



**IN THE HIGH COURT AT NAIROBI**  
**MILIMANI LAW COURT**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 1363 OF 2003 (OS)**

**SHEM OGOLA OKETCH ..... PETITIONER**

**VERSUS**

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

**JUDGMENT**

**Introduction**

1. This matter was filed through an originating summons dated 30<sup>th</sup> October 2003. Unfortunately the file got lost and was only reconstructed by an order of the court made on 30<sup>th</sup> September 2013. The Court regrets this incident and the consequent delay this has caused to the petitioner.
2. The summons is supported by the petitioner affidavit sworn on 30<sup>th</sup> October 2003 and a supplementary supporting affidavit sworn on 4<sup>th</sup> April 2011. The petitioner seeks the following orders in the summons:
  - a. *A declaration that the plaintiff's fundamental rights and freedoms under section 70, 72(3)&(5), 74(1), 77, 78(1), 79(1), 80(1) and 82(3) have been and were contravened and grossly violated by police officers and other government servants, agents, employees and institutions in 1986 and on diverse dates thereafter.*
  - b. *A declaration that the plaintiff is entitled to the payment of damages and compensation for the violations and contraventions of his fundamental right and freedoms under the aforementioned provisions of the Constitution.*
  - c. *General damages, exemplary damages on an aggravated scale under s. 84(2) of the Constitution of Kenya for the unconstitutional conduct by government servants and agents.*
  - d. *Any further orders, writs, directions, as this court may consider appropriate.*
  - e. *Costs of the suit, with interest at court rates.*

**Petitioner's case**

3. The petitioner's case is contained in his supporting affidavits and the oral testimony he gave in court. He testified that on 5<sup>th</sup> October 1986 he was arrested at his residence at Kariobangi South by six plainclothes officers who alleged that he was a member of *Mwakenya*. The officers searched his house for about two hours and took away his books, passports, magazines and

periodicals. In the process of conducting the search, the officers tore beddings and a sofa. He was thereafter handcuffed, blindfolded, led into a car and taken to Buruburu Police Station where he spent the night.

4. The next morning at about 8.00 am, six police officers came to pick him up. He was once again handcuffed, blindfolded and made to lie on the floor of a Landrover vehicle. The Landrover was driven in halting motion occasioning him injuries when brakes were applied and as a result he became unconscious. When he regained consciousness, he found himself in a small, poorly lit cell at the basement of what he came to learn was Nyayo House. At this time he was naked and could barely move his legs.
5. At about 10.00 am, police officers then came for him, naked as he was, and took him to a room on the 26<sup>th</sup> floor. He was made to sit in front of a round table which had 6 police officers on both sides and one officer at the head of the said table. He was interrogated and asked to give an account of himself from birth to the time of arrest. He was beaten up and given a foolscap and pen and told to write proper answers to the questions he had been asked.
6. The petitioner testified that he stayed in Nyayo House from 6<sup>th</sup> October 1986 to 14<sup>th</sup> November 1986, during which period he was made to walk on his knees, while naked and handcuffed, on the passage between the cells. He was forced to do press ups, was beaten, referred to as *Mwakenya* and forced to confess to being a *Mwakenya* agent. He further testified how he was locked in the water-logged cell in which cold air pushed through a hole in the ceiling. He also stated that he was denied food. At some point, he collapsed in the wet cell. He was pulled out and given water to drink so as to revive him.
7. On 14<sup>th</sup> November 1986, he was asked to confess to being a member of *Mwakenya*. At about 5.00pm he was taken to the Nairobi Traffic Headquarters and thereafter blind folded and taken to court where he was charged with taking unlawful oath contrary to **section 6(b)** of the *Penal Code*. He pleaded guilty and was sentenced to three years. He served his time at Kamiti Prison.
8. The petitioner states that at the time he was arrested he was holding a job at the Bank of India. He lost his job as a result of the arrest. As a result of the suffering he underwent, the petitioner testified that he became asthmatic and continues to suffer physically and psychologically.

### **Respondent's Case**

9. The respondent filed grounds of opposition dated 6<sup>th</sup> June 2008 and further grounds of opposition dated 1<sup>st</sup> December 2010. It contends that the facts in support of the application are incorrect, insufficient and are both factually and legally wanting. It states that the application is a non-starter for want of full disclosure and that it is fatally incompetent for reliance on an incompetent supporting affidavit. The respondent did not file any replying affidavit.

### **Determination**

10. The petitioner's statements of facts have not been controverted by the respondent. In this respect I adopt the dicta of Lenaola J., in *Kariuki Gathitu v Attorney General Petition Nairobi Petition No. 1188 of 2003*[2013]eKLR, where he stated that, "*It is now trite that although a party alleging a fact has the onus of proof of that fact, the opposing party is at the very least expected to file a response to those allegations of facts. Where such a party actually appears in the proceedings but neither in pleadings nor in oral evidence does he answer to those facts, then the court can only but take it that those facts are actually uncontested. In the cross-examination of the Plaintiff nothing substantial came out that would sway this Court's mind to disbelieve the Plaintiff and I therefore accept all the facts as set out above to be true.*" The duty of the court in such a case is to assess the facts and determine whether they support the cause of action pleaded.

11. The petitioner testified that he was arrested, incarcerated and subjected to harsh and cruel treatment and prosecuted on allegation that he was an a member of an outlawed organisation, *Mwakenya*. The petitioner was detained incommunicado at Nyayo House from 6<sup>th</sup> October 1986 to 14<sup>th</sup> November 1986 when he was arraigned in court and charged with a non-capital offence. The petitioner was held and brought to court beyond the prescribed 24 hours after arrest and the respondent has not proffered any explanation as to why the petitioner was so detained beyond the stipulated time. I therefore find and hold that the petitioner's rights guaranteed under **sections 72(3)** and **section 79(1)** of the former Constitution were violated.
12. The petitioner's account of the treatment he endured during his time in police custody was intended to make him confess that he was a member of *Mwakenya*. ***Black's Law Dictionary, 8<sup>th</sup> Edition*** defines torture as, '*infliction of intense pain to the body or mind punish, to extract a confession or information or obtain sadistic pleasure.*' The European Court of Human Rights also defined torture and inhuman treatment in the ***Greek Case Y.B. Eur. Conv. On H.R. 186 9 Eur. Comm'n on H.R.*** as follows, '*The notion of inhuman treatment covers at least such treatment as deliberately causes suffering, mental or physical, which, in particular situation is unjustifiable. The word "torture" is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others, or drives him to an act against his will or conscience.*'
13. I find and hold that the petitioner was subjected to torture, cruel and degrading treatment while he was in police custody contrary to **section 74(1)** of the former Constitution.

### **Relief**

14. As a result of the violations of his rights, the petitioner suffered physical and psychological injury. He also lost employment. Considering the cases of ***Harun Thungu Wakaba v Attorney General, Nairobi HC Misc. Appl. No. 1411 of 2004 [2010]eKLR*** and ***Benedict Munene Kariuki and 14 Others v Attorney General, Nairobi HC Petition No. 722 of 2009 [2011]eKLR*** and the circumstances of this case, I award the petitioner herein Kshs. 1,500,000/= as general damages.

### **Disposition**

15. I therefore enter judgment for the petitioner in the following terms:
- a. **I declare that the petitioner's fundamental rights and freedoms under sections 72(3) and 74(1) of the former Constitution were contravened and violated by the respondent's agents when he was arrested, detained and subjected to torture, cruel and inhuman treatment in 1986.**
  - b. **I award the petitioner the sum of Kshs. 1,500,000.00 as general damages.**
  - c. **The respondent shall bear the costs of the petition.**
  - d. **Interest on damages at court rates from the date of judgment.**

**DATED and DELIVERED at NAIROBI this 16<sup>th</sup> day of April 2014.**

**D.S. MAJANJA**

**JUDGE**

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

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