



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 1376 of 2003

STANLEY WAWERU KARIUKI.....PETITIONER

VERSUS

THE HON. ATTORNEY-GENERAL.....RESPONDENT

JUDGMENT

### Introduction

1. The Plaintiff, Stanley Waweru Kariuki, has filed this Originating Summons seeking various orders against the state for his arrest and incarceration at the infamous Nyayo House torture chambers during the month of September 1988. In the Summons dated 30<sup>th</sup> October 2003, Mr. Waweru alleges that his fundamental rights and freedoms as enshrined in **Sections 70, 72 (3), 72 (5), 74(1), 77, 78(1), 79(1) and 80 (1&3)** of the Repealed Constitution were violated by special branch officers and other Kenya government servants, agents, employees and institutions in 1988 and on diverse dates thereafter. He therefore seeks the following reliefs:

***“(i) A declaration that the Plaintiff’s fundamental rights and freedoms under sections 70, 72 (3), 72 (5), 74(1), 77, 78(1), 79(1)and 80 (1 &3) of the constitution were violated by special branch police officers and other Kenya government servants, agents, employees and institutions in 1988 and on diverse dates thereafter***

***(ii) 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 Constitutions.***

***(iii) General damages, exemplary damages and moral damages on an aggravated scale under section 84(2) of The Constitution of Kenya for the unconstitutional conduct by the Kenyan government servants and agents.***

***(iv) Any further orders, writs, directions, as this Honourable Court may consider appropriate.***

***(v) Costs of this suit and interest”.***

### The Plaintiff's Case

2. The Plaintiff avers in his affidavit sworn on the 16<sup>th</sup> of October 2003 that he was an employee of African Tours and Hotels at Trade Winds Hotel when he was arrested on 22nd September 1988 by plainclothes Policemen, who took him to his house where he was interrogated and a search of his house was conducted and his documents and personal effects seized. He was thereafter taken to Kwale Police

Station where he remained for three days while being tortured several times including by being kicked and slapped. Thereafter he was taken to Port Authority Police Station where he was locked up for four days. He was then taken from there to the Kenya African National Union (KANU) offices in Mombasa where he met one, the Late Hon. Sharrif Nassir who confirmed that he was the person they were looking for; an alleged bandit and a member of an underground movement. Later on he was driven while blindfolded, to a place he later discovered was Muthangari Police Station in Nairobi where he remained for four days.

3. He was taken from Muthangari Police Station, again while blindfolded and tied up, to a place he later discovered was Nyayo House. It is his claim that at Nyayo House he was interrogated by a team of Special Branch Police Officers for many hours, on all manner of subjects including his life history, friends, associates and on his political convictions and opinions. He also alleged that he was held incommunicado, was forced to strip naked and kept in waterlogged cells.

4. On the next day, he claimed in his testimony that he was taken to the Police Headquarters in Nairobi where he was beaten with slaps, blows, rubber whips, broken chair parts and tyre strips. Finally he was allegedly locked up in a flooded dark cell into which hot and cold air and sawdust were pumped at intervals and he was frequently sprayed with cold water. He also claimed that he was kept without food, a sleeping mat, blanket or drinking water during the entire ordeal.

5. He also alleged that he was humiliated by a female interrogator who burnt his private parts with cigarette butts and hit his testicles until they were swollen to the amusement of her colleagues. He alleged that at one point this female interrogator fondled his private parts while pretending to be nice to him only for her to scream and allege that he had raped her as a result of which he was beaten until he was unconscious. He alleged that he was not given any treatment for his injuries but was put on pain killers to ease his pain.

6. The Plaintiff claims that he was taken to court on the 18<sup>th</sup> of October 1988 between 6.00-6.30pm, before the Resident Magistrate in **Nairobi Criminal Case No. 4437/88, R –v- Stanley Waweru Kariuki** and he was charged with two counts of being in possession of seditious publications contrary to **Section 57(2) of the Penal Code, Cap 63 Laws of Kenya** and one count of being a member of an unlawful society contrary to **Section 6(a) of the Societies Act, Cap 108 Laws of Kenya**. He admitted the charges to prevent being tortured anymore and also because he feared for his family. He was sentenced to 5 years imprisonment on each count and the sentences were to run concurrently. He appealed against the sentence in **Stanley Waweru Kariuki v Republic, Criminal Appeal No. 1436 of 1988**, and his sentence was reduced to a 3 year imprisonment term. The Plaintiff produced the charge sheet in **Nairobi Criminal Case No. 4437/88, R –v- Stanley Waweru Kariuki** in which the charges are stated as well as the original typed copy of the proceedings and judgment, and also index of appeal in **Stanley Waweru Kariuki v Republic, Criminal Appeal No. 1436 of 1988**.

7. The Plaintiff states that after his conviction and sentence, he served in many prison institutions including Kamiti, Naivasha and Murang'a in which prisons the warders continued with acts of torture against him by keeping him in 'semi-nude' tattered prison uniforms and fed him with badly cooked food. He was also subjected to hard labour. As a result, he suffered torture, trauma, psychological and mental anguish. He also developed ulcers, back aches and other discomforts of the body. He further avers that his children's education suffered as a result of his imprisonment and he became a social outcast and could not be considered for any public job or office on account of his alleged political views and opinions.

8. The Defendant filed no response to the Originating Summons and called no evidence to rebut the Plaintiff's allegations. In the absence of any evidence by the Defendant to controvert the averments of fact by the Plaintiff, the court takes the position that the facts are as presented and I therefore find that the Plaintiff's case remains unchallenged. I also agree with Wendoh J in **Nairobi HCCC 1408 of 2004 Rumba Kinuthia –v- Attorney General** where in considering a constitutional reference in respect of which no response was filed opined as follows;

***“Despite the fact that the applicant made very serious allegations against the defendant, government agents, servants and police officers, no affidavit was filed in reply, so that all the facts deponed to by the applicant in his affidavit are what the court will take as representing the correct factual position.”***

9. The Plaintiff was arrested on 22<sup>nd</sup> September 1988 and was not charged in Court until 18th October 1988. He was therefore held in violation of the provisions of Section 72(3) of the Repealed Constitution which provided as follows:

***“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.”***

10. The Plaintiff was charged with an offence that did not carry the death penalty. Consequently, under the above provisions, he should have been charged in Court within 24 hours of his arrest. If he was not so charged, then the responsibility was on the State to explain why he was held without charge beyond the period permitted by the Constitution. In the absence of any explanation from the State, I find and hold that the Plaintiff’s rights under Section 72 of the Repealed Constitution were violated following his arrest and detention from the 22<sup>nd</sup> September 1988 to 18th October 1988 at the various police stations and also at the Nyayo House cells.

11. The Plaintiff alleges that while in the custody of the State and State agents, he was subjected to torture, cruel and degrading punishment. I have elsewhere above given in some detail the alleged acts of torture that he was subjected to. **Section 74(1)** of the Repealed **Constitution** provided that;

***“No person shall be subject to torture or to inhuman or degrading punishment or other treatment.”***

12. The High Court has held in several decisions that the acts to which those incarcerated at the Nyayo House cells were subjected to amounted to torture and cruel, degrading punishment. See the case of **Harun Thungu Wakaba & Others v The Attorney General Nairobi HC Misc. Appl. 1411 of 2009(OS); Wachira Waheire v The Attorney General Nairobi HC Misc. 1184 of 2003(OS), Rumba Kinuthia & Others v The Attorney General, Nairobi HC Misc. Appl. No. 1408 of 2004 and Cornelius Akelo Onyango & Others v The Attorney General Nairobi HC Misc. 233 of 2009 (Unreported)**. This Court in line with those decisions therefore finds and holds that the Petitioner was subjected to torture and cruel, degrading punishment in violation of his rights under **Section 74** of the Repealed **Constitution**.

13. The Plaintiff also alleges that his rights under **Section 77** of the Repealed **Constitution** were violated by the Defendant. The Section provided as follows:

***“If a person is charged with a criminal offence, then, unless the charge is withdrawn the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.”***

14. The Court of Appeal has held in the case of **Julius Kamau Mbugua -v-Republic Criminal Appeal No 50 of 2008 (unreported)** that **Section 77** protected rights in the course of the trial. The Petitioner was in this case convicted on his own plea of guilty, and so there was no clear and uncontested violation of the rights set out under **Section 77** of the Repealed **Constitution**. See also **Odungi Randa Ong’ombe v Attorney General Petition No. 780 of 2008** and **James Omwega Achira v Attorney**

## **General Petition NO. 242 of 2009.**

While making the above finding, I am alive to the fact that the Petitioner was taken to Court at 6.00 p.m. well outside normal Court times. It may well have been that he was actually forced to enter a plea of guilty but the issue was later addressed on appeal and while the conviction was sustained, his sentence was reduced. He has not said anything of the right to appeal which he duly exercised to his advantage. That is all I can say on this aspect of his case.

15. The Plaintiff also alleges that his rights under **Section 79(1)** of the Repealed Constitution were violated by the Defendant. The section provides as follows:

***“Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence”.***

16. The Plaintiff contends that the Defendant’s Special Branch Police Officers while searching his house confiscated his personal documents including his academic certificates, groceries, detergents, household goods and old newspapers all of which were not used as evidence in the criminal case contrary to the protection of the Plaintiff’s right to freedom of expression to read, to receive ideas and information without hindrance as provided under **Section 79(1)** aforesaid.

17. He was also denied an opportunity to communicate with members of his family, friends or advocates to organize his defence. This was in violation of his right under **Section 79(1)** of the **Constitution**. The totality of the evidence by the Petitioner indicates clear breaches of, and intention to violate and hinder the Plaintiff in his enjoyment of the rights that the Repealed Constitution guaranteed to him. There can be no doubt that the acts of the Respondents interfered with his freedom of expression as set out in **Section 79(1)** of the Repealed Constitution and I so find.

### **Damages**

18. It is now settled law that a party whose Constitutional rights are found to have been violated by the State is entitled to damages. The quantum of damages is in the discretion of the Court, taking into account the nature of the violations. This Court has found that the State did violate the Plaintiff’s rights under **Sections 72, 74, 78 and 79 (1)** of the Repealed **Constitution**. The Plaintiff is therefore entitled to damages in respect of those violations.

19. The High Court has awarded damages for violation of constitutional rights in a number of cases that have come before it arising from incarceration in Nyayo House. In the case of **Harun Thungu Wakaba -v- The Attorney General Misc Appl. No. 1411 of 2004**, Okwengu J, awarded the Petitioners who were incarcerated and had their rights violated in circumstances similar to the Petitioner’s amounts, in general damages for each of the 20 Applicants, ranging from Kshs. 1,000,000.00 to Kshs.3,000,000.00. In the case of **Rumba Kinuthia –v- Attorney General (supra)** which is a similar case based on similar facts as this one save for the period of incarceration, Wendoh J made an award of Kshs.1,500,000.00 as general damages.

20. The Petitioner in this case also seeks exemplary damages for the violation of his rights by State agents. However, the view of this Court in that regard is in line with the reasoning in the case of **Benedict Munene Kariuki and 14 Others -v- the Attorney General High Court Petition No. 722 of 2009** where it was held that no exemplary damages should be awarded in addition to general damages in respect of violation of constitutional rights.

21. The Petitioner claims and has proved that he was held in custody at various police stations and at Nyayo House for 27 days. In awarding damages to the Petitioner in this matter, I agree with the view of the court in the case of **Dominic Arony Amolo-v- Attorney General – High Court Misc. Appl. No. 494 of**

2003 that the violation of the Petitioner's rights as set out above were part of the same transaction and that a global award in respect of all the violations is sufficient. In light of the awards made in similar cases as set out above, and taking into account the 27 days he was held unlawfully and the losses he suffered in his career and doing the best I can in the circumstances, I make a global award of **Kshs.3.500,000.00** on general damages.

22. The Petitioner shall also have the costs of this Petition plus interest on damages from the date of judgment until payment in full.

23. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 11TH DAY OF JANUARY, 2013**

**ISAAC LENAOLA  
JUDGE**

**In the presence of:**

*Coram: Irene – Court clerk*

*Miss Lavuna holding brief for Mr. Wanyoike for Petitioner*

*No appearance for Respondents*

**Order**

*Judgment duly read.*

**ISAAC LENAOLA  
JUDGE**