case, I am inclined to follow the dicta in **Ochieng Kenneth K’ogutu (supra)** that Nyayo House Torture Chamber cases are in a special category because the fact that in its final Report, the Truth, Justice and Reconciliation Commission found as a matter of fact that the chambers existed and are now a museum to remind Kenyans never to return to those days, a foundational basis for the present Petition was created. Further, where the present regime has publicly, through the President, acknowledged the ills of past regimes and specifically the painful ordeals that some Kenyans underwent at Nyayo House adds to the need for this Court to accept that evidence. As for the Petitioner specifically, granted, he did not produce any material evidence of his torture but where the Respondent casually dismisses the claim without any attempt at rebutting his evidence, even by way of cross-examination, it is difficult to fault the Petitioner.

42. Further, although there was a measure of delay in bringing forth the claim, suffice it to say that I shall admit the Petition the delay notwithstanding for reasons that the reluctance of Kenyan Courts to admit torture claims prior to 2012 calls for this Court not to perpetuate that reluctance in cases such as the one before me. Indeed as was stated in **Gerald Gichohi (supra)** and having seen the Petitioner in Court and watched his demeanour, this Court cannot shut its eyes to the historical injustices committed in the past and I am certain that he falls in that category.

43. I am also in agreement with the general jurisprudence of our Courts and which I have attempted to summarise above that each case must be looked at in its own peculiar circumstances and I am certain that the present Petition deserves favourable consideration. Having so said, the Petitioner was held for eight days and was released without charge. Two issues arise therefrom:

(i) Whether his incarceration for the eight days without being taken to Court was unconstitutional

(ii) Whether he was tortured as alleged

44. I will address each issue based on the facts and the law as applicable thereof.

Whether the Petitioner’s Incarceration for Eight Days without being taken to Court was Unconstitutional

45. The Petitioner was arrested on 14th April, 1989 and released on 23rd April, 1989. The operative law at the time was **Section 72 (3) of the Repealed Constitution** which provides as follows:

A person who is arrested or detained—

(a) for the purpose of bringing him before a court in execution of the order of a court; or

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to

commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.

46. From the evidence tendered before this Court, the Petitioner was arrested on suspicion of being associated with an organization called the Kenya Patriotic Front. At the very most therefore, the allegation would have amounted to a misdemeanour had he been taken to Court but he was not.

47. In that regard, in **Albanus Mwasia Mutua vs Republic [2006] eKLR** the Court of Appeal held that the appellant's constitutional rights guaranteed under **Section 72 (3) of the Repealed Constitution** had been grossly violated because he was taken before the trial magistrate some eight months from the date of his arrest and no explanation at all was offered for that delay. The court made the following pertinent remarks:

“At the end of the day, it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place. The jurisprudence which emerges from the cases we have cited in the judgment appears to be that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge. In this appeal, the police violated the constitutional right of the appellant by detaining him in their custody for a whole eight months and that, apart from violating his rights under section 72 (3) (b) of the constitution also amounted to a violation of his rights under section 77 (1) of the constitution which guarantees to him a fair hearing within a reasonable time. The deprivation by the police of his right to liberty for a whole eight months before bringing him to court so that his trial could begin obviously resulted in his trial not being held within a reasonable time. The appellant's appeal must succeed on that ground alone.”

48. It is thus apparent that where the State fails to explain why a suspect is not taken to Court within the period envisaged by the law, any purported defence in that regard has to be dismissed.

49. Having found that the Petitioner was held in unlawful custody for eight days, and that action being unconstitutional, the same is so declared under **Section 72 (3) of the Repealed Constitution**.

Whether the Petitioner was Tortured as Alleged

50. Torture was outlawed by dint of **Section 74 of the Repealed Constitution** and **Article 29 (d) of the Constitution, 2010**. But what is torture? **Article 1 of the Convention against Torture** defines 'torture' to mean:

“... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person...” -see also **Rojas Garcia vs Colombia 687/96 at the Human Rights Committee**.

51. One of the other elements required in a claim for torture under the **Convention against Torture** is that there has to be involvement of a public official and that where the acts complained of 'do not cause extreme pain and suffering to an ordinary person' then they are outside the definition of 'torture' - see **Sarah Joseph and Melissa Castav, The International Covenant on Civil and Political Rights, Cases, Materials and Commentary, 3rd Edition**.

52. Has the Petitioner therefore proved that he was tortured? He claimed that he was continuously beaten by Special Branch Officials (they are therefore public officials) and he was locked up in a water logged cell with occasional bursts of cold water being sprayed on him. That he was also starved of food and water on occasion while being forced to rotate around his finger intermittently. I believe him. There is no defence to torture and I am satisfied that there is cause to make a finding in favour of the Petitioner.

Remedies

53. Prayers (a) and (b) of the Petition seek a declaration that the Petitioner's fundamental rights and freedoms were violated for the eight days that he was held at Nyayo House Torture Chambers. I have shown why those prayers must be granted.

54. Prayers (b) and (c) relate to payment of damages as compensation for the said violations. Aside from general damages, exemplary and moral damages are also sought.

55. In that regard, exemplary damages and moral damages are only payable where the Respondent has had a propensity for repeating the same violations. That cannot be true in the present case and such damages are not payable in the circumstances. On costs, they follow the event and so they are properly awardable.

Disposition

56. Noting the findings above, the proper orders to make in the instant Petition are that judgment be and is entered in favour of the Petitioner against the Respondent in the following terms:

a) A declaration is hereby issued that the Petitioner's fundamental rights and freedoms were contravened and grossly violated by the Respondent's Special Branch Police Officers who were Kenyan Government Servants, agents, employees and in its institutions at Nyayo House Torture Chambers for eight (8) days from 14th April, 1989 to 22nd April, 1989.

b) An award of Kshs.1 Million is made to the Petitioner as compensation for the violations aforesaid.

c) Costs and Interests on (b) until payment in full.

57. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF APRIL, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Mr. Gitau for Petitioners

Mr. Obura for Respondent

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE