



**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 151 OF 2013**

**BETWEEN**

**JOSEPH NJUGUNA NJOROGE .....PETITIONER**

**AND**

**HON ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF PUBLIC**

**PROSECUTIONS ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner has brought this petition against the respondents alleging violations of his fundamental rights following his arrest and assault while in police custody on 11<sup>th</sup> March 2011.?
2. The petitioner testified that on 11<sup>th</sup> March 2011, he met with his friends Joseph Ndungu Munyui (PW 3), Cyrus Kinyi Nene (PW 4) and Joseph Ngugi Mwirigi (PW 2) at Oil Man Café situated at Banana, Karuri, Kiambu County for a cup of tea after work. They left the Café for their respective homes at about 9.00 pm. While walking towards, Karuri Police Station they came across four men who ordered them to stop, they complied with the orders. The petitioner testified that it was at that time he realized that they were police officers as two of them were armed with rifles.
3. The four friends were immediately hand-cuffed. The petitioner was hand-cuffed with PW 2 while PW 3 and PW 4 were hand-cuffed together. The petitioner testified that he asked the officers why they were under arrest. One of the officer started beating him while telling him not to instruct the officer how to do his job. The petitioner testified that the officer continued to beat him while they were being frog marched to Karuri Police Station. The beating continued until they reached the entrance to the Police Station. The officer who was beating the petitioner shouted, “*nikifiko kwa O.B. mbele yenu mtanitambua!*” The petitioner avers that the officer attempted to slap the petitioner at the back of his head with his left hand but he bent forward as if trying to evade the slap but the officer kicked him directly on his face injuring his eye. The petitioner stated that he fell on the ground together with PW 2.

4. By the time they reached the front desk of the Police Station, the petitioner's right eye was bleeding profusely. The petitioner recalled that when the officers at the front desk saw the condition of his eye, they declined to make an entry in the Occurrence Book ("OB"). He was taken to the Karuri Health Centre for treatment by the officers while his companions were locked in the cells.
5. The petitioner testified that he declined to be treated under those circumstances and demanded a P3 form. The officers returned the petitioner to the Police Station where they met the Officer Commanding Station who gave the petitioner a handwritten note to take to the hospital and promised to give him a P3 form the following day. The petitioner was treated at Karuri Health Centre but due to severity of the injury he was referred to Kiambu District Hospital at around midnight. At Kiambu District Hospital he was again referred to Kenyatta National Hospital where he reached at about 1.30 am. He left Kenyatta National Hospital at about 7.00 am and went back to Karuri Police Station.
6. On the next day at about 10.00am, the petitioner returned to the Police Station and was given the P3 form by the Deputy OCS. After recording his statement, the petitioner was informed that an identification parade would be done at a later date and he would be invited to participate. After a few days later on 26<sup>th</sup> March 2011, the petitioner was called by the Deputy OCS to attend the identification parade to identify the officer who assaulted him. The petitioner testified that he identified the officer but that the officer was not arrested and that no action was taken in the matter.
7. The petitioner called his companions, PW 2, PW 3 and PW 4 as witnesses. They all confirmed that they were arrested and placed in police custody until the next day when they were released at about 3.00pm without any charge being preferred against them. They also testified how the petitioner was assaulted by an officer whom they identified in the identification parade.
8. The respondents' deny that the petitioner's rights and fundamental freedoms were violated as alleged or at all. The respondent's case is that the petitioner was indeed arrested and that he was injured but that the injury was not a result of an assault by the respondent's agents. The respondent called the one witness Chief Inspector Boniface Maundu (DW 1) who was the Deputy OCS at Karuri Police Station at the material time and was the officer charged with investigating the matter.
9. DW 1 testified that he was aware of assault allegations made by the petitioner on 11<sup>th</sup> March 2011. He was directed by the Station Commander to investigate the complaint. He confirmed that he studied the OB which confirmed that the petitioner and his four colleagues were arrested and brought to the police station by four officers who were assigned duties at Banana Trading Centre to patrol the area following complaints that a group of people were extorting money from motorists at the Banana Matatu terminus which is about 1 km from the Police Station. The petitioner and his friends were among a group of seven persons suspected of touting. According to DW 1's account of the OB, one suspect got injured when entering the Police Station compound and was rushed to Karuri Health Centre and brought back. He was released by the OCS and immediately upon release he made a complaint against the police. DW 1 confirmed that the next day the petitioner came to the station and was issued with a P3 form. He also recorded statements of the other three persons who were in custody. On 24<sup>th</sup> March 2011, the petitioner returned the P3 form duly filled wherein the degree of injury was ascertained as harm. He also recorded statements from all the police officers on patrol including those manning the front office.
10. DW 1 testified that the Karuri Police Station compound is fenced and that the entrance had a protruding barbed wire. According to his investigation there were people who wanted to rescue the petitioner and when he turned back he slid and fell and was cut by the right lower eyelid. As a result DW 1 concluded that no offence had been committed by the officer and recommended the file be closed.

11. The petitioner has alleged that several of his rights were violated. These include the right to dignity, the freedom and security of the person and the right to fair administrative action. The issue in this matter is whether the petitioner was arrested and assaulted and whether his rights were violated as alleged. It is not in doubt that he was arrested by police officers and taken to Karuri Police Station.

12. The facts and evidence in this matter implicate the freedom and security of the person is protected under **Article 29** of the Constitution which provides as follows;

*29. Every person has the right to freedom and security of the person, which includes the right not to be—*

*(a) deprived of freedom arbitrarily or without just cause;*

*(b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;*

*(c) subjected to any form of violence from either public or private sources;*

*(d) subjected to torture in any manner, whether physical or psychological;*

*(e) subjected to corporal punishment; or*

*(f) treated or punished in a cruel, inhuman or degrading manner.*

13. The National Police Service has the responsibility of maintaining law and order, preventing and detecting crimes and apprehension of offenders under **section 24** of the **National Police Service Act, 2011**. These responsibilities must be carried out in accordance with the Constitution and the law. Apprehension and arrest of suspects must, in accordance with **Article 29(a)** of the Constitution, not be arbitrary and without just cause. The burden of proof that the petitioner's arrest was not arbitrary and justified is on the State.

14. The petitioner and his witnesses testified that they were meeting as friends whereupon they were arrested at night. Although, DW 1 testified that there were incidents of robbery in the area, no evidence was laid to show that there was reasonable evidence that the petitioner was one of the miscreants who was targeted by the police action. The petitioner and his companions were not arrested at the Banana Bus Terminus but near the Police Station. It is highly unlikely that people involved in criminal activity of the kind alleged by DW 1 would be near the Police Station. Likewise, the allegations that there was an attempt by some people to rescue the petitioner are baseless. They would have been arrested particularly by the armed officers and charged with the serious offence of aiding a person arrested escape from lawful custody.

15. On the evidence, I find that the petitioner has established that on the balance of probabilities he was assaulted by a police officer while he was in the custody of the police. DW 2 testified on the basis of police reports and statements but such statements and the Occurrence Book were not produced in evidence. None of the policemen who were involved was called to give evidence. The results of the identification parade were not produced. In the circumstances, I am entitled to draw an adverse inference that in fact it is likely that the assault that the petitioner and his witnesses described took place. I also find the evidence of the petitioner and his witnesses was clear and consistent.

16. Although the petitioner has stated he was tortured, I find no such evidence. Torture, cruel and inhuman treatments have acquired a specific meaning drawn from international law and an act, such as the one complained of does not amount to torture. 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***). Any other form of violence that falls short of torture is clearly prohibited under **Article 29(c)** of the Constitution which prohibits violence of any from public or private sources.

17.I therefore find that the petitioner’s rights were violated under **Article 29(a)** and **(c)** of the Constitution. Having found liability, I think in these circumstances, an award of damages would also be appropriate. The petitioner suffered an eye injury. According to the P3 form and the medical report of Professor Adala, the petitioner sustained lacerations on the right upper lid and lower lid. Professor Adala, in his report, dated 28<sup>th</sup> June 2011, the petitioner suffers from excessive watering which may require surgical revision in the future.

18.Damages for violation of fundamental rights are very much at large and are intended to vindicate the right violates. In the circumstances, I think a sum of Kshs. 200,000 is adequate to compensate the petitioner.

19.The final orders as therefore as follows;

- a. **A declaration be and is hereby made that the petitioner’s rights under Article 29(a) and (c) of the Constitution were violated by the 2<sup>nd</sup> respondent’s officers on 11<sup>th</sup> March 2011.**
- b. **The petitioner is awarded Kshs. 200,000/= as general damages which shall accrue interest at court rates from the date of this judgment.**
- c. **The petitioner is awarded costs of the petition.**

**DATED and DELIVERED at NAIROBI this 26<sup>th</sup> day of May 2014**

**D.S. MAJANJA**

**JUDGE**

Ms Kairu instructed by Kihara Gitonga and Company Advocates for the petitioner.

Ms Mwangi, Litigation Counsel, instructed by the State Law Office for the 1<sup>st</sup> respondent.

Mr Ng’etich, Prosecution Counsel, instructed by the Directorate of Public Prosecutions for the 2<sup>nd</sup> and 3<sup>rd</sup> respondent.