



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.207 OF 2013

BETWEEN

MACHARIA WA KAMAU.....1ST PETITIONER

GEORGE GICHUKI KAMAU.....2ND PETITIONER

JOSEPH KANYINGI KAMAU.....3RD PETITIONER

AND

THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

Introduction

1. On 3rd March 1992, the Petitioners allege that they were at Uhuru Park, Nairobi in a tent at a section known as “**Freedom Corner**” where they were allegedly fasting and holding peaceful demonstration for the release of their brothers, Hon. Koigi wa Wamwere and Charles Kuria Wamwere and all the then 53 political prisoners in Kenya, when they were inhumanly and brutally battered with boots and batons, slaps, rubber whips, kicks and blows all over their bodies by Kenya Police Officers and General Service Unit Officers.

2. They claimed that the Kenya Police Officers and General Service Unit Officers by those actions violated their fundamental right not to be subjected to torture in violation of **Section 74(1)** of the **Repealed Constitution**.

3. In their Petition dated 17th April 2013, they have sought the following orders;

- a. *A declaration that the three (3) Petitioner’s Fundamental Rights and Freedom from torture were each contravened and grossly violated by the Respondent’s Kenya Police Officers and General Service Unit Officers (G.S.U.) who were Kenyan Government servants, agents, employees and in its institutions on diverse date and time on 3rd March 1992 up to 19th January 1993.*
- b. *A declaration that the three Petitioners are each entitled to the payment of general damages, exemplary and moral damages and compensation for the violations and contraventions of their fundamental Rights and Freedoms from torture under Article 23(3) of the Constitution of Kenya, 2010.*

- c. *General damages, exemplary and moral damages for torture for each Petitioner.*
- d. *Any further orders, writs, directions, as this honourable Court may consider appropriate.*
- e. *Costs of the suit, and interest.*

The Petitioner's case

4. The Petitioners' case is as contained in their Petition, the Affidavits of Macharia wa Kamau George, Gichuki Kamau and Joseph Kanyingi Kamau all sworn on 17th April 2013. The contents of all the three affidavits are the same and I will therefore summarise their depositions as herebelow.

5. That on 3rd March 1992 p.m., they were at **Freedom Corner** within Uhuru Park in a tent, together with their mothers while fasting for the release of the following 53 political prisoners;

- | | |
|-------------------------------|-------------------------------|
| 1. Hon. Koigi Wa Wamwere | (28) Wilson Awour Angonga |
| 2. Mirugi Kariuki | (29) Mwanga Aate Seikwo |
| 3. Rumba Kinuthia | (30) Charles Kuria Wamwere |
| 4. Harris Akong'o Arara | (31) Jethro Sakuo |
| 5. Sheik Aziz Said Rimo | (32) Charles owuor |
| 6. Joseph Mwaura Kinuthia | (33) James Mawa |
| 7. James H. Gitau Mwara | (34) Daniel Muli |
| 8. Harun Thungu Wakaba | (35) Sabastian Kamau |
| 9. Geoffrey Kuria Kariuki | (36) David Gitundu |
| 10. Kibathi Muigai | (37) Kennedy Maina |
| 11. Harrison Githaiga Gicheru | (38) Dixon Jowe Aliech |
| 12. Loli Wambua Kamau | (39) Gibson Maina Kimani |
| 13. Stephen Mulili Kituu | (40) Milton Chege Kimani |
| 14. Philip Tirop Arap Kitur | (41) Samuel Mwangi |
| 15. Nduthu Karimi | (42) Boniface Mawa Matunda |
| 16. Kang'ethe Mungai | (43) John Kibe |
| 17. Peter Nguthu Mburu | (44) Mutiso Mwangire |
| 18. Joseph Mugeru Wainaina | (45) Dickson Nabwire Namadoa |
| 19. Raphael Wambua Mutwili | (46) Effermont Ng'ang'a |
| 20. Peter Kamande Gitau | (47) Hassan Hussein Juma |
| 21. George Kamau Njenga | (48) James Kisenge Musyoka |
| 22. Daniel Njuguna Kihunga | (49) George Anyona |
| 23. John Ogola Ojiro | (50) Augustine Njeru Kathangu |
| 24. Francis Gachie Nakitari | (51) Odhiambo Pia |
| 25. Simon Gathi Mwaniki | (52) Edward Okongo Oyugi |
| 26. Patrick Ngure | (53) Isaiah Ngotho Kariuki |
| 27. Shadrack Masika Mariwa | |

After allegedly being beaten as stated above, they were arrested by Kenya Police Officers and bundled into a police vehicle and taken to their rural home at the then Murang'a District.

6. They contended that they did not have any weapons at the time of the fast and the only possessions they had were their clothes, blankets to keep themselves warm at night, water to drink and wash their faces, Bibles and hymn books. They also had a tent which was donated to them by a well-wisher. Other well-wishers including the Late Prof. Wangari Mathai gave them moral support, food, clothing and water as they waited on the Government, through the Attorney General, to respond to their Petition for release of the political prisoners aforesaid.

7. They averred that their only demand was for their brothers and other political prisoners to be released, and if not, they were determined to camp at the **Freedom Corner** and starve to death by going on a hunger strike.

8. They specifically also alleged that on the evening of 3rd March 1992, between 4.00 p.m. and 9.45pm, while still at **Freedom Corner**, they were suddenly attacked and brutally tear gassed, beaten with boots and batons, slaps, rubber whips, kicks and blows all over their bodies by over 100 Kenya Police Officers and General Service Unit Officers. They stated that they were left badly injured and some of the women like the Late Prof. Wangari Mathaai were taken to hospital, unconscious. They were then arrested, bundled into police vans and allegedly taken to various police stations in Nairobi and thereafter deported to their rural homes. They claimed that the acts of the Police were a violation of their fundamental rights and freedoms and in particular the protection against torture and from being treated in an inhuman and degrading manner.

9. It was their further deposition that after one to five days at their homes, together with the mothers of political prisoners, they came back to Nairobi and began a peaceful campaign and hunger strike at the All Saints Cathedral Church compound. That they were hosted at the bunker of the Church from 4th March 1992 to 19th January 1993 when all the political prisoners were released between 24th June, 1992 to 19th January, 1993. They claimed that while hosted at the All Saints Cathedral Church, Kenya Police Officers and General Service Unit Officers continued to attack them in violation of their fundamental rights and protection from torture as guaranteed under **Article 74** of the **Repealed Constitution**.

10. The deponed that their physical, psychological, political and economic lives were messed up as they were tortured for expressing their fundamental rights and freedoms and that to-date they continue to suffer trauma.

11. The Petitioners have therefore sought general damages, exemplary and moral damages of Kshs.5,000,000.00 for each of them plus the declarations and orders elsewhere set out above.

The Respondent's case

12. The Respondent, the Attorney General, opposed the Petition through Grounds of Opposition dated 29th July 2013 which read as follows;

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

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

(c) That the Petitioners have not shown by way of evidence that the alleged acts were committed by officers of the Government. Newspaper cuttings in themselves do not amount to evidence as provided under the Evidence Act Cap 80. (Samson Owimbo Ojiayo vs the IEBC & Anor, NRB HCPT 104 of 2013: Lenaola J.)

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

(e) 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. He also filed written submissions and his case is that the Petition has been brought after an inordinate delay of over twenty years after the alleged violations were committed and no reasons have been advanced to explain the said delay.

14. It was his further submission that the Petitioners had not demonstrated that the acts they complained

of in fact happened and that the State was responsible for them. He submitted that newspaper cuttings do not in any event amount to evidence as provided under the Evidence Act and relied on the case of **Tesco Corporation Ltd vs Bank of Baroda HCCC No.182 of 2007** where it was held that a newspaper or its contents cannot be admitted as evidence unless it had satisfied the criteria established under **Section 35** of the **Evidence Act (Cap 80) Laws of Kenya**.

15. It was the Respondent's further contention that the burden of proof is on the Petitioners to prove all their allegations and he relied on the case of **Col Peter Ngari Karume & Others vs Attorney General Const. Application No.128 of 2006** in that regard where it was held that a party which alleges any fact has the burden of proving that fact. It was therefore the Respondent's contention that the Petitioners had failed to prove the allegations they had made against the State and their Petition should be dismissed.

16. As regards the claim for damages in constitutional matters, the Respondent claimed that damages are not meant to restore a person to the state he was in before the alleged injury but to give a just satisfaction. On that submission, he relied on the case **Maharaj vs Attorney General of Trinidad and Tobago** (no citation provided).

17. He added that generally, the Petitioners' case is weak and they have failed to prove the allegations on a balance of probability and he therefore urged the Court not to believe their allegations because they had failed to produce a single document to support those allegations as against the State. Further, that it was not possible for the Police to torture the Petitioners for a whole year as alleged and yet the Petitioners had failed to seek medical attention for their injuries. He therefore submitted that in the absence of any credible evidence, the Court should find that none of the Petitioners had been tortured and that if at all the incident happened, the police officers were only carrying out their duties of dispersing the crowd at **Freedom Corner** as mandated by law.

18. He relied on the case of **Col. Peter Ngari Kagume & Others (supra)** to make the submission that a Court of law has the responsibility of guarding the gates of justice and to grant access only those who merit the grant of the orders sought as provided by the law.

19. As regards an award of exemplary damages he submitted that such damages are not awarded in cases where political circumstances have changed for the better.

20. The Respondent therefore urged the court to dismiss the Petition for lack of evidence and merit.

Determination

21. The Petitioners filed this Petition claiming that they were beaten with boots, slaps, rubber whips, kicks and blows all over their bodies by Kenya Police Officers and General Service Unit Officers while holding a peaceful demonstration at **Freedom Corner** of Uhuru Park and therefore claim a violation of the right not to be subjected to torture as was protected by Section **74(1)** of the **Repealed Constitution**.

22. In response, the State opposed their claim on two grounds; firstly, that they have filed the claim too late in the day and therefore the State would be prejudiced as it does not have the means of proving its case as those officers who may be answerable have since left the Police Service or have died or cannot be traced. Secondly, that the Petitioners have not availed any evidence to substantiate their allegations.

23. I will first deal with the issue of inordinate delay and thereafter address the issue of proof. If I find that the Petitioners have placed sufficient material before the Court to enable it determine their claim favorably against the State, I will then proceed to determine their claim of violation of their right to protection against torture and determine the appropriate relief to grant. If not the matter ends there.

Whether there is inordinate delay in filing the Petition

24. The Attorney General made the point that delay in filing the present Petition called for its dismissal but I do not know any law or a particular provision of the **Repealed Constitution** that provided for a

limitation of the period within which a claim for enforcement of the Bill of Rights could be filed. Indeed in **Dominic Arony Amolo Misc. Appl. No.494 of 2003** it was held and I agree, that;

“...Section 3 of the Constitution excludes the operation of Cap 22 with regards to claims under fundamental rights and further that fundamental rights provisions cannot be interpreted to be subject to the legal heads of legal wrongs or causes of action enunciated under the Limitation Act, Cap.22.”

25. To my mind therefore, the law does not impose limitations for filing of proceedings to enforce fundamental rights and freedoms as enshrined in the Bill of Rights.

26. On delay in filing the Petition it is clear to me that the facts relied upon and giving rise to the claims in the Petition before me occurred between 3rd March 1992 and 19th January, 1993 before the promulgation of the **Constitution 2010** on 27th August, 2010. When asked why it took close to twenty two years to file their claim, the Petitioners stated that justice is currently being done for those who suffered in past regimes which was not the case in the past. While it is true that there is no limitation of time on constitutional law cases and also true that the Judiciary has over the last few years been providing redress for human rights atrocities that occurred in previous regimes, I am of the view that Courts ought to examine each of the claims made keenly and only those that have been substantiated should be addressed.

27. In that context, I shall then proceed to determine the Petition on the basis of the evidence presented by the Petitioners.

Whether the Petitioners’ fundamental right and protection from torture was violated

28. **Section 74(1)** of the **Repealed Constitution** protected the right not to be subjected to torture and other cruel and degrading treatment in the following terms;

“No person shall be subject to torture or to inhuman or degrading punishment or other treatment”

29. In previous decisions of this Court, I have repeated that the law on protection against torture and other degrading and inhuman treatment is well settled under well known international human rights instruments. For example, **Article 5** of the **United Nations Universal Declaration of Human Rights (“UDHR”)** states that **“No one shall be subjected to torture or to cruel, in-human or degrading treatment or punishment.”** Since the adoption of the **UDHR** on December 10, 1948, this provision has been reproduced in several other international human rights instruments including the **International Covenant on Civil and Political Right (ICCPR”)**, **The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment**, **The European Convention on Human Rights (ECHR)**, **The American Convention on Human Rights (AmCHR)**, **the Inter-American Convention to prevent and Punish torture and the African Charter on Human and Peoples Rights (Banjul Charter)** all which provide that torture is prohibited in all its forms and elements and the right to be protected against torture cannot be derogated from.

30. Having so said, it was the Petitioners’ claim that they were tortured by officers of the Kenya Police and the General Service Unit who beat them all over their bodies using batons, rubber whips and they were also tear gassed. In that context and in the specific circumstances of this case, I agree with the Respondent that the law is clear that a party that seeks to rely on a fact bears the burden of proving that fact. In that regard, **Section 107(1)** of the **Evidence Act (Cap.80 Laws of Kenya)** states as follows;

“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.”

Further, **Section 109** of the **Evidence Act** provides 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 persons.”

31. While it is possible to argue that non-denial of facts by the Respondent is enough to warrant a finding that the facts may be true (and this Court has previously held so) each case must be looked at in its own circumstances and in this case, in all the claims made against the State, the Petitioners failed to adduce any tangible evidence to prove any of the allegations they have made. I say so because PW1, Macharia wa Kamau in examination in-chief stated that he was seriously beaten but he did not go to any hospital. When cross-examined by the Court, he stated that he did not actually suffer any bodily injuries during the beatings. That he, upon arrest, was taken to the Central Police Station, was not locked up but was instead taken to his village in Murang’a. PW2, George Gichuki Kamau, testified that he was seriously beaten with kicks and sticks and upon arrival in his village at Murang’a he went to Kiriani Clinic because he was injured and he got medicine. He stated that he arrived at Kiriani at midnight, got treated and returned back to Nairobi the following day. I know no rural clinic that opens at midnight. PW3, Joseph Kanyingi Kamau, stated that he was also beaten and had slight injuries and he was treated at Murang’a District Hospital. It is unclear how he found his way to Murang’a District Hospital the same night if he was taken to his rural home which certainly was not Murang’a Town where the said hospital is situated. That after he was treated he returned to Nairobi and went to camp at All Saints Cathedral.

32. I note therefore that despite PW2 and PW3 claiming that they were given medical cards at the respective hospitals or clinics they attended, none of them produced them as evidence. Such evidence would have been sufficient to prove their claim. They also did not provide any medical reports or any evidence to substantiate their claims that they were beaten as alleged and that they continue to suffer trauma to-date. How then is a Court of law to believe them and rely on mere allegations that they were beaten without any evidence? They also could not state the dates then they were beaten while at All Saints Cathedral or events that occurred while they were there although they claimed torture while at the Cathedral. While dealing with a similar case in **Margaret Wanjiru & 5 Others vs Attorney General Petition No.210 of 2013**, this Court stated as follows;

“Even if I was for a moment to assume that due to passage of time, they would not be able to acquire the requisite documents to prove that they sought the medical attention, the Petitioners still had other ways of proving their case. Why did they not for instance have other witnesses testify on their behalf? I believe it would not have been difficult for them have other women whom they were with at the Freedom Corner testify for them and that would have corroborated their testimony. I am also of the view that it was possible for them to get a witness (es) from the All Saints Cathedral Church where allegedly they kept camp from 4th March 1992 to 19th January 1993, a period close to one year. Certainly, they must have been at the Church’s compound with the approval and knowledge of the Church’s leadership”.

33. I reiterate the above statements and further, there were clear and unexplained inconsistencies with the averments of the Petitioners in their affidavits and their oral testimony in Court. For instance, they stated in the affidavits that they were at **Freedom Corner** agitating for the release of their brothers Koigi Wa Wamwere and Charles Kuria who were political prisoners at the time. However, in cross-examination PW1 stated that Koigi wa Wamwere’s family were his family friends while PW 3 stated in his testimony that he merely knew Koigi wa Wamwere and Kuria Wamwere and was not related to them. At this point I will do no better than reiterate my sentiments in **Margaret Wanjiru & 5 Others vs Attorney General Petition (supra)** on the need to give consistent and substantiated evidence where I stated;

“This Court will not tire in reminding the victims of historical injustices such as the Petitioners that it is a Court of law and it operates within the parameters of the law and nothing else. It is not enough for them to come to Court and make such serious allegations against the State and the violations meted upon them and fail to substantiate them with evidence.”

Further, the words of Nyamu J. (as he then was) in **Col Peter Ngari Karume & 7 Others vs Attorney General (supra)** when he expressed himself as follows, are still relevant today;

“Turning to the alleged violation as aforementioned, it is incumbent upon the Petitioners to avail tangible evidence of violation of their rights and freedoms. I have gone through the Petitioners’ affidavits which have horrifying allegations. The Respondent has denied all those allegations. The allegations of violations could be true but the Court is enjoined by law to go by the evidence on record. The Petitioners’ allegations ought to have been supported by further tangible evidence such as medical records, witnesses’ or rather oral evidence capable of being subjected to cross examination to test its veracity. The Petitioners did not provide such evidence except the averments of what transpired to them.

He concluded on that issue as follows;

It is most probable that in the prevailing circumstance then, the Petitioners were subjected to physical beating, torture, detention without trial among other violations but the Court is deaf to speculation and imaginations and must be guided by evidence of probative value. When the Court is faced by a scenario where one side alleges and the rival side disputes and denies, the one alleging assumes the burden to prove the allegation. I have gone through the entire Court record and there is absolutely nothing to support the allegations made by the Petitioners.”

I am in agreement with the learned judge and his words apply squarely to the matter before me.

34. Before I conclude on this aspect of the Petition, I have seen the “**Society**” Magazine Issue No.4 of 23rd March, 1992 which run a story captioned; “**State Tyranny**” and produced as annexure “MWK I” in the Affidavit of Macharia wa Kamau. I am unable to admit the same as evidence because **Section 35** of the **Evidence Act** provides as follows;

1. *In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following condition are satisfied, that is to say –*
 - a. *If the maker of the statement either –*
 - i. *Had personal knowledge of the matters dealt with by the statement; or*
 - ii. *Where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or I might reasonably be supposed to have, personal knowledge of those matters; and*
 - b. *If the maker of the statement is called as a witness in the proceedings;*

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the Court unreasonable.

(2) In any civil proceedings, the Court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is

mentioned in subsection (1) of this section shall be admissible or may, without any such order having been made, admit such a statement in evidence-

(a) notwithstanding that the maker of the statement is available but is not called as a witness;

(b) notwithstanding that the original documents is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or the Court may approve, as the case may be.

(3) Nothing in this Section shall render admissible any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.

(4) For the purposes of this Section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialed by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible.

(5) For the purpose of deciding whether or not a statement is admissible by virtue of this Section, the Court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a medical practitioner.

While interpreting the above provision of the law, in **Tesco Corporation Ltd vs Bank of Baroda (supra)** the High Court held that a newspaper was not covered under the provision of **Section 35** of the **Evidence Act** and I so hold.

35. In addition, even if I was to assume for a moment that it was to be admitted, I am still not able to see any evidentiary and probative value it has on the Petitioners' case. (See **Margaret Wanjiru & 6 Others vs Attorney General (supra)**).

Whether the Petitioners are entitled to the orders sought

36. The Petitioners have sought a declaration that their fundamental rights and freedoms were violated between 3rd March 1992 and 19th January 1993. I have said that no tangible evidence to support such a declaration has been tendered and so no such declaration can issue.

37. They also prayed for compensation in the nature of general, exemplary and moral damages for the said breaches. It is obvious that such compensation cannot be paid if there is no evidence of torture.

38. As for costs, although they have not succeeded in their claim I do not see any reason to burden them with costs.

Disposition

39. There being no merit in the Petition dated 17th April 2013, the same is dismissed.

40. I shall make no orders as to costs.

41. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 18TH DAY OF DECEMBER, 2015

ISAAC LENAOLA

JUDGE

In the presence of;

Muriuki – Court clerk

Mr. Mwaru for Petitioner

No appearance for Respondent

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE