



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO 424 OF 2013

JOSEPH MIGERE ONOO.....PETITIONER

VERSUS

THE ATTORNEY GENERAL..... RESPONDENT

JUDGMENT

Introduction

1. The petitioner, who describes himself as an adult of sound mind working in the law firm of S.W Ndegwa and Co. Advocates, alleges violation of his constitutional rights by agents of the state following his alleged arrest and torture in various places in 1986, when he was a student at Egerton University.

2. He alleges that he is a person entitled to the rights set out in sections 72(1) 72(3), 72(5), 74(1), 77(1), 77(2) and 79(1) of the repealed constitution of Kenya and under Chapter Four of the 2010 Constitution. His claim is that his rights were violated by Special Branch Police Officers and other state officers and institutions on 15th May 1986 and for 26 days at Nyayo House torture chambers and thereafter in various Kenyan police stations. He therefore seeks the following orders from the Court:

1. A declaration that the petitioner's fundamental rights and freedom were contravened and grossly violated by the respondent's Special Branch Police Officers who were Kenyan Government Servants, agents, employees and in its institutions on 15th May 1986 and for 26 days at Nyayo House torture Chambers, Nairobi area torture chamber and thereafter in other Kenyan Police Stations in Nairobi and Nakuru.

2. 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.

3. General damages, exemplary damages and moral damages on an aggravated scale under s 84(2) of the Repealed Constitution of Kenya and under Article 22 and 23 of the constitution for the unconstitutional conduct by the Kenyan government servants and agents be awarded.

4. *Loss of employment opportunities from the year 1986 to date*
5. *Any further orders, writs, directions, as this Honourable court may consider appropriate*
6. *Costs of the suit and interest.*

The Petitioner's Case

3. The case for the petitioner is set out in his petition dated 19th August, 2013 and his affidavit in support sworn on the same date. The petitioner also filed submissions dated 23rd June 2014. Pursuant to orders made by the Court on 22nd October 2014, the petitioner gave oral evidence and was cross-examined by the respondent on his claim.

4. In his affidavit sworn in support of his petition, the petitioner deposes that he is an adult born in 1960 in Kogelo sub location, South Sakwa Location, Awendo Division, in Migori County working in the law firm of S.W. Ndegwa & Co. Advocates.

5. He also makes various averments with regard to his family and educational background. He states that he was admitted at Egerton University in 1983 for a diploma course in animal health.

6. The petitioner avers that in 1986, when he was a final year student, there was a disagreement between the students and the College Administration over the pocket money called **"boom"**. He avers that on 15th May 1986, at around 3.00 a.m. he was arrested at Egerton University in Nakuru by three Special Branch Police Officers at about midnight (sic). The officers allegedly informed him that they wanted to search his room, which they did. It is his further averment that the officers then carried away his books, newspapers, and magazines, as well as personal correspondence and other publications without giving reasons for taking them away, and that he was thereafter driven away in an unmarked police vehicle. He alleges that the books and other publications have never been returned to him, a violation of his freedom of expression guaranteed under section 79(1) of the repealed constitution and Article 33 of the 2010 Constitution.

7. It is his further averment that he was informed by the officers that he was under arrest without the offence being disclosed to him, that he was locked up in a solitary cell at Nakuru Police Station overnight; that the following morning, the 16th May 1986, he was driven while blindfolded all the way to Nairobi where he was booked at Langata Police Station in isolation.

8. The petitioner avers that on 19th October 2012, he wrote a letter to the Officer Commanding Langata Police Station enquiring about the nature of the offence against him but his letter was not responded to. A copy of this letter is annexed to his affidavit.

9. It is the petitioner's contention that later that day, on 17th May 1986 at about 300p.m., he was again blindfolded and driven around the city of Nairobi for a period he estimated to be about one hour; that he eventually ended up in a dark and filthy underground cell which he later came to know was Nairobi Area Police Headquarter Torture Chambers; that on 18th May 1986 at about 10.00p.m., he was again blindfolded and driven around the city of Nairobi for what he estimated to be more than one hour; that he ended up in a lift to the 24th floor of Nyayo House where he was presented to a panel of about ten (10) people led by a tall black man whom he later learned was called James Opiyo. He alleges that the said Opiyo asked him to tell them all he knew about the Mwakenya organization and the meetings that he had held with Jaramogi Oginga Odinga and Martin Shikuku.

10. The petitioner further avers that he was ordered to strip naked; that he was beaten by the Special Branch Officers with slaps, rubber whips, broken chair pieces, kicks and blows; that this kind of torture was repeated for about 26 days in which he was held at Nyayo House, Nairobi Area Police Headquarters and Nakuru Police stations. It is the petitioner's deposition further that after every session of beatings he

would be returned to a dark cell flooded with cold water; and that pressurized water would be sprayed on him for several hours.

11. It is also his averment that he was kept without food or drinking water for 26 days, and that his family did not know where he was for the period between his arrest and his release. He alleges that these acts were in violation of his freedom from torture or inhuman or degrading treatment contrary to section 74(1) of the repealed constitution Article 28 of the 2010 Constitution.

12. The petitioner claims that he was briefly released on 4th June 1986 from the cells at Nairobi Area torture chambers and instructed not to disclose to anybody what he had seen; that he was ordered to report to the Special Branch offices in Nakuru who would hand him over to Egerton University; that in Nairobi he met several of his colleagues at Egerton and they boarded the same vehicle to Nakuru but were arrested upon reaching Nakuru and detained in filthy cell at Nakuru Central Police Station where they stayed without food or drinking water or blankets from 4th June to 9th June 1986.

13. The petitioner avers further that in the morning of 9th June 1986, they were rushed before the Nakuru Chief Magistrate's Court on a defective charge of "desire to see the president." The petitioner has annexed to his affidavit a newspaper cutting from the Nation Newspaper of 10th June 1986 as evidence. He alleges that they were all threatened that the charges against them would be withdrawn and they would be re-arrested to face fresh torture. He states that they were all given a free bond of Kshs two thousand. He avers that the defective charges against him were withdrawn on 12th June 1986 in his absence, which he terms a violation of his constitutional right to protection of the law.

14. The petitioner further avers that in July 1986, all the students were called back to Egerton College to sit their exams; that he and other students who had organized a trip to Kabarak were denied entry; that the other students protested and so he and the others were allowed to sit their exams.

15. The petitioner alleges that in August 1986, all the third year students were told to report at Kilimo House to check their employment and positing; that he and his colleagues duly reported but were told that there was a letter from Egerton College containing a list of names of student who should not be posted until further notice; that upon further inquiry they realized that the list contained the names of the students who had been detained. The petitioner depones that on 15th October 2012, he wrote to the Ministry of Livestock and Fisheries Development to avail the letter containing the names of the students who were not supposed to be employed and posted but did not get a reply.

16. The petitioner further deposes that he and his colleagues were denied their results and certificates until 1992; that on or about 5th April 1988, he and his colleagues filed an application at the High Court in Nakuru seeking the release of their results and certificates; that their application was dismissed in 1989; that they filed an appeal against the said decision in 1989 in Nakuru in Civil Appeal No 10 of 1999 and the Court ordered the administration of Egerton University to release their results. He graduated from Egerton University with a Diploma in Animal Health at the graduation ceremony held at the Egerton College on 25th September 1992.

17. The petitioner claims that he graduated from Egerton seven years after his colleagues; that to date he has been barred from employment by the Government yet all his colleagues who got their results in time were employed; that he was forced to earn a living through odd jobs and his physical, psychological and economic and political life was messed up on the basis that he was holding political opinions other than those of the KANU government. He further alleges that he suffered and still suffers torture trauma, and immense loss of earnings.

18. In his examination in chief by his Counsel, Mr. Ochich, the petitioner stated that he now works for the firm of SS Malonza & Co. Advocates where he does general work, including clerical or messengerial work, but that he had gone up to Diploma level at the Egerton University Department of Animal Health. He stated that he had joined Egerton University in September 1983, completed his studies in 1986 but graduated in 1992.

19. The petitioner further testified that immediately after completing his exams, he was arrested on 15th May 1986 just before the final exams as there was some tension at the university over reduction of “boom”. Though he finished in 1986, his results were detained and he went to many courts before a decision was made in his favour and his results and certificate were released.

20. The petitioner further testified that he was arrested on 15th May 1986 at Egerton University by people who identified themselves as Special Branch Officers; he was brought while blindfolded to Nairobi and later learnt he was at Langata Police Station. He further testified that he was not told the reason for his arrest but was asked about Jaramongi and others at a place he came to know was Nyayo House. He further testified that he was beaten and asked about Mwakenya, and that he was at Nyayo House between 15th May and 4th of June 1986.

21. It was also his testimony that he was arrested and charged on 9th June 1986 with incitement to violence, but that the charges were later withdrawn. He also reiterated his averments that he had studied animal husbandry but has never been employed in the public service as he was informed that there was a list of people who could not be employed.

22. Upon cross-examination by Mr. Obura, the petitioner stated that he had been briefly released on 4th June 1986 but that he was re-arrested when he reached Nakuru, and that he was in custody for 26 days from 15th May 1986 to 9th June 1986. He also testified that he was held in Langata for one day, but that he spent the rest of the time at the underground cells at Traffic Headquarters Police Station near Kenyatta Hospital between 16th May – 9th June 1986. He did not have any Occurrence Book (OB) entry from the police stations he alleged he had been held in, but it was his testimony that the officers who arrested him identified themselves as Special Branch officers by word of mouth.

23. He also testified that he confirmed this as he was brought to Nyayo House which was their headquarters, and that he could identify one of the men as a bulky man called James Opiyo. He blamed his failure not to graduate on the Special Branch, though he conceded that it is possible for one not to graduate because of a disciplinary problem. The petitioner further testified on cross-examination that he stayed at Nyayo house for 4 days, and that he would be taken to Nyayo House for two hours.

24. In response to questions from the Court, the petitioner stated that the 26 days he was in custody were inclusive of the time he was arrested until he was released; that he was in Langata Police Station for one day and at Traffic Police between 16th of May 1986 – 4th of June 1986, and from 4th June 1986 – 9th June 1986, he was in Central Police Station, Nakuru.

25. It was also his testimony in response to the Court that he never slept in Nyayo House; that he was interrogated for maybe one or two hours and then taken back to where he was staying. He further stated that his case for the release of his results was against Egerton University and the Attorney General.

26. On re-examination by Mr. Ochich, the petitioner testified that it was the Special Branch Police Officers who caused the delay in his graduation for arresting him on issues he knew nothing about. He also stated that he never slept at Nyayo House but was taken there for about two or four hours for interrogation. He also stated that he did not have the proceedings in respect of the charges against him in Nakuru.

Submissions

27. In highlighting the submissions filed on behalf of the petitioner, Mr. Ochich submitted that the petitioner was alleging violation of his rights under section 72-84 of the former constitution and under Articles 22 and 23 of the current Constitution. He reiterated the facts in support of the petition set out in the affidavit of the petitioner and submitted that the mode of arrest of the petitioner was unlawful and did not accord with the provisions of sections 21 and 22 of the Criminal Procedure Code, Cap 75.

28. It was also his submission that the petitioner was discriminated against on the basis of his

political opinion contrary to section 82 of the former constitution. According to Mr. Ochich, the petitioner lost employment opportunities and was told, upon seeking employment with the Ministry, that there was a letter that he should not be employed. Mr. Ochich relied on **High Court Civil Case No. 1161 of 2010 CMK vs CUEA** in which the Court equated the right to work to the right to life.

29. With respect to the argument by the respondent that the petition had been brought 26 years after the alleged violations, the petitioner relied on **High Court Petition No. 777 of 2008 – Oduor Ongwen vs Attorney General** to submit that there is no limitation on breach of human rights. He asked the Court to grant general and exemplary damages to the petitioner.

The Respondent's Case

30. The state did not call any witnesses in this matter. Learned Counsel Mr. Obura filed submissions dated 15th July, 2014 and an affidavit sworn by Philip Ndolo on 22nd May, 2014 in opposition to the petition.

31. While denying the petitioner's allegations in their totality, the state makes three arguments against the petition. It contends, first, that the Court cannot rely on mere allegations, and that one who alleges constitutional violations must plead such violations with clarity and precision. In this regard, it is its submission that while the petitioner alleges torture against him, he has produced no medical report to support his contentions.

32. It is its case, further, that the petitioner has not produced any evidence to support his argument that he was incarcerated, in particular, that no occurrence book entries have been produced to support his claim. The respondent notes that the only evidence relied on is a letter written to the Officer Commanding Police Station (OCS), Langata, dated 19th October, 2012, more than 26 years after the events complained about. The respondent notes that this document cannot be authenticated as it does not bear any proof that it was served on the OCS.

33. The respondent also questions the evidential value of the newspaper cuttings relied on by the petitioner, as well as the time it has taken him to file the petition. The respondent further notes that a large part of the claim is directed at Egerton University, which has not been made a party to this petition.

34. The respondent therefore submits that the petition has no merit and should be dismissed with costs.

Determination

35. Having considered the pleadings and submissions of the parties in this matter, I believe the sole issue for determination is whether there has been a violation of the petitioner's rights, and if so, whether he is entitled to the reliefs he seeks. In determining this issue, it will also be necessary to consider whether the petition is time barred.

36. The petitioner has alleged violation of his rights under sections 72 (1), 72 (3) and 72 (5) of the repealed constitution pursuant to his alleged arrest and incarceration in various police stations in Kenya. He also alleges violation of his right to a hearing in that the case against him was withdrawn in his absence, and he only learnt of the withdrawal in the media. He also alleges discrimination on the basis of his political opinion.

37. The petitioner has, in his written submissions, cited various decisions in support of his case. Among these is the decision in the case of **David Gitau Njau and 9 Others vs The Attorney General, Petition No 340 of 2012** on the definition of torture and **CMK vs CUEA, HCCC Case No 1161 of 2010** with regard to the importance of one to be employed which is a right linked with life. I believe there is no dispute with the principles that the petitioner submits have been established by the courts in the cases he relies on. The courts have consistently pronounced themselves on the prohibition of torture in both the repealed and the 2010 Constitution. The question is whether those principles apply to the facts in the case

of the petitioner.

Whether the Petition is Time Barred

38. Our courts have recognized on several occasions that there is no time bar to the institution of petitions in regard to alleged violations of human rights. In the case of **Joan Akinyi Kabasellah and 2 Others vs Attorney General, Petition No 41 of 2014** this Court 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 filing 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.’

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.

41. In my view, this is one case in which the Court is justified in reaching the conclusion that the delay is unreasonable, and the petition is time barred. As the Court observed in **High Court Petition No. 306 of 2012 Ochieng’ Kenneth K’Ogutu vs Kenyatta University and 2 Others:**

[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.

[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 Ibrahim Kaisha Kanzika –vs- Central Bank (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.

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.”

42. I need say no more on this point.

43. Having reached the conclusion that the instant petition is time barred, I need not address myself to the question of the alleged violation of the petitioner’s rights. However, I will, for the sake of completeness, direct my mind to the evidence that is before me on the question of violation of rights.

Violation of the Petitioner’s Constitutional Rights

44. The burden on a party who alleges violation of his constitutional rights is now clearly settled in our law. Such a party has an obligation to demonstrate the provisions of the Constitution that have been violated, and the manner in which they have been violated- see **Anarita Karimi Njeru (Supra) and Trusted Society of Human Rights Alliance -v- Attorney General & Others High Court Petition No. 229 of 2012**. It is also a requirement, under the Evidence Act, for a party to establish his claim by adducing such evidence as will prove his case. Section 107 of the Act provides that:

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.

45. At section 109, the Evidence Act states that:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

46. The petitioner has alleged violation of his rights under the repealed constitution as well as the 2010 Constitution. He has claimed that he was arrested, held in custody for 26 days in Nyayo House, Langata Police Station, Nairobi Area Police Station and Central Police Station in Nakuru, and that he was subjected to torture in these institutions. In support of his allegations, the petitioner relied primarily on newspaper cuttings. The question is whether extracts from newspapers are admissible as evidence in judicial proceedings, particularly in petitions alleging violation of constitutional rights.

47. In **Tesco Corporation Ltd vs Bank of Baroda (K) Limited, Civil Case 182 of 2007** in which the Court was faced with the question of the admissibility of a report contained in a newspaper, the Court took the following view:

“The real question for consideration and decision by this court is as to whether on the evidence it has been satisfactorily established that the plaintiff did part with the possession of the premises or any part thereof to any one in a manner to constitute a breach of contract. The only evidence relied upon by the applicant is a newspaper report contained in the Daily Nation of 19th November, 2007. The issue here is admissibility of documentary evidence as to the facts in issue.

The provisions of Section 35 of the Evidence Act are clear on this issue...

Having considered the application in light of the affidavit evidence and submissions by both counsel and the relevant law, I am not persuaded that the newspaper report is covered under the provisions of Section 35 of the Evidence Act.”

48. In the case of **Wamwere vs The A.G (2004) 1 KLR** and **Randu Nzau Ruwa and 2 Others vs Internal Security Minister and Another (2012) eKLR**, the Courts similarly observed that media articles have no probative value and the courts cannot rely on them as the basis for determining a matter.

49. Aside from the newspaper cuttings, the petitioner has sought to rely on two letters, both of which he wrote in 2012, to support his allegations that he was arrested, and that he was denied employment by the state. The first is the letter dated 19th October 2012 to the Officer Commanding Station, Langata Police Station, regarding his alleged confinement in that station. The second is the letter to the Ministry of Livestock and Fisheries, also written in 2012, seeking information about the list allegedly written by Egerton University, of students who should not be employed. Aside from the fact that these letters were written, like the present petition, over 25 years after the alleged events, they do not in any way help to advance the petitioner’s claim. One is, indeed, tempted to view the letters as a belated weak attempt to bolster the petitioner’s claim.

50. The petitioner did tender oral evidence in Court. However, as is obvious from the summary set out above, it was riddled with contradictions, and it cannot be relied on. In the circumstances therefore, there is no evidence before this Court that would justify a finding in favour of the petitioner.

51. In the event, the petition must fail. It is hereby dismissed, but with no order as to costs.

Dated, Delivered and Signed at Nairobi this 30th day of June 2015

MUMBI NGUGI

JUDGE

Mr. Ochich instructed by the firm of Ochich TLO & Associates for the petitioner

Mr. Obura instructed by the State Law Office for the respondent