



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CONSTITUTIONAL HUMAN RIGHTS DIVISION
MISC APPL 1377 OF 2003

SIMON MAINA WAWERUPLAINTIFF

VERSUS

THE ATTORNEY GENERALDEFENDANT

JUDGMENT

Introduction

1. In his application brought by way of Originating Summons dated 30th October 2003 and supported by an affidavit sworn on 27th October 2003, the applicant alleges violation of his rights under sections 70-82 of the former constitution of Kenya.
2. While the application was filed in 2003, the record indicates that it was, for reasons not on record, first placed before a Judge seven years later in October 2010. It then suffered a series of delays, including the demise of the plaintiff's Counsel, but was eventually heard on 6th June 2014.

The Applicant's Case

3. In his affidavit and evidence before the Court, the plaintiff, who was a prison warder working at the Kamiti Prison at the time of his arrest, stated that he was arrested on 30th June 1986 and charged in Criminal Case No. 2993 of 1987- Republic –vs- Simon Maina Waweru with being a member of the Mwakenya movement and sentenced to imprisonment for 3 years.
4. The applicant deposes that on 29th May 1986, he was arrested at his place of work at Kamiti Prison and locked up at Muthaiga Police Station. The following day, he was driven to Nyayo House and detained in a cell in the basement of the building. He avers that while at Nyayo House, he was put in a cold water logged cell for many days without food or drink; that he was continuously beaten and splashed with cold water at high pressure; that he was interrogated on many occasions by various police officers; was kept without sleep and was assaulted until he sustained injuries.
5. He alleges that he was subjected to humiliation and threatened with death unless he admitted various allegations made against him. He contends that these acts of torture by police officers were in breach of section 74(1) of the constitution.
6. According to the applicant, he was subjected to torture and ill-treatment for 61 days before being taken to court and charged outside the normal working hours with being a member of an unlawful

society, sentenced to three years imprisonment, and taken to Kamiti, Manyani and finally King'ong'o prisons to serve his sentence.

7. The applicant contends that he was denied access to a lawyer and his relatives and was coerced to plead guilty. He claims that the trial court neglected to uphold its duty as a custodian of his rights and failed to note that his plea of guilty was not voluntary and unequivocal; and that it further failed to seek an explanation from the prosecution on why he had been detained for 61 days without being brought to court contrary to section 77 of the constitution.
8. The applicant claims that after he was released from prison, he was not paid his terminal benefits, a failure he claims is a violation of section 75 of the Constitution which guaranteed everyone the right to property. He asserts that the acts of the state were in violation of his constitutional rights under sections 70 to 82 of the constitution and international law and conventions to which Kenya is a party.
9. On cross examination, he denied being a member of Mwakenya, but stated that he admitted the charge because he had been tortured by officers of the state in the period that he was held in Nyayo House. He had also been threatened that he would be killed if he did not admit the charges. He further claimed that he was taken to court at 7 p.m., and that did not appeal against his conviction and sentence as he was not told he could appeal.
10. He explains his failure to lodge a claim against the state for the alleged torture against him after leaving prison because he was unwell and did not have money to pay an advocate, and asks the court to grant him orders as follows:
 1. ***A declaration that the plaintiff's fundamental rights and freedoms under Section 70, 72 (3& 5), 74(1), (76,77,78(1),79(1) & 80(1) 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.***
 2. ***A declaration that the Plaintiff is entitled to the payment of damages and compensation for the violations and contraventions of his fundamental rights and freedoms under the aforementioned provisions of the constitution.***
 3. ***General damages, exemplary damages on an aggravated scale under Sec. 84(2) of the constitution of Kenya for the unconstitutional conduct by government servants and agents.***
 4. ***Any further orders, writs, directions, as this Honourable Court may consider appropriate.***
 5. ***Costs of the suit, with interest at court rates.***

The Respondent's Case

11. The Attorney General opposes the applicant's case and has filed grounds of opposition dated 28th January 2014 in which he states that the petition is grossly defective and should be struck out; that the petitioner was arrested and charged with sedition which was a capital offence at the time and so his detention was bound to be longer pending investigations; that the Kenya Police is professional in undertaking its statutory mandate and it does not condone false imprisonment that does not follow the rules, nor does it torture suspects in its custody as alleged; that as custodians of the rule of law, the Kenya Police respects and upholds each individual's equality and freedom before the law as enshrined in the Constitution; and that the petitioner's detention was done in accordance with the Public Security (Detained and Restricted Persons) Regulations 1966 and was therefore lawful. No affidavit was filed to controvert the averments of fact by the applicant, but the respondent filed submissions dated 30th April 2014 which I shall refer to in the course of this judgment.

Determination

12. The application before me calls for determination of one main issue: whether the respondent violated the applicant's rights under sections 70, 72 (3) and (5), 74(1), 76, 77, 78(1), 79(1), 80(1) and 82(3) of the constitution in his arrest, detention, prosecution and imprisonment. Should the answer to this issue be in the affirmative, a second issue for determination is whether there has been such delay in filing and prosecuting this claim as to disentitle the applicant to relief.
13. The facts of this matter are largely undisputed. The applicant was a prison warder then working at the Kamiti Prison. He was arrested on 29th May 1986. While he states that he was held by the state for a period of 61 days, the record of proceedings before the Chief Magistrate in Nairobi, Mr. H.H. Buch, shows that he was charged in court on 27th July 1987, which suggests a period of detention in excess of a year. The court will however, accept his averments as representing the correct state of affairs with regard to the time that he was held in custody before he was charged in court.
14. The applicant has deposed to being held in Nyayo House and being subjected to various acts of torture, including being assaulted, denied food and water, kept in a waterlogged cell and having water at high pressure directed at him. As the respondent has not filed an affidavit to controvert these averments of facts, the court will take them as being unchallenged.
15. The applicant alleges violation of several rights guaranteed under the former constitution. Sections 70 of the constitution guaranteed to everyone, without discrimination, the rights set out in the constitution, including the right to life, liberty and security of the person; conscience, expression and association.
16. Section 72(1) guaranteed to every one freedom deprivation of liberty. It provided as follows:

(1) No person shall be deprived of his personal liberty save as may be authorized by law..”

17. Section 72(3) was in the following terms:

“A person who is arrested or detained-

(a) for the purpose of bringing him before a court in execution of the order of a court; or

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty- four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with. (Emphasis added)

18. The applicant was arrested and held in detention for a period of 61 days before he was finally charged in court and jailed. No explanation was forthcoming from the state with regard to the extended period of detention. He was charged with the offence of being a member of an unlawful association, which was not a capital offence. Consequently, he ought to have been produced in court within 24 hours of his arrest. That he was held in detention for a period of 61 days was a clear violation of his right to liberty and a violation of section 72(3) of the constitution.
19. The applicant also alleges violation of his right under section 74 of the former constitution which provided that

“(1) No person shall be subject to torture or to inhuman or degrading punishment or other treatment.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorized the infliction of any description of punishment that was lawful in Kenya on 11th December, 1963.”

20. The applicant contends, and this has not been controverted, that after his arrest and for the period that he was held in Nyayo House, he was put in a cold, water logged cell for many days without food or drink, and that he was continuously beaten and splashed with cold water at high pressure.
21. In response to the application and the allegations made against its officers, the state submits that it is disadvantaged and could not file an affidavit in reply because of the time that has elapsed; that documents relating to the applicant’s prosecution were destroyed or lost or worn out. It relies on the decision of Nyamu J in **Peter Ngari Kagume -vs- The Attorney General & Others High Court Petition No. 128 of 2006** with regard to the passage of time between the alleged violations and the filing of this application.
22. As this court observed in **High Court Misc. Civil Case No. 565 of 2005, Mugo Theuri -vs- The Attorney General**, it cannot be disputed that the state violated the rights of the applicant when he was held for 61 days before being charged with any offence. The absence of state records notwithstanding, the fact that he was produced in court and charged with an offence by the state at the end of this period, if nothing else, confirms that he was in the hands of state officers for the period that he alleges that he was so held. To hold the applicant for this period of time was clearly a violation of his rights under sections 72(1), (3) and (5) of the former constitution.
23. Further, I am persuaded that the applicant’s rights under Section 74 were violated by the respondent in the period that he was detained unconstitutionally. The High Court has held in several decisions that the detention of persons at the Nyayo House cells was accompanied by, and would appear to have been intended for, the purpose of extracting confessions from those so held through torture. The state has not now, or at any point, offered any reasonable explanation for the indefinite detention, and then the arraignment in court that was invariably followed by a plea of guilty. See in this regard the decisions of the court in **Harun Thungu Wakaba -v- The Attorney General Nairobi HC Misc Appl 1411 of 2009 (OS); Rumba Kinuthia -v- Attorney General Nairobi HCCC 1408 of 2004; Bernard Wachira Waheire -v- Attorney General Nairobi HCCC No 1184 of 2003.**
24. While the applicant has alleged violation of his rights under sections 75 on the right to property, 76 pertaining to privacy, and 77(1) relating to the right to a fair trial, no evidence was adduced to support the allegation. With regard to the right to a hearing, and as correctly submitted by the respondent, the applicant was convicted on his own plea of guilty on the date that he was charged in court. There was therefore no trial conducted during which the right to a fair hearing could be said to have been violated. Further, as was held by the Court of Appeal in **Julius Kamau Mbugua -vs- Republic, Court of Appeal Criminal Appeal No. 50 of 2008**, the rights guaranteed under section 77 were trial-related. Thus, where a trial had not taken place, one could not allege violation of the rights guaranteed under that section.
25. The applicant has also alleged violation of the rights guaranteed under sections 79 and 80 to freedom of expression, assembly and movement. He has not, however, adduced any evidence in support of the alleged violations and I therefore make no findings with respect thereto.
26. The applicant also makes various allegations against the trial Court and its alleged failure as a custodian of rights to uphold his constitutional rights by failing to note that his plea of guilty was not voluntary. It may well be that the court could have made inquiries with regard to the circumstances and the manner in which the applicant and others were brought to court. However,

the court record indicates that the particulars of the charge were read to the accused, and that he had entered a plea of guilty.

27. As observed earlier, the state has challenged the present application on the basis that the applicant has taken a very long time before filing the claim alleging violation of his rights. It has relied on the decision of the court in **Lt. Col Peter Ngari Kagume and Others -v- Attorney General** (supra).
28. I believe that the question of limitation of time with regard to constitutional violations in this country has been dealt with and settled in favour of the applicant in light of the decisions that I have set out above. Further, it has also been recognized that in respect of the Nyayo House torture cases, it was not possible for those who fell victim to state abuses to file claims in the then prevailing repressive political regime. It was only after the opening up of the political space in 2003 that parties were able to lodge their claims against the state.
29. As I observed at the beginning of this judgment, the application before me was filed in 2003, immediately after there was a change of government that allowed for the enjoyment of those freedoms that had hitherto been denied citizens. As I also observed, it is not clear why the matter was not disposed of earlier, but I can find no basis for denying the applicant relief on the basis that there was delay in lodging his claim for compensation.
30. Having found violation of the applicant's rights guaranteed under sections 72 and 74 of the former constitution, I am also satisfied that he is entitled to damages for such violations. The jurisprudence that has emerged over the years in matters similar to this is that a person whose rights were violated by the state is entitled to an award of damages for such violations - see **Dominic Amolo Arony -vs- The Attorney General High Court Misc. Civil Case No. 494 of 2003; Harun Thungu Wakaba -vs- The Attorney General; Rumba Kinuthia -vs- Attorney General** and **Bernard Wachira Waheire -vs- Attorney General** (supra).
31. With regard to the amount of damages awarded in compensation for violation of constitutional rights, the amounts have varied. In arriving at an appropriate award in this matter, I am guided by the decisions of the court in the case of **Rumba Kinuthia -vs- Attorney General; Bernard Wachira Waheire -vs- Attorney General** and **Harun Thungu Wakaba & 20 Others -vs- Attorney General** (supra) in which awards of general damages ranging between Kshs1.5 m and 2.5m were made.
32. The applicant in this case was held in custody for a period of 61 days before he was taken to court, in violation of his constitutional rights. In my view, a global award of Kenya Shillings Three Million (Kshs3,000.00) is reasonable recompense for violation of his constitutional rights.
33. The applicant shall also have the costs of the suit together with interest on damages and costs from the date of judgment until payment in full.

Dated, Delivered and Signed at Nairobi this 31st day of July 2014

MUMBI NGUGI

JUDGE

Mr. Macharia instructed by the firm of Ngugi Muhindi & Co. Advocates for the applicant

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