



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**MILIMANI LAW COURT**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**  
**PETITION NO. 184 OF 2013**

**BETWEEN**

**ABUYA ABUYA ..... PETITIONER**

**AND**

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

**JUDGMENT**

**Petitioner's Case**

1. The petitioner is a former Member of Parliament. He represented Kitutu East (now Kitutu Masaba) Constituency in the National Assembly between 1978 and 1988. He has brought the petition dated 25<sup>th</sup> March 2013 seeking the following reliefs:
  - a. *This court be pleased to declare that the petitioner's arrest on 24<sup>th</sup> January, 1987, his subsequent detention and torture for four days was a gross violation of his constitutional rights to protection against unlawful arrest, wrongful detention and torture as expressly provided for under Articles 25, 27, 28, 29, 31, 32 and 33 of the Constitution.*
  - b. *Having so declared, this court further be pleased to assess and award general and punitive damages for the pain, humiliation, distress and resultant loss of not only the honour the petitioner commanded in society, but also his parliamentary seat.*
  - c. *The respondent do pay the costs of these proceedings*
  - d. *Such other orders as this court deem fit to grant.*
2. The petitioner's case is set out in the petition and his supporting affidavit sworn on 25<sup>th</sup> March 2013. He also gave oral evidence. He testified that on 22<sup>nd</sup> January 1987 at about 3.00 pm while he was preparing to go to the debating chamber at Parliament Buildings, he was approached by Special Branch officers who identified themselves. The officers requested him to accompany them see a Mr James Opiyo at Nyayo House. Due to parliamentary business he did not accompany them but decided to go there on 24<sup>th</sup> January 1987.
3. At Nyayo House, he was escorted by police officers to 21<sup>st</sup> floor to meet Mr James Opiyo. The petitioner testified that he knew Mr Opiyo as they had gone to Kisii High School between 1962 and 1966. After exchanging pleasantries in his office, Mr Opiyo took him to another office for

questioning and introduced him to officers including a female officer. He was interviewed for about an hour but was not informed that he was under arrest. Thereafter he was taken to the ground floor where he was ordered to enter into a waiting Government registered white Land Rover. His driver, who had brought him, was ordered to leave the area immediately. He was then blindfolded while being driven around the City.

4. At about 8.00 pm the petitioner testified that he was returned to Nyayo House where he was locked up in the cells. At around 9.00 pm some officers came and interrogated him further. He was asked whether he knew about some Members of Parliament, students and lecturers were planning a coup. He was questioned about *Mwakenya* and some illegal publications namely; *Pambana* and *Mpatanishi*. He denied any involvement in clandestine activities. At around midnight, he was taken to the basement cells. He was locked in an extremely cold and tiny poor lit cell where he spent a night. He slept hungry and on the floor.
5. On the 25<sup>th</sup> morning, he was taken back to the 21<sup>st</sup> floor where he met several other officers amongst them a woman. He was asked the same questions regarding his involvement in subversive activities. He was ordered to strip naked and the female officer squeezed his private parts on allegation that he had attempted to overthrow President Moi's government. He was denied the chance to answer call of nature and instead told to do it in room and in the officers' presence and thereafter ordered to clean up.
6. He was taken back to the basement where he was given *uji* like *ugali* and half cooked beans full of weevils which he declined to eat. On the third day at Nyayo House he was taken to 21<sup>st</sup> floor cell where he was ordered to walk on his knees several times. He was asked questions and because he had no answers his fingers were pricked with some sharp objects. He collapsed that evening and taken for treatment at Kenyatta National Hospital. The petitioner testified that the officer refused the doctor's request that he be admitted. He was taken back to the cells and when his health deteriorated. He was released on 28<sup>th</sup> January 1987 without charges being preferred against him.

### **The Respondent's Case**

7. The respondent opposed the petition through the replying affidavit sworn on 12<sup>th</sup> June 2013 by the Staff Officer Operations (SOOPS), Henry K. Barmao and Grounds of Opposition dated 12<sup>th</sup> June 2013.
8. The respondent contends that the petition is time barred and that the claim for unlawful imprisonment offends the express provisions of **section 3** of the ***Public Authorities Limitations Act***. It argues that the suit should not be entertained as the issues raised by the petitioner can be canvassed under the ***Truth Justice and Reconciliation Act, 2008***. The respondent avers that the Kenya Police Service does not condone false imprisonment and torture of suspects by any of its officers. The respondent contends that the Special Branch is not known to the Kenya Police.
9. Mr Barmao depones that the petitioner's allegations that he was held in any police station or a police cell by the Kenya Police are not true as they are not documented anywhere.

### **Determination**

10. Although the petitioner relied on the provisions of the Constitution, the matters in dispute occurred during the currency of the former Constitution and I shall therefore determine the matter under the former Constitution.
11. I have considered the parties' affidavits, submissions and the authorities referred to therein and I consider the following issues fall for determination:
  - a. Whether the petition herein is time barred;

- b. Whether the claims should be addressed before the Truth Justice and Reconciliation Commission; and
- c. Whether the respondent violated any of the petitioner's rights under the Constitution.

### ***Limitation of the cause of action***

12. The issues of applicability of **section 3** of the **Public Authorities Limitations Act** to claims made under **section 84** of the former Constitution was considered in *Wachira Wahere v Attorney General HC Misc. Case No. 1184 of 2003* where the court held that the **Public Authorities Limitations Act** limiting the period for initiating actions against public authorities is inconsistent with the Constitution to the extent that it limits a party's right to seek redress for contravention of his fundamental rights under the Constitution. It is noteworthy that **section 84 (1)** of the former Constitution did not provide a time limit within which claims founded on violation of fundamental rights and freedoms could be lodged.

### ***Truth Justice and Reconciliation Commission***

13. The respondent defends the petitioner's claim on the basis that it ought to be dealt with under the **Truth, Justice and Reconciliation Act, 2008**. This issue, I find, lacks merit and I reiterate what I stated in *Grace Wanjiru Miano v. Attorney General [2014]eKLR* that, "... 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."

### ***Violation of fundamental rights and freedoms***

14. The petitioner raised allegations of violation of his fundamental rights and freedoms in his supporting affidavit and in oral evidence. He gave of the place, time and date he was incarcerated and the person who he met at Nyayo House. The petitioner knew Mr Opiyo who invited him to his office. His evidence was unshaken in cross-examination.
15. The replying affidavit filed on the respondent's behalf amounts to a bare denial of the petitioner's detailed testimony. Mr Barmao was content to state that, "*the Kenya police does not condone false imprisonment without following the rule of law, torture of suspects by any of its officers and that the Special Branch Officers are alien to the Kenya Police and has never been a police station or a police cell and therefore any allegations that the petitioner was held by the Kenya Police are untrue.*" Furthermore, the deponent of the replying affidavit was not cross-examined. This averment is insufficient to controvert the petitioner's testimony and deposition.
16. In the circumstances I must find and hold that the petitioner's fundamental rights and freedoms were violated when he was subjected to harsh, cruel and inhuman treatment contrary to **section 74(1)** of the former Constitution that guaranteed freedom from torture or inhuman and degrading treatment. I also find that he was detained in custody for a period not permitted by **section 72** of the Constitution when he was held in police custody from 4 days.

### **Reliefs**

17. In assessing general damages, the petitioner relied on the case of *James Omwega Achira v Attorney General Nairobi Petition No. 242 of 2009* where the petitioner was awarded Kshs 2,500,000 and *Harun Thungu Wakaba v Attorney General HC Misc. Appl. No. 1411 of 2004 (Unreported)* where the petitioners were awarded between Kshs 1,000,000 and 3,000,000. The respondent on the other hand urged the court to award the sum of Kshs 200,000.00 as the petitioner was only in detention for 4 days. Counsel for the respondent referred to *Jaoko Noo Ooro v Attorney General [2013]eKLR*.

18. Considering the cases cited and the fact that the petitioner was held in custody for a period of 4 days and was subjected to unconstitutional treatment, a sum of Kshs 1,000,000.00 would be appropriate in the circumstances.

**Disposition**

19. I now enter judgment for the petitioner and issue orders as follows;

- a. **I hereby declare that the fundamental rights and freedoms of the petitioner guaranteed under sections 72 and 74(1) of the former Constitution were infringed by the respondent.**
- b. **The petitioner is awarded a sum of Kshs 1,000,000.00 as general damages.**
- c. **Interest on (b) above shall accrue at court rates from the date of this judgment.**
- d. **The respondent shall bear the costs of the suit.**

**DATED and DELIVERED at NAIROBI this 31<sup>st</sup> March 2014.**

**D.S. MAJANJA**

**JUDGE**

Mr Mosei instructed by Maroro and Omariba Associates Advocates for the petitioner.

Ms Irari, Litigation Counsel, instructed by the State Law Office for the respondent.