



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.724 OF 2009

JOSEPH NDUMIA THEURI.....PETITIONER

VERSUS

HON. ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

Introduction

1. The three Petitions before me are part of a series of Petitions brought by persons who have alleged torture and other infringements of fundamental rights in the infamous Nyayo House Torture Chambers.

Petition No.729/2009

2. The Petitioner, Joseph Ndumia Theuri, by his Petition dated 16th April 2009 allege that on 13th October 1989, he was lawfully at his place of work within City Hall, Nairobi when he was arrested by a contingent of Police officers who then led him to his house at Dagoretti in Nairobi where a thorough search was conducted. Later, he was taken to Kileleshwa Police Station where he was held for one night before being blindfolded and after a long drive, he found himself at Nyayo House. For fourteen days thereafter, he was interrogated about his alleged links with an organization known as “*Mwakenya*” which had been proscribed by the Government of the Republic of Kenya. Allegations were made that he was a recruitment agent for the said organization and that he was also involved in sending young Kenyan men for military training in Libya. He was throughout that period allegedly assaulted with rubber whips, metal bars, broken chairs and he was also consistently slapped, kicked and hit with blows. That he would sometimes be placed in a dark cell where pressurized hot and cold water would be sprayed at intervals and he was kept without food, water and beddings.

3. It was also his case that when he fell ill after then days in custody, he was taken for treatment at Kenyatta national Hospital before he was taken back to Nyayo House and released four days later. He contends that after his release, he was dismissed from employment but after intervention by the Local Government Workers Union, he was reinstated he faced at work.

4. The Petitioner has also argued that he suffered physically, psychologically, economically and politically as a result of his ordeal aforesaid and he now prays for the following reliefs;

“i) A declaration that the Petitioner's fundamental rights and freedoms were contravened and grossly violated by the Respondent's Special branch Police Officers who were Kenyan Government servants, agents, employees and in its institutions on 13th October, 1989 and for 14 days at the Nyayo House Torture Chambers.

ii) A declaration that the Petitioner is entitled to the payment of damages and compensation for the violation and contraventions of his fundamental rights and freedoms under the aforementioned provisions of the Constitution (former).

iii) General damages, exemplary damages and moral damages on an aggravated scale under Section 84(2) of the Constitution of Kenya (former) for the unconstitutional conduct by the Kenyan Government servants and agents be awarded.

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

v) Costs of the suit and interest”

5. I note that the Respondent was served, was represented at the hearing of the Petition and filed a Replying Affidavit sworn on 27th July 2011 by one Julius K. Ndegwa, a Senior Deputy Commissioner of Police. He depones that there are no records of the petitioner being arrested and or locked up at Kileleshwa Police Station on the alleged dates or at all. That in any event Occurrence Books are destroyed after 10 years and cell Registers after 5 years.

6. Further, that the Kenya Police is a professional service and has never involved itself in the torture of suspects and that Nyayo House Torture Chambers has never been a Police Station neither is he aware of any Police cells locate there.

7. That therefore the Petition should be discussed with costs.

Petition No.41/2010

8. Edith Wairimu Kairuki is the Petitioner in this Petition and her case is that on 13th March 1988, she was arrested in Nakuru, and whisked away to Nairobi's Nyayo House where she was held for five days. Here alleged interrogators accused her of being a follower of one, Koigi Wamwere, an alleged dissident and anti-government operative and also accused here of distributing seditious publications known as “”Pambana” and “Mpatanishi”.

5. In the Petition, she claimed that she was repeatedly slapped, beaten up ith broken chair pieces and rubber whips and was kicked mercilessly for the five days she was in custody. She was at the time, five months pregnant and was not allowed any communication with her family, was charges being preferred against her.

6. She contended that the actions of the government agents caused her physical, psychological pain and violated her fundamental rights. She now seeks the following reliefs;

“i) A declaration that the Petitioner's fundamental Rights and Freedoms were contravened and grossly violated by the Respondent's Special Branch Police officers who were Kenyan Government servants, agents and/or employees and in its institution on 13th March 1988 for 5 days at Nyayo House Torture Chambers.

ii) A declaration that the Petitioner is entitled to the payment of damages and compensation for the violation and contraventions of his fundamental rights and freedoms under the aforementioned provisions of the Constitution.

iii) General damages, exemplary damages and moral damages on an aggravated scale under Section 84(20 of the Constitution of Kenya for the unconstitutional conduct by the Kenyan Government its

agents and/or servants be awarded.

iv) *Any further order, writs, directions as this honourable Court may consider appropriate.*

v) *Costs of the Petition and interest.”*

7. I have perused the record and sadly, I see no response by the Respondent but I have noted that he filed written Submissions which I will consider later in this judgment.

Petition No.42/2010

8. The Petitioner in this Petition is one, David Munga Kibiro. In his Petition dated 26th August 2010, he claims that 29th July 1986 he was arrested while lawfully at his residence within Kahawa West area of Nairobi, taken to Kileleshwa Police Station and later to Nyayo House. On the following day, a panel of interrogators led by one James Opiyo grilled him on his links to a banned organization known as “*Mwakenya*”. He was allegedly threatened during interrogation by an armed policeman who kept waving pistol at him.

9. It is also the Petitioner's case that he was kept in custody for 19 days before he was released without charge. Later, he was shunned by members of his clan and other people who declined to be associated with him because he was deemed to be anti-Government. His businesses also collapsed and he lost contracts worth millions of shillings for that reason. It is his further case that he suffered psychological, economic social, political and filial trauma and his rights under **Article 72(1),(2) and (3) of the Repealed Constitution** were grossly violated.

He now seeks the following Orders;

“i) A declaration that the Petitioner's fundamental Rights and Freedoms were contravened and grossly violated by the Respondent's Special Branch Police Officers who were Kenyan Government servants, agents and/or employees and in its institutions on 29th July 1986 for 19 days at Nyayo House Torture Chambers.

ii) A declaration that the Petitioner is entitled to he payment of damages and compensation for the violation and contraventions of his fundamental rights and freedoms under the aforementioned provisions of the constitution.

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 it agents and/or servants be awarded.

iv) *any further order, writs, directions as this Honourable Court may consider appropriate.*

v) *Costs of the Petition and interest.”*

10. Like in Petition No.41/2010, I see no response by the Respondent to this Petition.

Determination

11. I have set out the facts as pleaded and with regard to petitions No.41/2010 and 42/2010, the facts are completely uncontested. It seems that the Respondent, in these matters has taken the simple view that “*he who alleges must prove*” and that it had no obligation to respond to the facts as laid out by the Petitioners. With respect, that position, plausible as it may sound, requires some interrogation. I say so because where a Petitioner alleges torture and unlawful incarceration in the circumstances that obtained during the one-party regime, this court expects a credible response from the Government. Constitutional violations cannot simply be swept under the carpet because it amounts to continuous perpetration of the culture of impunity and hiding behind legal niceties in refusing to accept or deny such violations.

12. In any event, **Rule 16** of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the individual) High Court Practice and Procedure Rules, 2006 states that the “Attorney General ... shall within fourteen days of service of the Petition, respond by way of a replying Affidavit and if any document is relied upon, it shall be annexed to the replying Affidavit”

In this case, it is obvious that the Respondent has failed to comply with that requirement and in any event, this Court has previously ruled that where facts are presented and there is no other evidence to rebut it, then, unless the evidence is so ridiculous, far-fetched or clearly made up, the Court would admit it. I take the same position with regard to the two positions aforesaid.

13. Turning to Petition No.729/2009, it is my view that the Petitioner has powered his case to the required standard. The evidence contained in the Replying Affidavit is no answer to the Petitioner's claim. I say so with respect, because it is a matter of judicial notice that the Kenya Police Service for many years failed to live up to its motto, “*utumishi kwa wote*” - service for all

14. The Petitions before me are a good example of its conduct in yester years and that fact has not been controverted.

15. In the end, I am satisfied that each of the three Petitioners before me has proved his/her case and are entitled to the declarations that their fundamental rights were violated as stated in their Petition.

16. Having held as above, the law as I understand it is that **Section 72(3), (5) and (6)** of the **Repealed Constitution** provide 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.

(5) If a person arrested or detained as mentioned in subsection (3)

(b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall, unless he is charged with an offence punishable by death, be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

(6) A person who is unlawfully arrested or detained by another person shall be entitled to compensation therefor from that other person.”

17. It is obvious that **Section 72(2)** was particularly breached because each of the Petitioners was arrested, and incarcerated for more than 24 hours while all the allegations against them would have led to non-capital offences.

18. For the above reasons, I shall issue declarations that the Petitioners' fundamental rights under **Section 72(3)** aforesaid were violated by agents of the Republic of Kenya.

Remedies

19. **Section 72(6)** aforesaid provides that once a violation of **Section 72(3)** has been proved, then the victim of the violation is entitled to damages. This was the holding in Gitau Cyrus Muraguri vs Republic; H.C. Misc. Case No.1185/2003 per Musinga J. among other authorities on the subject and I hold the same view.

20. As to quantum of damages, in Harun Thungu Wakaba & Others vs The Attorney General, H.C. Misc. Appl. No.1411 of 2004, Okwengu J. in similar situations awarded the Petitioners between Kshs.1 Million to Kshs.3 Million for violation of rights.

Guided by the authorities that I have perused, I deem it fit to grant a global award in damages as follows;

i) In Petition No.729/2009, I shall award the Petitioner **Kshs.1,500,000/-** plus costs.

ii) In Petition No.420/2010, I shall award the Petitioner **Kshs.500,000/-** plus costs.

ii) In Petition No.421/2010, I shall award the Petitioner **Kshs.2,000,000/-** plus costs.

21. Judgment is entered in the above terms against the Respondent.

22. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 15TH DAY OF MARCH, 2013

ISAAC LENAOLA
JUDGE

In the presence of:

Irene – Court clerk

Mr. Okindo for Petitioners

Mr. Opondo for Respondents

Order

Judgment duly read.

ISAAC LENAOLA
JUDGE