



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 398 OF 2013

BETWEEN

JILAN SABILA LABO PETITIONER

AND

THE ATTORNEY GENERAL RESPONDENT

JUDGMENT

Petitioner's Case

1. The petitioner's case is set out in the petition dated the 29th July 2013. It is supported by the petitioner's own affidavit sworn on the same date. The petitioner gave oral testimony to support his case.
2. The petitioner testified that on 7th October 1987 he was arrested by two policemen in plain clothes as he alighted from a matatu at DC Stage at Kibera. He was accused of being involved with the clandestine and outlawed *Mwakenya* movement. He was taken to Lang'ata Police Station for questioning where he was kicked, slapped and whipped in an effort to get him to confess his relationship with one Ali Sakwa who was allegedly associated with *Mwakenya*.
3. The petitioner stated that he was detained at Lang'ata Police Station for three days and on 10th October 1987 he was blindfolded and driven to a place he later came to learn was Nyayo House. He was taken to a dark cell in the basement of the building. He avers that on the following day he was taken to the 24th floor where, before a panel of interrogators, he was forced to strip naked. He was assaulted by being beaten with rubber whips, broken chair pieces, slaps, kicks and blows in a bid to make him confess involvement in *Mwakenya* activities. The petitioner testified that a Mr Opiyo extracted a tooth from him using pliers. The petitioner stated that he was released on 24th October 1987 and taken to Eldoret. After this ordeal he decided to go to exile in Uganda. He stayed there for three years.
4. The petitioner avers that he lost his business and that his psychological, economic and social life was gravely affected. He also suffered stigmatization, trauma, sleep disorders, acute ulcers and other health implications. In his petition he seeks the following orders:

- a. *A declaration that the Petitioner's fundamental rights and freedoms were contravened and grossly violated by the Respondent's special branch police officers who were Kenyan Government Servants, agents, employees and its institutions on 7th October 1987 for 14 days at Nyayo House Torture Chambers.*
- b. *A declaration that the Petitioner is entitled to the enjoyment of damages and compensation for the violations and contraventions of his fundamental rights and freedoms under aforementioned provisions of the Constitution.*
- c. *General damages, exemplary damages and moral damages on an aggravated scale for the unconstitutional conduct of the Kenyan Government servants and agents be awarded.*
- d. *Any further orders, writs and directions that this Honourable court may deem fit and just to grant*
- e. *Costs of this suit and interest*

The Respondent's Case

5. The respondent relies on the replying affidavit sworn on 4th October 2013 by Benson Githinji Kibui, a Deputy Commissioner of Police and Nairobi County Police Commander, and written submissions dated 31st March 2014.
6. Mr Kibui contends that the petitioner has not disclosed the names or the identities of the two policemen in plain clothes who arrested him in Kibera. He therefore argues that Kenya Police should not be held accountable for alleged acts of the unidentified persons. He further avers that their records do not indicate that a Mr Ali Sakwa was allegedly associated with the *Mwakenya* operatives. He depones that Lang'ata Police Station does not have jurisdiction over the office of the District Commissioner in Kibera and as such his averments do not add up.
7. Mr Kibui affirms that the Occurrence Book and Cell Registers of all police stations in the country are destroyed after 10 and 5 years respectively as required by the Police Standing Orders as such there are no entries to ascertain the authenticity of the petitioner's allegations.
8. The respondent denies that torture was inflicted on the petitioner at Nyayo House. It avers that the Kenya Police Service, as a professional force that executes its mandate in accordance with the law, is not privy to the petitioner's allegations. The respondent further avers that the Kenya Police Service does not condone false imprisonment. Its position is that the Special Branch officers are alien to the Kenya Police Service and as such any allegations that the petitioner was held at stations manned by Kenya Police are false.
9. The respondent submits that the general statements made by the petitioner do not hold any probative value and as such he has failed to prove his case against the State.

Determination

10. I note that the petitioner has relied on the provisions of the Constitution. The events giving rise to the petition occurred in 2003 during the currency of the former Constitution. The Constitution is not retrospective and as such this matter must be resolved using the equivalent provisions of the former Constitution. In this judgment the reference to Constitution is reference to the former Constitution.
11. The petitioner testified affirmatively regarding the events of October 1987. The respondent has put forth mere denials and in my view the State as the custodian of police records in relation to any arrests must be in a position to authenticate any allegation made by an individual who alleges that he was wrongfully arrested and held in custody particularly where names of specific persons, dates and places are cited. In ***Oduor Ongwen and 20 Others v The Attorney General Nairobi Petition No. 777 of 2008 [2011]eKLR*** it was held that, "*The State has the power, machinery and ability to obtain information from each and every police station or court in the absence of an appropriate affidavit supported by such documentary evidence as would be sufficient to counter the Petitioner's averments; the Respondent cannot simply argue that the Petitioner's claims have*

no proof.” The claim by Mr Kibui, that he examined the records and could not find reference to Ali Sakwa, does not add up as he also states that police records were destroyed according to the Standing Orders. If indeed there were records, which he perused, perhaps he would have made them available for examination by the court.

12. I am also inclined to agree with the holding of Lenaola J., in ***Kariuki Gathitu v Attorney General Petition Nairobi Petition No. 1188 of 2003***, where he stated as follows, “*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.*”

13. The respondent asserts that the Special Branch is unknown to the Police Service. In my view, the evidence taken as whole shows that the petitioner was in police custody and reference to Special Branch Officers does not absolve the Police from liability in view of the clear evidence led by the petitioner.

14. The issue for determination is whether the uncontested facts before the court disclose a violation of the petitioner’s rights. The petitioner was held in police custody for a period of 14 days without charges being preferred. I therefore find and declare that his right to personal liberty guaranteed under **section 72** of the Constitution were violated when he arrested and held in police custody and Nyayo House for a period longer than that prescribed by the Constitution.

15. The petitioner gave evidence how he was assaulted in force him to confess that he was a member of *Mwakenya*. His treatment in police custody in view amounts to torture, cruel, inhuman and degrading treatment and torture contrary to **section 74(1)** of the Constitution.

Disposition

16. Having come to the conclusion that the respondent’s agents violated the petitioners’ fundamental rights, the next issue for my determination is what reliefs I should grant.

17. The petitioner did not produce any medical records to demonstrate the nature and extent of his injuries, physical and psychological. However, I have no doubt that he suffered from the treatment that was inflicted upon him. I have also applied my mind to the authorities cited on the award of damages in similar cases (See ***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***). I therefore award the sum of Kshs. 1,200,000 as general damages.

18. I therefore enter judgment for the Petitioners 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 tortured in 1987.**
- b. **I award the petitioner the sum of Kshs. 1,200,000.00 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 14th day of April 2014.

D.S. MAJANJA

JUDGE

Mr Okindo instructed by Rumba Kinuthia & Co Advocates for the Petitioners.

Mr Obura, Litigation Counsel, instructed by the State Law Office for the Respondent.