



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 426 OF 2013

BETWEEN

NOAH KIBET SIGILAIPETITIONER

AND

THE ATTORNEY GENERALRESPONDENT

JUDGMENT

1. The petitioner was at the times material to this suit employed by the Kenya Armed Forces. He joined the Forces in 1979. He has filed the petition dated 26th August 2013 claiming that his rights and fundamental rights and freedoms were violated by the respondent.
2. The petitioner relied on his own affidavit sworn on 26th August 2013. He also gave oral testimony. He recalled that on 1st August 1982, he was arrested by Kenya Army Officers who initially detained him at Langata Army Barracks and subsequently at Kamiti Maximum Prison for 2 weeks. After 2 weeks, army officers interrogated him without telling him why he was being detained and interrogated. He was transferred to Naivasha Maximum Prison where he was subjected to further interrogation and harrowing torture for seven days continuously.
3. The petitioner testified that the torture comprised of solitary 24 hour confinement in a dark water logged cell while stark naked, being denied toilet facilities, food and drinking water. He recalled that he was beaten during interrogation and as a consequence he lost two teeth in addition to other soft tissue injuries. As a result of sitting in the cold room he also contracted pneumonia. The petitioner stated that after the isolation in the dark water logged cell he was coerced into signing a statement of confession whose contents he was not allowed to read.
4. The petitioner testified that from Naivasha Maximum Prison, he was taken to the Langata Barracks before a Court Martial without being furnished with the charges and evidence against him. He stated that prior to the hearing, an officer advised him to plead guilty in exchange for a light sentence. He pleaded guilty as advised and was sentenced to 15 years imprisonment. Thereafter he was then taken to Nairobi Allocation and Remand Prison, then Mombasa Shimo La Tewa Prison in Mombasa. He completed his sentence at Naivasha Maximum Prison.
5. The petitioner avers that at the time of his arrest he was denied access to his residence at Embakasi. He lost all his testimonials and personal items. As a result of his dismissal he could not find employment as he did not have his academic and professional certificates. He stated that he

has suffered psychologically since his ordeal and he seeks damages.

6. The petition is opposed by the affidavit of Major Joseph Karbuali Kosen, a Staff Officer at the Kenya Defence Headquarters, sworn on 27th March 2014. The tenor of the affidavit is that the respondent denies that it violated the rights and fundamental freedoms of the petitioner. He averred that the petitioner was involved in the events leading to the attempted military coup in 1982 as he commandeered a private car and he was tried as such and convicted by a court martial and sentenced.
7. The respondent also avers that the petitioner was entitled to enjoy the fundamental freedoms protected in the former Constitution subject to the limitations in the **Armed Forces Act (repealed)** and the derogations permitted in **section 86(4)** of the former Constitution.
8. The petitioner has brought this claim under the Constitution. Although the petitioner makes reference to the Constitution, the incident subject of this suit occurred in 1982 before the promulgation of the Constitution. As the Constitution is not retrospective, the provisions of the former Constitution must govern the determination of the case and as such this judgment will proceed on that basis (see **Samuel Kamau Macharia v Kenya Commercial Bank SCK Appl. No. 2 of 2012 [2012]eKLR**).
9. It is not in dispute that the petitioner was a member of the Armed Forces. Under **section 86(4)** of the former Constitution, the rights of members in the disciplined forces were limited as follows;

?In relation to a person who is a member of a disciplined force raised under any law in force in Kenya, nothing contained in or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in contravention of any of the provisions of this Chapter other than sections 71, 73 and 74.
10. The purport of **section 86(4)** is to permit derogation of rights and fundamental freedoms for members of the disciplined forces including the Armed Forces except the rights protected under **sections 71, 73 and 74** of the former Constitution. **Section 71** of the former Constitution protects the right to life, **section 73** prohibits slavery and forced labour while **section 74** is the prohibition against torture cruel and inhuman treatment. These non-derogable rights constitute peremptory norms under international law.
11. Since it is not in dispute that the petitioner was in the armed forces at the time and subjected to military discipline, by reason of **section 86(4)** of the former Constitution, the only claim the petitioner makes for violation of his fundamental rights and freedoms is in respect of contravention of **sections 71, 73 and 74** of the former Constitution.
12. The gravamen of the petitioner's claim is that he was arrested and kept in custody for longer than is necessary and was tortured. The claim for unlawful detention which falls under **section 72** of the former Constitution is excluded from consideration as is any claim arising from the manner in which his trial was conducted under **section 77** of the Constitution.
13. The only triable claim is that of torture which is contrary to **section 74(1)** of the former Constitution which provides "No person shall be subject to torture or to inhuman and degrading treatment". The meaning of torture inhuman and degrading treatment is drawn from international law. The generally accepted definition of torture is to be found in the **United Nations Convention Against Torture and other Cruel, Inhuman or degrading Treatment or Punishment** which defines torture as; "any act by which severe pain or suffering whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an

official capacity.” This definition of torture has been adopted by our courts in ***Republic v Minister For Home Affairs and Others ex parte Sitamze*** [2008] 2 EA 323 and ***Frankline Kithinji Muriithi v Loyford Riungu Muriithi and Others*** Nyeri CA Civil Appeal No. 43 of 2013 [2014] eKLR.

14. The petitioner has given clear evidence of the torment he underwent up to the time he pleaded guilty. I find no basis to disbelieve his testimony. These facts have not been controverted by the respondent apart from a mere denial. Torture of a person is not permitted under any circumstances. I therefore find that the allegations of torture are proved on the balance of probabilities. The petitioner is entitled to damages.

15. The petitioner did not provide any medical evidence which would enable the court assess the nature and extent of his injuries. In assessing general damages I have considered several cases; ***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. In those cases the petitioners’ were tortured and detained for long periods of time. In the circumstances and doing the best I can, I award the petitioner Kshs. 600,000.00 as general damages.

16. I accordingly allow the petition and enter judgment in favour of the petitioner as follows;

- a. **I declare that the petitioner’s rights under section 74(1) of the former Constitution were violated when he was subjected to torture between 1st August 1982 and 17th September 1982.**
- b. **The petitioner is awarded Kshs. 600,000/= general damages which shall accrue interest at court rates from the date of this judgment.**
- c. **The respondent shall pay the petitioner’s costs.**

DATED and DELIVERED at NAIROBI this 30th day of May 2014

D.S. MAJANJA

JUDGE

Mr Agina instructed by Agina and Associates Advocates for the petitioner.

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