



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.208 OF 2013**

**BETWEEN**

**BERNARD KIHU MATAMA.....PETITIONER**

**AND**

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

**JUDGMENT**

**Introduction**

1. The Petitioner, Bernard Kihui Matama has filed this Petition claiming that his fundamental right and freedom not to be subjected to torture was violated by the Special Branch Police Officers, on diverse dates in 1990 at Pangani Police Station, Buru Buru Police Station and the infamous Nyayo House Torture Chambers; allegedly for being related to one, Rumba Kinuthia, an Advocate of the High Court and alleged critic of the Government of the day.

2. In his Petition dated 17<sup>th</sup> April 2013, the Petitioner therefore seeks the following orders;

***“(1) A declaration that the Petitioner’s fundamental rights and freedom from torture 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 diverse dates at Buruburu Police Station, Pangani Police Station and at Nyayo House Torture Chambers for eight (8) days from 8<sup>th</sup> October 1990 to 17<sup>th</sup> October 1990.***

***(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 from torture under the aforementioned provisions of the Constitution of Kenya for a total of eight (8) days.***

***(3) General damages, exemplary damages and moral damages on an aggravated scale under Section 23(3) of the Constitution of Kenya of 2010 for the unconstitutional conduct by the Kenyan Government servants and agents be awarded. (sic)***

***(4) Any further orders, writs, directions, as this honourable Court may consider appropriate.***

(5) *Costs of the suit, and interest.*”

**The Petitioner’s case**

3. The Petitioner claims that on 8<sup>th</sup> October 1990, he was arrested at a house belonging to Rumba Kinuthia within Kariobangi South Estate Nairobi by Special Branch Police Officers where he was also residing while working as a houseboy. He was then bundled in a waiting police Land Rover Motor vehicle, blindfolded and driven for hours before being taken to Buru Buru Police Station where he was locked up in a solitary police cell.

4. The following day, he alleged that he was bundled into a waiting police Land Rover, blindfolded and again driven for hours before being taken to Pangani Police Station where he was locked up in a solitary cell and later in the evening taken to Nyayo House Torture Chambers and locked up in a dark basement cell. He claims that he was later taken in a lift to the 24<sup>th</sup> Floor of the Nyayo House where he was presented to a panel of about ten people led by a Mr. James Opiyo who interrogated him about the Kenya Patriotic Front formed by one Koigi wa Wamwere.

5. He was thereafter ordered to strip naked and was beaten mercilessly with slaps, rubber whips, broken chair pieces, kicks and blows until he bled all over his body. That those acts of torture were repeated for eight days in the duration he was held at Nyayo House. After each session of beating he would allegedly be returned to a dark cell flooded with cold water where pressurized water would also be sprayed on him for several hours while naked.

6. He avers that he was kept without food, a sleeping mat, blanket or drinking water for the entire eight days he was held at Nyayo House.

7. He further claims that he was forced to do press-ups, rotate using his finger pointed on the ground while the Special Branch Police Officers continued to whip his back and it is his contention that for the eight days neither his family nor his friends knew where he was and they could not communicate to him.

8. He also contends that as a result of the acts of the Special Branch Police Officers, he still suffers trauma, poor eyesight and immense loss of earning which up to now affects him.

9. It is the Petitioner’s case therefore by the actions aforesaid the State violated **Section 74** of the **Repealed Constitution** which protected him against being subjected to inhuman or degrading punishment or other such treatment. That the High Court has previously held that the acts perpetrated by the State at Nyayo House amounted to torture and he referred the Court to various decisions such as; ***Rumba Kinuthia vs Attorney General HCC No.1408 of 2004***, ***Wachira Waheire vs Attorney General*** and ***James Njau Wamburu vs Attorney General HCC No. 3892 of 1994*** in that regard.

10. He has further submitted that the Respondent having failed to reply to the Petitioner’s claims, he has proved his case to the required standard and relies on the case of ***Harun Thungu Wakaba & 20 Others vs Attorney General HCC No.1411 of 2004*** where the Court stated that where the Attorney General had not filed any Replying Affidavit in answer to the factual position put forward by the Petitioner, the same stood uncontroverted.

11. The Petitioner has, for the above reasons, prayed for exemplary and general damages of Kshs.8,000,000.00 and it is his submission that exemplary damages are meant to punish the Respondent for the conduct of agents of the State in inflicting harm to him and further that exemplary damages are given as supplementary to the general damages. In that regard, he relies on the case of ***Rookes vs Bernard (1964) AC 1129*** where it was held that exemplary damages are given where there is oppressive conduct by Government services.

For the above reasons, the Petitioner seeks orders elsewhere set out above

**The Respondent’s case**

12. The Respondent, the Attorney General, opposes the Petition through the Grounds of Opposition dated 29<sup>th</sup> July, 2013 which read as follows;

***“(1) That the Petition has been brought after inordinate delay of over twenty three years after the alleged violation was committed.***

***(2) That no reasons whatsoever have been advanced to explain the long and inordinate delay.***

***(3) That the Petitioner has not shown by way of evidence that the alleged acts were committed by officers of the Government.***

***(4) That the Respondent herein shall be gravely prejudiced if the Petition is allowed to proceed as the would be witnesses have either retired, left service or passed on etcetera. (sic)***

***(5) That the Petition is otherwise an abuse of the process of this Honourable Court and shall at the earliest opportunity seek to proceed by way of viva voce evidence.”***

13. In addition to the above Grounds of Opposition, the Respondent filed written submissions. His case can be summarized as follows;

14. He claims that he was unable to call any live witnesses because of the inordinate delay in filing the Petition. That it is not enough for the Petitioner to claim that he was tortured at Nyayo House Chambers by the Respondent. He also claims that it is possible for the Petitioner to avail medical reports to the Court as evidence of his torture claims yet he has not done so. He further submits that the Petitioner has the burden of proving his case beyond reasonable doubt and on that point he relies on the case of ***Col Peter Ngari Kagume & Others vs Attorney General Constitutional Application No. 128 of 2006*** where the Court held that a Court of law is guided by evidence and without it, no claim should succeed.

15. As regards the quantum of damages in constitutional matters, he submits that an award of damages should only be made to achieve just satisfaction and that the same should be moderate and normally on the lower side by comparison to tortuous awards. In addition, that exemplary and aggravated damages should not be granted in constitutional cases. He therefore submits that an award of Kshs.200,000.00 would be sufficient as compensation to the Petitioner and on that point, he relies on the cases of ***Jaoko Noo Ooro & 5 Others vs Attorney General (2013) e KLR*** where the Petitioner was awarded Kshs.700,000.00 for the fourteen days he was held and tortured at Nyayo House Torture Chambers.

### **Determination**

16. It is the Petitioner’s claim that he was held incommunicado for eight days at Buru Buru Police Station, Pangani Police Station and later at Nyayo House Torture Chambers where he was subjected to inhuman and degrading conditions and was tortured by Special Branch Police officers. He therefore claims that his right not to be subjected to torture had been violated and he seeks the declarations and orders elsewhere set out above.

17. In response, the Respondent submitted that the Petitioner had not proved his case because he had failed to avail evidence such as a medical report to prove that he, indeed, had been tortured.

18. To my mind, even if the Respondent had challenged lack of any documentary evidence by the Petitioner to prove his case, he failed to controvert the evidence of the Petitioner who testified in Court on 22<sup>nd</sup> July 2014. This Court appreciates the nature of viva voce evidence which is crucial in any trial. The fact that the Respondent did not counter the evidence of the Petitioner, as nothing of substance came out of his cross-examination, means that this Court must take the position that the facts as presented by the Petitioner remain unchallenged.

19. The Respondent has further claimed that the Petitioner had filed his Petition too late and as such the Respondent’s case had been compromised because he was unable to get live witnesses to support his case.

20. The Petitioner in that regard explained that he could not file his case prior to the change of regime in 2003 because President Daniel Arap Moi was still in power and he did not have faith that this case would be administered with justice. While I am in agreement with the Respondent that the Court's indulgence may be abused by Parties that sleep over their rights and have no serious explanations for the delay, I am satisfied that the reformed Kenyan Judiciary has an obligation to vindicate past violations of fundamental rights and freedoms in order to secure the Country's future. In *Cholmondely v Republic (2008) e KLR*, the Court of Appeal while admitting the failing of the Court in the past stated as follows;

***“The Court must now and enforce against the State the fundamental rights and freedoms of the individual guaranteed by the Constitution.”***

Similarly, this Court in *Gerald Gichohi & 9 Others vs Attorney General Petition No.487 of 2012* stated as follows;

***“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.”***

21. I adopt the above position and having so stated, I now proceed to examine the facts and determine whether they disclose any violation of the Petitioner's Fundamental rights and freedoms as alleged.

22. In that regard, **Section 74 (1)** of the **Repealed Constitution** provided that; ***“No person shall be subject to torture or to inhuman or degrading punishment or other treatment.”***

23. I have elsewhere above given in some detail the alleged acts of torture that the Petitioner claims he was subjected to; they included; being held in a solitary confinement in a small solitary dark cell with no lighting, deprived of basic needs such as water, food, clean clothes and that he was blindfolded, stripped naked, forced to do press-ups while his fingers were on the floor. He was also hit using sticks and whips, held in a cell with pressurized water and forced to sleep on the cold floor without blankets. These acts of being held in a dark room, blindfolded while naked, being whipped with sticks and whips have been held by the High Court in the cases of *Harun Thungu Wakaba & Others vs The Attorney General (supra)*, *Wachira Waheire vs The Attorney General (supra)* *Rumba Kinuthia & Others vs The Attorney General (supra)* and *Cornelius Akelo Onayngo & Others vs The Attorney General Nairobi HC Misc.233 of 2009* as amounting to torture and cruel, degrading treatment. I adopt the same reasoning and I find no reason to depart from that finding. I therefore find and hold that the Petitioner was subjected to torture and cruel, degrading treatment in violation of his rights under **Section 74** of the **Repealed Constitution**.

### **Damages**

24. Having found a violation of the Petitioner right under **Article 74(1)** of the **Repealed Constitution**, I must now grant him an appropriate remedy. He has sought in that regard both general and aggravated/exemplary damages of Kshs.8,000,000.00 side from the declarations regarding violation of fundamental rights.

25. This Court, in *Jenniffer Muthoni Njoroge & 10 Others vs G (2013) e KLR* articulated the criteria to be used in awarding damages in torture type of cases. It expressed itself as follows;

***“In awarding damages therefore, I shall use the following criteria; (i) The torture inflicted on each Petitioner (2) The length of time the Petitioners were held in unlawful custody (iii) The decided cases on the subject matter (iv) what is fair and reasonable in the circumstances of each case, and I have chosen to give a lump sum in each case.”***

I will use the same approach in the instant Petition.

26. Further, I am also alive to the principle that exemplary and general damages for the violation of fundamental rights and freedoms ought not to be granted in the same Petition as the alleged transaction leading to the violation in question are of the same facts and therefore a global figure should be granted - See *Benedict Munene Kariuki and 14 others vs the Attorney General High Court Petition No.722 of 2009, Samuel Waweru Kariuki vs Attorney General (2013) e KLR*.

27. On the basis of the above principles, and bearing in mind that the violations of the Petitioners' right as set out elsewhere above were part of the same transaction, and noting the eight days he was held incommunicado and subjected to acts of torture I shall order that he be awarded Kshs.400,000.00 as general damages.

28. In the end, the final orders shall be as follows;

*(1) It is hereby declared that the Petitioner's fundamental rights and freedom from torture 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 diverse dates at Buruburu Police Station, Pangani Police Station and at Nyayo House Torture Chambers for eight (8) days from 8<sup>th</sup> October 1990 to 17<sup>th</sup> October 1990.*

*(2) It is hereby declared that the Petitioner is entitled to the payment of damages and compensation for the violations and contraventions of his fundamental rights and freedoms from torture under the aforementioned provisions of the Constitution of Kenya for a total of eight (8) days.*

*(3) The Petitioner is awarded Kshs.400,000 as damages under (2) above plus interest from the date of this judgment.*

*(4) The Petitioner is awarded costs of the Petition plus interest thereon.*

29. The Petitioner shall also have the costs of the Petition plus interest on the damages from the date of judgment until payment in full.

30. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 11<sup>TH</sup> DAY OF SEPTEMBER, 2015**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Kazungu – Court clerk

Mr. Gitau8 for Petitioner

Mr. Kuria for Respondent

**Order**

Judgment duly read.

**ISAAC LENAOLA**

**JUDGE**

**11/9/2015**