



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR PETITION NO 721 OF 2009

KARIGE KIHORO PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL RESPONDENT

JUDGMENT

Introduction

1. Karige Kihoro, the petitioner, has brought this petition seeking redress for violation of his fundamental rights and freedoms by State agents which he alleges occurred on diverse occasions in 1969, 1971, 1975, 1977 and 1986. In his Amended Petition dated 3rd June 2010 which is supported by his affidavit sworn on the same date, the petitioner alleges violation of his fundamental rights and freedoms under Sections 72(1), (3), (5), 74 (1), 77 (1) & (2), 79 (1) and 82 (3) of the former Constitution of Kenya. He asserts that these violations were committed by officers from the then Special Branch of the Kenya Police, other police officers, servants and agents of the government of Kenya. He seeks general, special and exemplary damages on an aggravated scale under Section 84 (2) of the former Constitution, as well as the costs of the petition.
2. The petitioner filed written submissions dated 8th December 2011, Further Submissions dated 6th June 2012, and Final Submissions dated 5th November 2012 in which he sets out his case and the authorities that he relies on.
3. The respondent opposes the petition and has filed a replying affidavit sworn on 21st July 2011 by Julius K. Ndegwa, a Senior Deputy Commissioner of Police II. He has also filed skeletal submissions dated 20th March 2011 and further submissions dated 6th November 2012.
4. On December 6 2010, Justice Daniel Musinga, who was then seized of the matter, directed that the matter would be heard by way of viva voce evidence. Hearing commenced before him on 28th July 2011 and the petitioner's case was heard in part. Thereafter, Justice Musinga was transferred to the Commercial Division of the High Court.
5. On 3rd February 2012, the petitioner applied and I directed that the proceedings in the matter be typed with a view to the matter proceeding before me from where it had reached before Musinga, J. While Musinga J. had directed that only the evidence of the petitioner would be taken orally, I allowed an application by Mr. Siro, Counsel for the respondent, to vary the said order to allow the evidence of the petitioner's two witnesses to be taken orally and for them to be cross examined on their affidavits. The matter proceeded before me on 19th July and 9th October 2012.

6. The petitioner was acting in person. He relied on his evidence and that of two other witnesses, a friend, **Peter Karicho Githumbi**, and his brother, **Hon. Wanyiri Kihoro** who were both cross examined on the contents of their affidavits both sworn on 6TH June 2011.

The Petitioner's Case

7. The petitioner alleges that he was arrested and subjected to torture by state agents on three diverse occasions spanning a period of some twenty years. The first was in 1969, the second in 1975, and the third in 1986. With regard to the first incident, the petitioner alleges that he was arrested on 6th October 1969 from his home in Nyeri by Special Branch officers who did not have a warrant to effect the arrest. He alleges that his books and type writer were seized, and that he was held for 21 days, until 27th October 1969, when he was released. He claims that during this period, he was subjected to torture.
8. He claims that the arrest and torture was effected against people who held different views from and were critical of the Kenya African National Union (KANU) political party. He states that following his arrest, he was taken to a camp on the slopes of Mount Kenya where he was held for twenty one days. He alleges that during this period, he was beaten with a rhino whip, confined in a room with many other people, and a demand was made that he should reveal where the guns he had received from Tanzania were. He was finally released and dropped near his home. He states that he was unable to walk after his release due to the beating that he had received.
9. The petitioner, who is now 62 years of age, maintains that his arrest, incarceration and torture were in violation of his rights under Section 82(3) of the former Constitution.
10. The petitioner alleges that following his arrest and torture in 1969, he was mistreated by the government and became unemployable. He contends that he secured employment with the public service as an Immigration Officer on 14th July 1970 following an interview with the Public Service Commission; that he was trained in public administration at the Kenya Institute of Administration in September, 1970, and that he was posted to the Jomo Kenyatta International Airport as an Immigration Officer. He alleges, however, that on 22nd February 1971, he was served with a letter dismissing him from service with the government. He alleges that on inquiring why he was being dismissed, he was informed it was because he was dangerous to the state. He produced in court a certificate of service which he testified he was given upon his dismissal.
11. He alleges that following his dismissal, he became unemployable in the public service and was condemned to poverty and suffering which he suffers to this day. He avers that he was occasionally employed in the private sector but that the Special Branch would intimidate his employers thereby leading to his dismissal.
12. The petitioner alleges further that in 1975, following the assassination of J.M. Kariuki, he was arrested in Nairobi and tortured for 17 days, between the 19th of April 1975 and 6th May 1975, in various police stations. He states that the Special Branch officers who arrested him alleged that he was responsible for the circulation of anti-government leaflets. No charges were brought against him following this arrest, but the petitioner alleges that he was greatly traumatized by the arrest and the torture he was subjected to. He states that after his release, he ran away to Tanzania where he remained until February 1977. He alleges that he was again arrested after his return in 1977.
13. The third incident in which the petitioner alleges violation of his rights by state officers occurred in 1986. He testified that he was arrested on 28th February and was on 7th August, 1986 charged before the then Nairobi Chief Magistrate in Criminal Case No. 3078 of 1986 with failing to report a felony, the existence of 'Mwakenya', and for publication of 'Mpatanishi', a seditious publication. He states that he pleaded guilty due to the torture he had been subjected to in the period that he was held in custody and was sentenced to 18 months' imprisonment. After his release in 1988, he was forced to flee to the United Kingdom with the assistance of Amnesty

International as he was again threatened with arrest following a visit to his brother, Mr. Wanyiri Kihoro, who was then being held at the Criminal Investigations Department Headquarters in Nairobi. He states that he remained in exile between 1988 and 2006.

14. The petitioner contends that the torture he was subjected to for 5 months and 7 days at Nyayo House was a violation of his constitutional rights under Section 74(1) of the former constitution. In support of his claim that he had been subjected to torture, he produced a medical report prepared by a Dr. D. M. Forrest who examined him in 1992 in the United Kingdom.
15. The petitioner submits that being arraigned in court after the expiration of 24 hours was a clear violation of his constitutional rights under Sections 72 (1), (3) and (5) and 77 (1) of the former constitution; that he was denied his freedom of expression contrary to Section 79 (1) and that confiscating his literature and not using it as evidence before a court of law was also a violation of section 79 (1). He contends, further, that his rights under Sections 77(2) (c) and (d) of the former constitution were violated as he was denied communication with his family members, lawyers and friends.
16. The petitioner prays for damages for the violations of his constitutional rights as set out above which he quantifies as including loss of earnings of 33 years of service to the government, the torture he was subjected to, as well as medical and legal fees. He has relied on the decisions of the court in **Dominic Amolo Orony vs. The Republic - High Court Misc Appl. 494 of 2003**, **Rumba Kinuthia vs. The Attorney General**; **James Njau Wambururu -v- The Attorney General High Court Civil Case No. 3829 of 1994** and **Harun Thungu Wakaba -v- The Attorney General Nairobi HC Misc Appl 1411 of 2009 (OS)**.

The Respondent's Case

17. The respondent opposes the petition and avers that there is no evidence to support the petitioner's contention that he was arrested and tortured by state agents in 1969 and 1975. The state relies on a replying affidavit sworn by Julius K. Ndegwa, a Senior Deputy Commissioner of Police, on 21st July 2011, Skeletal Submissions dated 20th March 2011 and Further Submissions dated 6th November 2011.
18. The state contends that there was no evidence that the acts complained of were committed by state agents, that they could have been committed by private citizens in which case the state would not be liable. They relied in this regard on the case of **Alphonse Mwangemi Munga & 16 Others -v- African Safari Club Limited High Court Petition No 564 of 2004**.
19. Through its Counsel, Mr. Siro, the state contended that the petitioner has failed to put forth facts and evidence in support of his claim. He relied on the decision in **Lt. Col Peter Ngari Kagume and Others -v- Attorney General Constitutional Application No. 128 of 2006** for the proposition that whoever wishes to have a matter determined in his favour must prove the existence of the facts he relies on.
20. The respondent disputes the allegation that the petitioner was arrested and tortured in 1969 and 1975. He contends that no documentary evidence has been tendered to prove that indeed these arrests took place; that the petitioner's evidence with regard to these two arrests was based on the evidence set out in the supporting affidavits sworn by Wanyiri Kihoro and Peter Karicho Githumbi, which affidavits were in turn based on the reports of others rather than on the personal knowledge of the witnesses. The respondent submitted therefore that such evidence was inadmissible under the Evidence Act.
21. The respondent submitted further that there are no police records to prove that the alleged events occurred; that it is impossible to locate, retrieve and authenticate the relevant entries in the Occurrence Book and Cell Register given that the alleged events took place between 34 and 40 years before the petition was filed; that Police Occurrence Book records are destroyed after 10 years while Police Cell records are destroyed after five years.

22. With regard to the 1986 arrest, the respondent, while acknowledging that the petitioner was charged in Criminal Case No. 3078 of 1986, took the position that the petitioner pleaded guilty to the charges and consequently has no basis for complaint. As for the medical report produced by the petitioner as evidence of torture, the respondent contended that the report was based on what the petitioner told the doctor and was therefore not reliable. The respondent therefore asked the court to dismiss the petition with costs.

Applicable Constitutional Provisions

23. The petitioner is seeking redress for alleged violation of his constitutional rights under the provisions of Sections 72(1), (3), (5), 74 (1), 77 (1) and (2), 79 (1) and 82 (3) of the former constitution of Kenya. These provisions were contained in the Bill of Rights of the former constitution which was set out in section 70-82. Titled ***'Protection of Fundamental Rights and Freedoms of the Individuals'***, the Bill of Rights set out at Section 70 the rights and freedoms to which each individual was entitled to. Section 72(1) prohibited the deprivation of liberty except in certain specified circumstances, including in execution of the order of a court, or on reasonable suspicion of having committed, or being about to commit, a criminal offense.

24. Section 72(3) required that a person who had been arrested and who is to be charged with a criminal offence should be brought before a court as soon as is reasonably practicable. Where he was not brought before a court within twenty- four hours of his arrest in non-capital offences, the constitution imposed an obligation on the state to prove that the person had been brought before a court as soon as is reasonably practicable.

25. Section 74 expressly prohibited subjecting any person to ***'torture or to inhuman or degrading punishment or other treatment,'*** while section 77 contained the constitutional guarantees to a fair hearing. Section 79 guaranteed to everyone the freedom of expression, the freedom to hold opinions without interference, and to receive and communicate ideas and information without interference. Section 82 contained the non-discrimination provisions of the former constitution, with section 82(3) containing the definition of discrimination. These provisions of the former constitution were in force in 1969, 1975, and 1986 when the petitioner alleges that he was arrested, detained unlawfully, and tortured.

Issues for Determination

26. From the respective cases presented by the parties before me, I believe that I am called upon to determine two issues:

- i. **Did the state violate the petitioner's rights in 1969, 1975 and 1986?**
- ii. **If it did, what is the relief that the petitioner is entitled to?**

The Evidence

27. The petitioner alleges that he was arrested in 1969 from Temple Road High School in Nyeri where he was teaching and taken to a camp near Mount Kenya Forest where he was detained for a period of 21 days and subjected to torture. He alleges that the arrest and torture were effected by an Inspector Kareithi, and that he was forced to take an oath by a Chief Karangi. He has sworn on oath and testified that he was in a room with about twenty other people, two of whom he names as Peter Young Kihara and Patrick Macharia. He states that Peter Young Kihara is recently deceased. He did not call Patrick Macharia as a witness, but relies on the oral and affidavit evidence of his two witnesses, Mr. Wanyiri Kihoro and Mr. Peter Karicho Githumbi.

28. The petitioner's first witness, Peter Karicho Githumbi, testified that he heard around November 1969 that the petitioner was missing from home, and that he had been taken to Chief Karangi. He later heard that the petitioner had been released, and he went to see him at home where the petitioner told him that he had been to Chief Karangi's. He also testified that he heard that the petitioner had been sacked from the government, and later he heard that he had been jailed at

Kamiti.

29. The evidence from the petitioner's second witness, Mr. Wanyiri Kihoro, is that he was aware that the petitioner, who is his older brother, was missing from home for about three weeks in 1969 when there was oath-taking in Central Province following the assassination of T.J. Mboya; that when the petitioner came back home, his ankles were swollen and he could not walk; that he used to take him to hospital together with Peter Karicho Githumbi, PW1, on Githumbi's bicycle.
30. Mr. Wanyiri Kihoro also testified that he was aware that his brother had secured employment with the government, and that he had subsequently lost his position. He was also aware of the protests that followed the assassination of J.M. Kariuki in 1975, and that his brother thereafter fled to Tanzania. He also testified that he was aware that his brother had been arrested, charged and imprisoned in 1986. They had both at one time been incarcerated at the same time in Nyayo House, a fact that he was aware of from information that he testified he had received from an askari at Nyayo House.
31. The respondent has countered that there is no documentary evidence to support the allegations that the petitioner was arrested, detained unlawfully and tortured; that the evidence of the petitioner's witnesses is hearsay, and that the petitioner has not shown why he has brought the petition in 2009, long after the persons who could have shed light on the matter had died.

The Events of 1969

32. The petitioner has testified that he was arrested, tortured and forced to take an oath in 1969. He has given the names of the state agent who arrested him as Inspector Kareithi, and the place where he was allegedly tortured as Chief Karangi's on the slopes of Mount Kenya. While the evidence from his two witnesses does not really advance his case in that it is composed mostly of what they heard either from the petitioner himself or from other, unnamed persons, it does confirm that he was missing from home for about three weeks, and that when he returned, he was unable to walk and the two witnesses had to take him to hospital for treatment. The petitioner's evidence with regard to his arrest and detention for 21 days at Chief Karangi's, and as to what transpired there, was not shaken on cross-examination. The state did not offer its version of event, confining itself only to the assertion that there are no records to authenticate the petitioner's claim.
33. While I am not without some sympathy for the respondent's position in accessing records or persons to testify given the length of time that has elapsed, I cannot shut out a litigant only because the state asserts that it is unable to procure its records, and has not shown any efforts that it made to do so. There is nothing before me to suggest that the petitioner made up the claims in his petition, claims which have been subjected to cross examination and remained consistent. I have therefore no basis for disbelieving his evidence that he was arrested, detained unlawfully, and subjected to torture, then released without charge.
34. The constitution then in force expressly prohibited the deprivation of personal liberty. It required that if one was arrested on suspicion of having committed or about to commit an offence, he was to be charged in court within 24 hours, unless he was suspected of having committed a capital offence, in which case he ought to have been brought before a court within 14 days. In the present case, the petitioner was not even brought before a court. He was held for 21 days and then released. This was in clear violation of his rights under section 72(3) of the former constitution.
35. The constitution also prohibited, at Section 74(1), subjecting a person to torture, cruel and degrading treatment, and from the evidence presented by the petitioner, he was indeed subjected to treatment that, in the absence of evidence to the contrary, amounted to a violation of Article 74(1). I therefore find and hold that the petitioner's right under Section 74(1) was violated by state or state agents who arrested him, subjected him to torture, and compelled him to take an oath.

Dismissal from Employment in 1971

36. The petitioner claims that he was dismissed from employment in 1971 'in the public interest.' He produced in court the certificate of service which he states he was given upon his dismissal. He claims that the dismissal was unlawful, and that he was denied a career in the civil service, did not have a pension, and was forced into penury. He alleges that he would obtain jobs in the private sector, but that the Special Branch would interfere, as a result of which he would be dismissed. He has not, however, adduced any evidence to support these claims, and his assertion that he would have had a career in the civil service and was denied by the acts of the respondent's officers are, in my view, speculative. I therefore make no findings in this regard.

The Events of 1975

37. The petitioner has also testified that he was arrested in 1975 following the assassination of J.M. Kariuki, held in various police stations for 17 days during which he was tortured, and that following his release, he fled to Tanzania. He states that when he returned in 1977, he was again arrested.

With regard to the events of 1975, his first witness, Peter Karicho Githumbi, testified that he had heard that he fled to Tanzania. His second witness, Mr. Wanyiri Kihoro, contradicts his evidence about his arrest in 1975. While the petitioner avers that he was arrested and held for 17 days in 1975 in various police stations, which he does not name, his brother averred as follows at paragraph 12 of his affidavit sworn on 6th June 2011:

12. THAT in 1975, your petitioner became again the target of the Kenyatta Government harassment, which again went out looking for him after the murder of the then Nyandarua North MP, the late JM Kariuki; that the Government in its endeavours to suppress popular dissent arising from the murder started looking for him and he had to go into hiding and later on went into exile in Dar es Salaam, Tanzania to avoid falling again in the hands of the dreaded Special Branch, and he lived in exile for a long time after this, to give the Special Branch enough time to forget him. (Emphasis added)

38. In the circumstances, I am unable to find any violation of the petitioner's rights by state agents in 1975.

The Events of 1986

39. The petitioner has testified that he was arrested in 1986 and held in custody between 28th February 1986 and 7th August 1986 when he was charged in court, a period in excess of 5 months, at Nyayo House. He was thereafter charged before the Chief Magistrate's Court in Nairobi in Criminal Case No. 3078 of 1986 with failing to prevent a felony, namely the publication of 'Mpatanishi' a seditious publication. He was convicted on his own plea of guilty and sentenced to 18 months' imprisonment. He did not appeal against either the conviction or sentence.

40. The petitioner alleges that he was arrested and held at the Nyayo House cells where this court has found in several decisions that torture of those arrested and held there was routine. See for instance, **Rumba Kinuthia -v- The Attorney General** and **Harun Thungu Wakaba & Others -v- The Attorney General Nairobi HC Misc Appl 1411 of 2009**. He has, in his Supplementary Affidavit sworn on 3rd June 2010, described in some detail the acts of torture that he was subjected to while he was held at the Nyayo House cells: that he was physically assaulted with whips, rubber tyre strips and broken furniture legs; he was held in a dark and water logged cell for many days or hours; he was washed with a hose pipe and water was pumped into his cell; he was denied medical treatment even though he had become ill and his liver was inflamed.

41. I have elsewhere in this judgment alluded to a medical report produced by the petitioner to support his contention that he was tortured by state agents. This document is dated 7th August 1992. The letterhead indicates that it originates from an organisation known as **Medical Foundation For Victims of Torture** and is signed by a **Dr. D.M. Forrest, MB, ChB, FRSC**. In it, Dr. Forrest sets

out what he calls the petitioner's '*testimony as given to me*', and draws his conclusions on the petitioner's condition in 1992 from the information that the petitioner gave him.

42. The purpose for which the medical report was produced is not clear, given that it was produced some four (4) years after the petitioner had been released from prison and had fled to the United Kingdom. However, I am not satisfied that it is a document that this court can rely on as constituting evidence of the torture the petitioner suffered at the hands of state agents, based as it is on what the petitioner himself told the doctor.
43. I am, however, satisfied, from the court documents that show that he was arrested and held in Nyayo House for a period in excess of 5 months, that he was subjected to torture as were other persons held in the same place and in the same circumstances as he was. Further, it is hard for the state to explain-and to its credit it has not attempted to-why the petitioner, who was arrested for a non-capital offence and so should have been produced before a court within 24 hours of his arrest as decreed by the then constitution at section 72(3), was held for a period in excess of five months. The only logical inference that one can draw from this lengthy period of confinement is that it was intended to subject him to such treatment and conditions as would lead to his pleading guilty to whatever charges were preferred against him.
44. The former constitution prohibited subjecting anyone to torture, cruel and degrading treatment. It prohibited deprivation of personal liberty, and it required that if one was arrested on allegation of having committed a criminal offence, he should be brought before a court within reasonable time, and if not brought within 24 hours, the state had an obligation to satisfy the court on the delay. No explanation has been tendered for the delay of 5 months before charging the petitioner in court, and I therefore find and hold that there was a violation of the petitioner's rights under section 72(3) of the former constitution.
45. The petitioner has alleged violation of section 77 with regard to the right to a fair trial. From the court proceedings produced before me, it is clear that the petitioner pleaded guilty to the charges against him, and that no trial took place. The Court of Appeal has held in the case of **Julius Kamau Mbugua -v-Republic Court of Appeal Criminal Appeal No. 50 of 2008** that the constitutional protection contained in this provision related to the trial process. Where the accused pleads guilty as in this case, there can be no basis for alleging violation of the right to a fair trial.
46. From the foregoing findings, I find and hold that the petitioner's rights under sections 72(3) and 74(1) of the former constitution were violated by the respondent by his arrest, incarceration and torture at Nyayo House for a period of 5 months and 7 days in 1986. In light of my earlier findings in respect of the events of 1969, the state was therefore guilty of violating the petitioner's rights in these two incidents.

Relief

47. I now turn to consider what relief to grant the petitioner for violation of his rights as set out above. The former constitution provided at section 72(6) that one whose right to personal liberty under the constitution was violated was entitled to damages, and this court has in several cases including those relied on by the petitioner, made diverse awards in damages for violation of constitutional rights protected under the then Bill of Rights.
48. In **David Njuguna Wanyoike -v- The Attorney General High Court Petition No. 792 of 2008**, where the petitioner had been detained for a period of 29 days in Nyayo House and subjected to torture before being charged in court, the court made a global award of Kshs 2,000,000. In **Rumba Kinuthia vs. The Attorney General High Court Petition No. 1408 of 2004**, the High Court (Wendoh J) made an award of Kshs 1,500,000.00. In **James Njau Wambururu -v- The Attorney General High Court Civil Case No. 3829 of 1994**, the plaintiff was awarded Kshs 800,000 by Ang'awa, J for violation of his rights by police officers who arrested him and tortured him. In **Harun Thungu Wakaba vs. The Attorney General Nairobi HC Misc Appl 1411 of**

2009, the High Court (Okwengu J) awarded the petitioners damages ranging between 1,000,000.00 and 2,000,000.00. to the petitioners in the matter, while Majanja J made a global award of Kshs 2,000,000.00 to each of the 14 petitioners in **Benedict Munene Kariuki & 14 Others -v- The Attorney General High Court Petition No. 722 of 2009.**

49. In this case, the court has found that the petitioner was held for a period of 21 days in 1969, and for an inordinately long period of 5 months and 7 days in 1986. In both periods, the court has found that his right under Article 72(1),(2) and (3) and 74(1). I make a global award in favour of the petitioner of Kenya Shillings Five Million (Kshs5,000,000.00) in respect of his incarceration for 21 days in 1969 and in 1986 at Nyayo House for 5 months.

50. The petitioner shall also have the cost of this petition.

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

Mumbi Ngugi

Judge

Karige Kihoro, Petitioner in Person

Christopher Siro, instructed by State Law Office, for Respondent