



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO 41 OF 2014

JOAN AKINYI KABASELLEH1ST PETITIONER

JUDITH ODAGO AYOO 2ND PETITIONER

GEORGE OMORE KABASELLEH 3RD PETITIONER

VERSUS

THE ATTORNEY GENERALRESPONDENT

JUDGMENT

1. The 1st and 2nd petitioners are the widows of one **Hajulas Nyapanji Kabaselleh** while the 3rd petitioner is his son. They are also the administrations of his estate. They have filed the present petition alleging violation of the constitutional rights of the deceased following his alleged arrest, incarceration and torture by officers of the state.
2. In the petition dated 28th January 2014, the seek the following orders:
 1. *A declaration that the late Hajulas Nyapanji Kabaselleh's fundamental rights and freedom were contravened and grossly violated by the respondent's special branch police officers who were Kenyan government servants, agents employees and in its institution on 23rd September 1986 and for 36 days at Nyati House and Nyayo House Torture Chambers and thereafter in Kenyan Prisons.*
 2. *A declaration that the petitioners as administrators of his estate are entitled to the payment of damages and compensation for the violations and contraventions of the deceased's fundamental rights and freedoms under the aforementioned provisions of the Constitution.*
 3. *General damages and exemplary damages and moral damages on an aggravated scale under S 84(2) of the Constitution of Kenya 1969 Articles 23 and 29 constitution of Kenya 2010 for the unconstitutional conduct by the Kenyan government servants and agents awarded.*
 4. *Any further orders, writs, directions, as this Honourable court may consider appropriate.*
 5. *Costs of the suit and interest*

3. The petition is supported by an affidavit sworn by the 1st petitioner, Joan Akinyi Kabaselleh, who also gave oral evidence and was cross-examined at the hearing of the petition. Her evidence is

that on 23rd September 1986, at around 2.00 a.m. the deceased was arrested at Kariobangi South in Nairobi by about 9 heavily armed masked plain clothes policemen who ransacked the house for several hours, for allegedly belonging to the Mwakenya Movement. She further avers that the deceased was taken to Nyati House where he stayed for a short while and then he was transferred to Nyayo House during which time his family was not aware of his whereabouts. She avers further that a relative saw him at the High Court remand cells on 29th October and called the family to inform them that the deceased had been sentenced to imprisonment.

4. The 1st petitioner has also made various averments with regard to the treatment the deceased was subjected to while in custody and: she claims that he was prison blind folded and instructed to lie flat on the floor of the Police Land Rover as he was driven to Nairobi; that he was locked at Pangani Police Station and spent the night there without food or blankets to cover himself; that on the following day he was blindfolded and driven around for hours and then was driven to the basement of a building which he came to know later was Nyayo House Torture dark cells.
5. She stated further that the deceased was interrogated daily by a panel of special Branch Officers who tortured him by beating him with slaps, whips, broken chair pieces of wood, and that he was made to stand in a pool of water.
6. She also claims that the deceased was locked in a dark cell for days and kept without food, a sleeping mat, blankets or drinking water for most days out of the 36 days that he was in custody and after being tortured he was threatened to sign a confession that he had taken an oath to overthrow the government. It is also her averment that the deceased was charged in court on 29th October 1986 at 5.30 p.m., and that he pleaded guilty to the charge of failing to prevent a felony. She avers that he was jailed for 4 and ½ years and taken to Kamiti Prison and Kingongo Prison where the prison warders continued committing acts of torture and cruelty and to subject him to inhuman and degrading treatment in contravention of the provisions of section 74(1) of the Constitution of Kenya, 1969 and or Article 29 of the 2010 Constitution.
7. The 1st petitioner also makes various averments with regard to the treatment that the deceased was subjected to while in prison. She alleges that he was segregated and held in solitary confinement and ate badly cooked food.
8. It is her averment that the deceased's health deteriorated and his physical, psychological, economic, and political life was messed up as he was tortured for being suspected of holding political opinions other than those of the then KANU government one party policies and ideologies; that he suffered from loss of appetite and poor eye sight, loss of his musical instruments stolen during the time he was away; loss of his job, and damage upto the time of his death.
9. In her oral evidence before the court, the 1st petitioner reiterated the contents of her affidavit set out above. It was her evidence that she later talked to him and he told her that he had been taken to Nyati House and Nyayo House before he was taken to court, charged and jailed. He did not appeal against his sentence.
10. She also testified that his family was stressed when he was taken away, and that they looked for him in police stations. She has produced in evidence a newspaper article from the Standard Newspaper of Thursday, October 30 1986, as well as a letter to her Counsel on record from the Chief Magistrate's Court dated 1st November 2013 with regard to the criminal proceedings pertaining to the deceased.
11. On cross-examination, she maintained that the deceased was arrested by Special Branch Officers whose names she did not know but that the deceased mentioned a Mr Opiyo. She stated that he told her that he was blindfolded and driven around Nairobi, and that a relative, now deceased, told them that she saw him at the law courts.

12. She also stated on cross examination that the deceased told them that he admitted the charges because he was told that if he admits the charge he would be released; and that he could not raise the issue of being coerced to admit the charges in court. With regard to the time taken before the filing of this petition, the 1st petitioner stated that it was because they were looking for letters of administration to the estate of the deceased; that they did not file the case before he died as it was too painful; and that they filed the case after the coming together of the people who had been tortured.
13. In his written submissions on behalf of the petitioners, learned Counsel, Mr Wandaka, reiterates the case presented by the 1st petitioner in her affidavit and oral evidence and urges the court to hold that the constitutional rights of the deceased were violated. He submits that the offences that the deceased was charged with were bailable offences and there was no reason to hold him for 36 days before charging him in court; that it is clear that his admission of guilt was not voluntary; and that the state broke his resistance by holding him in solitary confinement, without access to a lawyer or relatives.
14. With respect to the claim for damages, Counsel relies on the decisions in **Otieno Mak'onyango – vs- Attorney General Nairobi HCCC Nisc. Appln. No. 845 of 2003; Oduor Ong'wen and 20 Others –vs- Attorney General Petition No. 777 of 2008** and **Grace Wanjiru Miano & Another –vs- Attorney General Nairobi Petition No. 226 of 2013**. He asks the court to make an award in damages of Kshs 20,000,000 in view of the fact that the deceased was a popular musician and his music business collapsed as a result of his incarceration.

The Respondent's Case

15. The respondent opposes the petition and has filed a replying affidavit sworn on 6th May 2014 by **Philip Ndolo**, the Deputy Director of Operations in the Kenya Police Service.
16. In the said affidavit, Mr Ndolo depones that he has been advised that the petition ought to be dismissed as it deals with issues that are purely hearsay and cannot be substantiated, contrary to the Evidence Act; that the petitioners have not produced any evidence to prove their allegations of any torture suffered by the deceased; nor do they have the *locus standi* to bring the petition under the repealed Constitution of Kenya 1969 on behalf of the deceased.
17. The respondent further denies the allegations made by the petitioners concerning the alleged Special Branch police officers and states that the Kenya police did not at the material time have any Unit in the name of Special Branch.
18. It is also the respondent's case that the deceased admitted the charges he was accused of, that there is no evidence of coercion produced, and he was therefore lawfully charged and sentenced.
19. It is also the respondent's position that the petitioners have not produced any evidence to prove the alleged torture, inhuman or degrading treatment suffered by the deceased; and the petition does not disclose any cause of action in favour of the petitioners. They therefore ask that the petition be dismissed.
20. In her submissions dated 22nd September 2014, Ms. Muchiri submits that the evidence adduced by the petitioners is hearsay evidence which, under the provisions of section 63 of the Evidence Act, is inadmissible. She submits further that the petitioners are not in a position to prove human rights violations that they did not experience, and she relies on the case of **Virginia Njeri Kamagara & Another -vs- The Attorney General High Court Petition No. 179 of 2012**. She also relies on the decision of Nyamu, J in **Lt. Col Peter Ngari Kagume and Others -v- Attorney General Constitutional Application No. 128 of 2006** and asks that the petition be dismissed with costs.

Determination

21. Having set out the respective submissions of the parties in this matter, I believe two main issues arise for determination: whether there has been inordinate delay in filing this petition, and secondly, whether there was violation of the deceased's constitutional rights.
22. I consider first whether there has been inordinate delay in filing the present petition that would disentitle the petitioners to relief. The events complained of occurred in September, 1986, some 27 years prior to the filing of this petition. The deceased in respect of whom this petition is brought died on 11th December 1998, 16 years ago. Letters of administration intestate to his estate were issued on 19th November 2012.
23. The petitioners explain the delay in filing the petition on the basis that they were looking for letters of administration to the estate of the deceased; that they did not file the case before he died as it was too painful, and that they decided to file the case after the coming together of the people who had been tortured. None of these explanations, however, is really satisfactory. While it is possible that the deceased may not have been able to file the claim in his lifetime, the explanation that the petitioners were looking for letters of administration is vitiated by the fact that the letters of administration were only applied for in 2012 in Succession Cause No. 1593 of 2012. With regard to the coming together of the persons who were subjected to torture, it is noteworthy that a large number of cases alleging torture, including those relied on by the petitioners, have been brought before the courts in the past decade before the present petition was filed.
24. Nonetheless, I take into account the views of the court with regard to limitation in respect of claims for enforcement of fundamental rights. In a line of cases such as **Dominic Arony Amolo – vs- Attorney General Nairobi HC Misc. 494 of 2003 (Unreported)**, **Wachira Waheire –vs- Attorney General Nairobi HC Misc. Civil Case No. 1184 of 2003 (OS) [2010]eKLR**, **Otieno Mak'Onyango –vs-Attorney General and Another Nairobi HCCC No. 845 of 2003 (Unreported)**, courts have consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights.
25. I note also the sentiments of the court in **James Kanyiita Nderitu v Attorney General and Another, Nairobi Petition No.180 of 2011** that
- “Although there is no limitation period for filing proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under section 84 of the Constitution, is entitled to consider whether there has been inordinate delay in lodging the claim. The Court is obliged to consider whether justice will be served by permitting a respondent, whether an individual or the State in any of its manifestations, should be vexed by an otherwise stale claim.”*
26. In the present case, I am satisfied that no prejudice has been occasioned to the respondent by the filing of the present claim.
27. The second issue to consider is whether the petitioners have made out a case of violation of the deceased's fundamental rights. The respondents have argued that the petition should be dismissed as the evidence relied on is hearsay, the petitioners not being able to testify to human rights violation that did not happen to them.
28. It is clear from the evidence adduced in court by the petitioners that they have no direct evidence relating to the alleged violation of the constitutional rights of the deceased. The averments made by the 1st petitioner in her affidavit and on oath before the court are based on what she alleges to have been told by the deceased.

29. The 1st petitioner has stated that the deceased was arrested on 23rd September 1986 around 2.00 a.m. The letter from the Chief Magistrate dated 1st November 2012 supports the petitioners' contention that the deceased was held by state officers until he was charged in court, about a month or so after the date the 1st petitioner has alleged that he was arrested. According to the said letter, Mr. Hajulas Nyapanjio Kabasselheh was charged in court on 29th October 1986 with neglect to prevent a felony contrary to section 392 as read with section 36 of the Penal Code; being in possession of a firearm contrary to section 4(2)(a) Cap 114 Laws of Kenya, and being in possession of ammunition without a firearm certificate contrary to section 4(2)(a). He was jailed for 18 months on the first count, and three years on the last two counts each, the latter sentences to run concurrently but the first to run consecutively. It is not in dispute that he did not appeal against his conviction and sentence.

30. Section 72(3) of the repealed Constitution of Kenya, which was in force at the time the events in this case took place, provided that an arrested person shall be brought before a court as soon as is reasonably practicable, and provided for 14 days in respect of capital offences and 24 hours in other cases. From the evidence before me, the deceased was brought to court 36 days after his arrest, and there was therefore, ipso facto, a violation of his rights under section 72(3) of the then Constitution.

31. The petitioners have also made various allegations about the torture and mistreatment that the deceased was subjected to after his arrest and during the time he was held in custody. However. There is no admissible evidence before the court to support the allegations of torture. Such evidence as was adduced by the petitioners constitutes inadmissible hearsay.

32. In this, I am in agreement with the views expressed by Majanja J when confronted with a situation similar to what is presently before me in the case of **Virginia Njeri Kamangara & Another -vs- The Attorney General (supra)** relied on by the respondent. In that case, in which the petitioner made similar allegations with respect to the alleged torture of her deceased husband, the Court stated as follows:

[21.] "Unfortunately, the evidence of harsh and cruel treatment constitutes inadmissible hearsay evidence. Section 33 of the Evidence Act (Chapter 80 of the Laws of Kenya) deals with statements by persons who cannot be called as witnesses. Section 33 lays out the kind of statements that constitute exceptions to the hearsay rule. These exceptions can only be permitted once the conditions set out in the opening paragraph at section 33 are met. It provides, "Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases"

33. The court then set out the permissible exceptions, which include statements on the cause of death, statements made in the course of business, against the interests of the maker or relating to the existence of a relationship, among others. As in the **Kamangara** case, none of the exceptions apply to the present case, and in the circumstances, I can find no basis for the allegation of torture of the deceased contrary to section 74 of the former constitution.

34. The respondents have also questioned the *locus standi* of the petitioners, but as the **Kamangara** and **Miano** cases (supra) illustrate, the personal representatives of the deceased have a right to bring a claim such as this.

Conclusion

35. In view of the matters set out above, it is my finding that the state violated the deceased's

constitutional right guaranteed under section 72(3) of the former constitution when he was incarcerated for a period of 36 days in violation of the constitutionally permitted period of 24 hours.

36.I make an award of **Kenya Shillings Eight Hundred Thousand (Kshs 800,000.00)** in general damages to the petitioners as the legal representatives of the deceased's estate. The petitioners 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 18th day of December 2014

MUMBI NGUGI

JUDGE

Mr Wandaka instructed by the firm of Kinuthia Wandaka & Co. Advocates for the petitioner

Ms Muchiri instructed by the State Law Office for the respondent