



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PETITION NO 1 OF 2010

ALEX J WAGUNYA KAGGIRI.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

1. In the petition dated 6th July 2010, the petitioner alleges violation of his constitutional rights following his arrest on 5th September 1988 and his incarceration and torture at Nyayo House between the 5th and 22nd of September 1988. The petition, which is supported by his affidavit sworn on 6th July 2010, is brought under the provisions of section 70 to 84 of the former constitution of Kenya and Rules 11 and 12 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure, Rules 2006. The petitioner seeks various orders and declarations with regard to the alleged violation of his constitutional rights. He also seeks a declaration that he is entitled to the payment of damages and compensation for the alleged violations of his rights and freedoms.

2. The respondent entered appearance on 9th July 2010 but did not file a reply or make submissions on the matter. Consequently, the facts as presented by the petitioner are uncontroverted.

The Petitioner's Case

3. The petitioner states that on 5th September 1988, at around 10.15 am, while he was at his place of work at KFA Headquarters in Nakuru, Special Branch Policemen searched his office for more than four hours. After the search, they carried away his books, magazines, newspapers, personal correspondence and other publications without giving any reasons. He claims that to date some of the books taken away have never been returned and are no longer available in the Kenyan book market. He alleges that this amounts to a violation of his freedom of expression, in particular the right to receive ideas and information guaranteed under section 79(1) of the former constitution.

4. He alleges that after the search he was arrested but was never told the reason for his arrest. He was afterwards locked up in solitary cells at various Police Stations within Nakuru, first at Menengai Police Station, Rongai Police Station and later at Kambi ya Moto and Mogotio Police Stations in violation of his rights under section 72(2) of the constitution. He claimed that he was later blindfolded and driven from Nakuru to Nairobi, while lying on his back in a Landrover, eventually ending up in a dark underground cell which he later came to know was known as Nyayo House Torture Chambers.

5. The petitioner avers that he was later taken in a lift to the 24th floor of Nyayo House where he was presented to a panel of about ten people led by a James Opiyo who interrogated him on what he knew about the Mwakenya Organisation; that he was ordered to strip naked and beaten mercilessly with slaps, rubber whips, broken chair pieces, kicks and blows until he had blood all over his body. He stated that after the beating he was returned to the dark cell which was flooded with cold water where pressurised water would be sprayed on him, while naked, for several hours. He continued staying in the cold cells until he became unconscious and could not drink or talk as his throat had become too painful to swallow anything. He claimed that these actions were repeated for the 17 days that he was held at Nyayo House in violation of his right to protection from torture or inhuman or degrading treatment under section 74(1) of the constitution. During this period, none of his friends or family member knew of his whereabouts.

6. The petitioner states that he was charged in court on 22nd September 1988, at about 5.45pm, before the Nairobi Chief Magistrate, with the offence of being a member of an illegal underground movement known as KPF and possession of seditious documents in **Nairobi Chief Magistrate Court Criminal Case No. 4059 of 1988** and was jailed for 7 years. The petitioner appealed to the High Court in **High Court Criminal Appeal No. 1338 of 1988**. Though he did not produce the record of proceedings in the case before the Chief Magistrate's Court, he has produced typed proceedings of **High Court Criminal Appeal No. 1338 of 1988** which was heard by Porter and Mbaluto, JJ and dismissed on the basis that he had pleaded guilty to the charges preferred against him in the Chief Magistrate's Court.

7. He avers that following his conviction, he was taken to Nairobi Remand and Allocation Prison in Nairobi Industrial Area from where he was transferred a week later to Kamiti Maximum Security Prison. He alleges that at the prison, the prison warders subjected him to torture, inhuman and degrading treatment in violation of section 74(1) of the constitution. He states that he was dressed in 'semi-nude' tattered prison uniform and fed on poorly cooked food, thus subjecting him to physical and psychological torture. He alleges that the entire process has left his life messed up physically, psychologically and economically and he continues to suffer torture, trauma, immense loss of earnings and damage to-date.

Determination

8. The issue for determination in this matter is whether there were violations of the petitioner's rights under the former constitution, and if so, what remedy the court should grant.

Violation of the Right to Personal Liberty

9. The evidence before the court, which has not been challenged by the respondent, is that the petitioner was arrested on 5th September 1988 but was not charged in court until 22nd September 1988. He was therefore held in custody for a period of 17 days. Under the provisions of Section 72(1) read together with section 72(3) and 72 (5) of the repealed constitution, he ought to have been informed of the reasons for his arrest and produced in court within 24 hours of his arrest unless the state could show reasonable cause why he had not been so produced within the stipulated period. Section 72 of the former constitution provided as follows:

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

(2) A person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.

(3) 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 offense 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. From the evidence presented before me by the petitioner, and in the absence of evidence to controvert his averments, the failure by the respondent to inform the petitioner of the charges against him and to charge him in court within the period provided for in the former constitution amounted to violation of his rights under Section 72(1), 72(3) and Section 72(5) of the former constitution.

Protection from Torture and other Cruel and Degrading Treatment

11. The petitioner alleges that his right not to be subjected to torture and other cruel and degrading treatment protected under section 74(1) of the former constitution was violated when he was held for a period of 17 days at the Nyayo House cells and was beaten and subjected to other acts of torture. Section 74 (1) provided that:

‘No person shall be subject to torture or to inhuman or degrading punishment or other treatment.’

12. The issue of what amounts to torture and cruel, degrading treatment has been the subject of judicial adjudication before this court in several cases. The court has held that the beatings, interrogation and confinement in dark cells to which those arrested and held in the now infamous Nyayo House torture chambers were subjected to amounted to torture and cruel and degrading treatment. I need not repeat the findings of the court in such cases as **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)**. In the circumstances, I find and hold that the petitioner was subjected to torture, cruel and degrading treatment contrary to section 74(1) of the former constitution.

13. The petitioner has alleged that he was subjected to torture while he was in prison at Kamiti Maximum Prison. The court notes that he served his time in prison following an unsuccessful appeal against conviction and sentence. He has not averred or established that he was subjected to conditions that were different from what other inmates were subjected to, and it is not possible, on the evidence before me, to make a finding on whether or not the conditions in prison amounted to a violation of section 74(1) of the former constitution.

Right to a Fair Hearing

14. The petitioner alleges that his right to a fair hearing as provided under section 77(1) of the former constitution was violated. This section required that when a person is charged with a criminal offence, he shall be afforded a fair hearing within a reasonable time by an independent and impartial court. 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 of the former constitution protected rights in the course of trial. In this case, the petitioner pleaded guilty to the charges against him, and he was not therefore subjected to a trial. As the petitioner was convicted on his own plea of guilty on the day he was charged in court, and in light of the interpretation given by the Court of Appeal to the provisions of section 77 of the former constitution, I find no violation of the petitioner’s right to a fair hearing under this provision of the former constitution.

Freedom of expression

15. The petitioner claimed that his freedom of expression as provided for by section 79(1) of the constitution was violated when the Special Branch Police Officers took away his books, newspapers and magazines, which publications were never returned to him and some of which are out of publication. Section 79(1) provided 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 petitioner has averred that the provisions of this section were violated because his books and publications were taken away, and that some of them are now out of publication. He has not expounded sufficiently on this point to enable the court arrive at a determination of whether or not there was a violation. In the circumstances, I make no findings on the issue.

Relief

17. I now turn to a consideration of what relief to grant the petitioner. As he has submitted in the written submissions dated 10th May 2012, the High Court has in the last decade or so dealt with cases similar to the present one in which parties sought redress for violation of their rights in the 1980s in the infamous Nyayo House torture chambers. These judicial precedents are unanimous that the treatment those arrested and held in Nyayo House were subjected to amounted to violations of constitutional rights, and that those whose rights were violated are entitled to damages.

18. The petitioner was arrested and incarcerated in Nyayo House for 17 days during which time he was subjected to acts of torture. The level of damages awarded in similar circumstances has varied, with awards of Kenya shillings 1,000,000-3,000,000 being made by Okwengu, J to the petitioners in the case of **Harun Thungu Wakaba -v- The Attorney General, Misc Appl. No. 1411 of 2004**; Wendoh, J making an award of Kshs 1,500,000.00 in the case of **Rumba Kinuthia -v- Attorney General (supra)** while Majanja, J awarded damages of Kshs 2,000,000.00 as general damages to the petitioners in **Benedict Munene Kariuki and 14 Others -v- the Attorney General High Court Petition No. 722 of 2009**.

19. In the circumstances of this matter, and bearing in mind the finding 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 in that matter were part of the same transaction and therefore no separate award is merited for each violation of the former constitution, I make a global award of Kenya Shillings Two Million (Kshs 2,000,000.00).

20. The petitioner shall also have the costs of the petition together with interest on damages from the date of judgment until payment in full.

Dated Delivered and Signed at Nairobi this 19th day of March 2013

Mumbi Ngugi
Judge

Mr. Gitau instructed by the firm of Gitau J.H. Mwaura & Co. Advocates for the Petitioner

No appearance for the Respondent