



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 226 OF 2013

BETWEEN

GRACE WANJIRU MIANO 1ST PETITIONER

ANTHONY MACHARIA MIANO 2ND PETITIONER

Suing as the administrators of the Estate of

JOSEPH KARUIRU MIANO

AND

HON. ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

Introduction

1. The petitioners bring this petition as the administrators of the estate of Joseph Karuiru Miano (“the deceased”) against the respondent representing the Government of Kenya and in particular of the Office of the President, the Police Force and the Directorate of Security Intelligence Department.
2. The petitioners claim that the deceased’s rights under **sections 72, 74, 77 and 79** of the former Constitution were violated by Special Branch officers when he was arrested detained for 26 days at Nyayo House from 29th December 1986 to 23rd January 1987 and subjected to torture and inhuman treatment.

Petitioners’ Case

3. The petitioners’ case is outlined in the petition dated 25th April 2013 and is supported by the affidavit of Grace Wanjiru Miano, widow of the deceased and an administrator of his estate, sworn on 25th April 2013. She also testified on behalf of the petitioners.
4. Prior to his arrest the deceased was a councillor for the Hospital Ward in Nakuru Town. His wife, Grace, testified that the deceased was arrested on 27th December 1986 by some unknown people while she was with him. She later discovered he was at Bondeni Police Station but she could not

immediately see him as the Police did not permit her to see him. She eventually managed to see her husband but they did not talk much. He informed her that he did not know why he had been arrested.

5. The deceased stayed in police custody for 26 days. The petitioners claim that he was tortured and subjected to inhuman treatment. He was a diabetic and he needed attention medical attention which was denied to him. Grace testified that his legs were rotting as he was forced to stand in chemicalised water. This fact was corroborated by the deceased's own testimony to that effect in the criminal proceedings. The deceased was eventually taken to court on 23rd January 1987 where he was charged with the offence of taking an unlawful oath. He was convicted on his own plea of guilty and was jailed for four years first at Kamiti Prison and then he was transferred to Nakuru GK prison. The petitioners contend that the deceased continued to be subject to acts of torture, cruelty, inhuman and degrading treatment throughout his time in prison.
6. The 1st petitioner testified that she and her children were affected psychologically. The children, who were all in school, had to drop out as she could not afford to pay school fees in the absence of her husband. The petitioners aver that the deceased's physical, psychological, economic and political life was messed up as a result of what he underwent in police custody and prison. The petitioners claim that the deceased's travails were as a result of holding political opinions other than those of then KANU Government one party policies and ideologies.
7. Apart from declarations, the petitioners submit that they are entitled to an award of Kshs. 20,000,000/= as compensation for the degrading and inhuman treatment meted out on the deceased. They rely on the holding in ***Otieno Mak'onyango v Attorney General Nairobi HCC Miscellaneous Application No. 845 of 2003*** and ***Oduor Ongwen and 20 Others v Attorney General Nairobi Petition No. 777 of 2008***. They urge this court to take cognizance of the fact that the deceased was a councillor at the time of his arrest and as such a generous award of damages should be granted to compensate for this loss.

Respondent's Case

8. The respondent opposed the petition through grounds of opposition dated 29th May 2013. The respondent argues that the deceased pleaded guilty to the commission of an offence before the ***Nairobi Chief Magistrate Criminal Case No. 322 of 1987*** and was convicted on his on plea of guilty and imprisoned to a term of four years imprisonment.
9. The respondent submits that the petitioners are not in a position to ascertain the facts of the case because human rights violations can only be sufficiently proven by the person who experienced them and cannot survive the person of the deceased. It further submits that from the examination in chief and cross examination of the witnesses, the 1st petitioner's evidence is purely hearsay, speculative and therefore inadmissible by virtue of **section 63** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***.
10. The respondent contends that the petitioners have not produced any evidence such as medical reports to support their claim that the deceased was tortured or subjected to solitary confinement. The respondent relies on the holding in ***Lt. Col Peter Ngari Kagume & Others v Attorney General Constitutional Application Number 128 of 2006*** where Nyamu J held that:; "...when the court is faced by a scenario where one side alleges and the rival side disputes, the one alleging assumes the burden to prove the allegation...turning to the alleged violation...it is incumbent upon the Petitioners to avail tangible evidence of violation of their rights and freedoms...the court is deaf to speculations and imaginations must be guided by evidence of probative value."
11. The respondent contends that the petition has been brought over twenty six years after the alleged violations were committed and no reasons have been tendered to explain the long inordinate delay. The respondent submits that there is need to bring proceedings to court as early as possible in

order that reliable evidence can be brought to the court for proper adjudication. The respondent cites *Lt. Col Peter Ngari Kagume & Others v Attorney General (Supra)* to support this proposition adding that it is in the interests of good public administration to adjudicate matters at the earliest opportunity. The respondent asserts that it is prejudiced as the potential witnesses have since left the Police Service or have retired or are deceased given the substantial period of time that has elapsed.

12. The respondent concludes by arguing that the matter arising in this petition falls within the mandate of the Truth Justice and Reconciliation Commission (TJRC) established under the **Truth Justice and Reconciliation Commission Act (Act No. 6 of 2008)** where **section 5(1)** which provides that, “*The objectives of the Commission shall be to promote peace, justice, national unity, healing and reconciliation among the people of Kenya by: (a) establishing an accurate, complete and historical record of violations and abuses of human rights and economic rights inflicted on persons by the State, public institutions and holder of public office both serving and retired between 12th December, 1963 and 28th February, 2008 including the (i) antecedents, circumstances, factors and context of such violations; (ii) perspectives of the victims; (iii) motives and perspectives of the persons responsible for commission of the violations; by conducting investigations and holding hearings.*” The respondent therefore submits that this matter ought to have been dealt with by the TJRC.
13. The respondent urges the court to dismiss the petition as it is an abuse of the court process. It is also contended that the court should exercise caution in awarding damages as there is an upsurge of petitions where persons are laying torture claims on behalf of deceased persons and the same cannot be substantiated.

Determination

14. The first issue for consideration is whether the petitioners can agitate this cause on behalf of the deceased. It is not in dispute that the petitioners are the duly appointed administrators of the estate of the deceased. Whether they have the *locus standi* must be determined by reference to **Article 22** of the Constitution which provides, inter alia, that:

(1) *Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.*

(2) *In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—*

(a) *A person acting on behalf of another person who cannot act in their own name;*
(*Emphasis mine*).

15. Under **section 82** of the **Law of Succession Act (Cap 160 Laws of Kenya)** provides that, “*Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers; (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate*” The extent of the powers of an administrator were described by Musyoka J., in ***Re the Estate of Thiong'o Nginyayu Muthiora (Deceased) Succession Cause Number 2131 of 2011*** as follows, “*..... He is the person to be sued by third parties over the estate or to sue such third parties to protect the estate. He is the person with power to enter into contracts on behalf of the estate and to enforce contracts that exist between the estate and third parties. He has the power to sell assets, to convert them into money, to invest estate funds, to compromise suits on behalf of the estate, among others. He has these powers, given to him by Section 79 and 82 of the Law of Succession Act, and by various provisions of the Trustee Act, Cap 167 Laws of Kenya.*” [*Emphasis mine*] I therefore find and hold that the petitioners having the capacity to pursue this suit on behalf of the deceased.

16. As regards the issue of whether the petition is time barred, I would do no better than quote and adopt the case of ***Wachira Waihere v The Attorney General Miscellaneous Civil Case Number 1184 of 2003 (OS)*** where the Court held that, “*We find that although there is need to bring proceedings to court as early as possible in order that reliable evidence can be brought to court for proper adjudication, there is no limitation period for seeking redress for violation of the fundamental rights and freedoms of the individual under the Constitution of Kenya.*” In this case, the respondent has not placed any material before the court by way of affidavit to demonstrate prejudice of difficulty in obtaining evidence.
17. I now turn to the allegation of violation of fundamental rights and freedoms. The petitioner’s allegations are uncontested in face of evidence presented by way of affidavit and the 1st petitioner’s oral testimony. The 1st petitioner was able to confirm that the deceased was arrested and detained beyond the time permitted by the Constitution without any reasonable explanation by the respondent. This fact is corroborated by the certified copy of the criminal proceedings. I therefore find and hold that the deceased was arrested on 27th December 1986 and brought to court and charged on 23rd February 1987. Keeping the deceased in detention for that period of time, without a reasonable explanation, was in infringement of the right to freedom of liberty guaranteed under **section 72** of the repealed Constitution.
18. The other issue relates to the alleged cruel and inhuman treatment by the respondent’s agents. The petitioner has deposed to several acts of harsh and cruel treatment against the deceased. No medical reports or other evidence was furnished to assist the court independently assess and verify the allegations of cruel and inhuman treatment to which the deceased was subjected. However, in the case of ***David Gitau Njau & 9 Others v Attorney General Petition No. 340 of 2012*** the court observed that, “*The fact the Respondent did not deny these allegations under oath indicate that the allegations are true. I therefore have no reason to doubt the veracity of the testimony of the Petitioners. I so find notwithstanding that none of the Petitioners produced any documents or medical evidence in support of the allegation that they were detained for 8 months, tortured or injured in the hands of the Respondents.*” I agree with these sentiments. I therefore find and hold that the petitioner has established a case torture, cruel and inhuman treatment contrary to **section 74** of the former Constitution. This fact is also corroborated by the criminal proceedings where the deceased testified as to his physical condition while in custody.
19. Having regard to the authorities cited by the petitioner, the facts and circumstances of the case, I award the petitioner Kshs 1,500,000.00 being general damages for the violation of the deceased fundamental rights and freedoms.
20. Before I dispose of the matter I would like to state that the Truth, Justice and Reconciliation Commission process which is now complete was not expected to supplant the jurisdiction of the High Court to determine claims of violation of fundamental rights and freedoms under **Article 165(3)(b)** of the Constitution. The respondent has not demonstrated that the petitioners have been granted relief by the Commission which may be taken into account in determining this matter.

Disposition

17. I find and hold that the deceased’s constitutional right was violated when he was kept in incarceration for longer period than what the Constitution provided and for torture, cruel and inhuman treatment.
18. I therefore enter judgment for the petitioners in the following terms;
- a. I declare that the deceased’s fundamental rights and freedoms under **sections 72 and 74** of the former Constitution were contravened and violated by the respondent’s agents.
 - b. I award the sum of Kshs. 1,500,000.00 in general damages to the 1st and 2nd petitioners as legal representatives of the deceased’s estate.
 - c. The petitioner shall have the costs of the petition.
 - d. Interest on damages at court rates from the date of judgment.

DATED and DELIVERED at NAIROBI this 21st day of February 2014

D. MAJANJA

JUDGE

Mr Wandaka instructed by Kinuthia Wandaka and Company Advocates for the petitioners.

Mr Gitiri, Litigation Counsel, instructed by the State Law Office for the respondent.