



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION**

**PETITION NO 97 OF 2011**

**JUSTUS OTOTO NYANGIRI .....PETITIONER**

**VERSUS**

**THE COMMISSIONER OF POLICE.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. In his petition dated 23<sup>rd</sup> May 2012, the petitioner seeks various orders and declarations with regard to the alleged torture that he was subjected to by police officers based at the Kabete Police Station on 15<sup>th</sup> March 2010. He alleges that his rights as guaranteed under Articles 29 and 49 of the Constitution of Kenya 2010 were violated following his arrest and detention at the Kabete Police Station between the 15<sup>th</sup> and the 16<sup>th</sup> of March 2010.

**The Petitioner's Case**

2. The petitioner's case as presented by his Counsel, Mr. Odera and as contained in his petition and in his affidavit sworn on 23<sup>rd</sup> May 2011 and his written submissions and supplementary written submissions dated 26<sup>th</sup> January 2012 and 25<sup>th</sup> April 2012 respectively is that his constitutional rights were violated when he was unlawfully arrested, assaulted and detained by police officers on the night of 15<sup>th</sup> March, 2010 and then released without charge on the evening of 16<sup>th</sup> March 2010. He states that he was employed as a matatu driver by one Thomas Mochana Nyairabu; that on 15<sup>th</sup> March 2010, at about 9.00pm, while he was driving Nissan Matatu registration number KBB 045F along Kangemi bridge, he was flagged down by a police officer who was aboard a police vehicle; that when he stopped, two police officers disembarked from the police vehicle and unlawfully and without any justification boarded his vehicle and ordered him to drive to Kabete Police Station; that one police officer slapped him on the face as he drove, causing him to lose control of the vehicle and land in a ditch; that he was then pulled out of the wreck of his vehicle while being assaulted with blows and kicks and bundled into a police vehicle which had been trailing his vehicle and driven to Kabete Police Station.

3. The petitioner alleges further that at the Police Station, several police officers subjected him to untold acts of torture which included whipping with an electric cable, beating on his elbows and knees using assorted weapons such as the 'Massai rungu', and stepping on his genitalia and the neck. He avers

that he was injured and exposed to cold, and was not accorded medical attention. He contends that these acts of torture contravened his rights as provided for by Article 25(a) and (c) of the Constitution; that the police officers contravened his constitutional rights by detaining him without any charges being preferred against him in contravention of Article 29 of the constitution; that he had not committed any offence at the time of his arrest, and if he had, the police failed to inform him in a language he understood the reasons for his arrest and subsequent detention contrary to Article 49 (1)(a), (b), (c) and (d) of the Constitution. He avers that he was not issued with the Occurrence Book (OB) entry of 15<sup>th</sup> March, 2010 with regard to his arrest which he alleges amounts to a contravention of his rights under Article 35(1) of the Constitution. He was released at 6.p.m on 16<sup>th</sup> March 2010 without charge.

4. The petitioner asked the court to be guided by, among others, the decision in **Harun Thungu Wakaba -v- Attorney General Misc. Appl. No. 1411 of 2004** and **Munene Kamau -v- Attorney General** in considering this petition, and to grant him the following orders:

*(a) A DECLARATION that the actions and omissions of the respondents violate the fundamental rights and freedoms of the petitioner.*

*(b) ALTERNATIVELY to (a) hereinabove a DECLARATION that the arrest and detention of the petitioner by the 1<sup>st</sup> Respondents Police Officers was illegal, unlawful and unconstitutional in violation of Article 29 of the constitution of Kenya.*

*(c) DECLARATION that the 1<sup>st</sup> respondents police officers not informing the petitioner in a language that he understands of the reason of his arrest and subsequent detention, was an infringement of the petitioner's rights as an arrested person and in violation of Articles 49(1)(a),(b)(c) & (d) of the constitution.*

*(d) A DECLARATION that failure by the 1<sup>st</sup> respondents police officers to issue the petitioner with the OB No. entry of 15<sup>th</sup> march 2010 at his arrest, which information the police had in their possession is a contravention of Article 35(1) of the constitution.*

*(e) Further and without prejudice to the foregoing an ORDER compelling the respondents to avail all information relating to the arrest of the petitioner on 15<sup>th</sup> march 2010.*

*(f) A DECLARATION that the brutal and indiscriminate bearing, flogging using a whip and electricity cable, hitting his elbows and knees with a baton, stepping on the petitioner's neck and genitalia with boots amounted to torture and cruel, inhuman or degrading treatment or punishment contrary to Article 25(a) of the Constitution.*

*(g) A DECLARATION that the torture meted out on the petitioner amounts to criminal offences of unlawful wounding and assault occasioning actual bodily harm contrary to section 237 and 251 of the Penal code, Chapter 63 Laws of Kenya respectively which need to be investigated by the 1<sup>st</sup> respondent and the perpetrators accordingly prosecuted.*

*(h) An ORDER compelling the respondents to investigate and/ or cause investigations to be conducted and to prosecute the Police officers responsible for the aforesaid criminal acts.*

*(i) An ORDER for COMPENSATION for the breach for the breach of the fundamental rights and freedoms of the petitioner.*

*(j) A DECLARATION that the petitioner is entitled to special, general, exemplary and punitive damages against the respondents herein jointly and/or severally.*

*(k) Special, general, exemplary and punitive damages as may be assessed by the Honourable court.*

*(l) Being a public interest suit no order as to costs.*

*(m) Any further relief or orders that the Honourable court shall deem just and fit to grant.*

### **The Respondents' Case**

5. The respondents oppose the petitioner's case and have filed undated Grounds of Opposition and written submissions dated 19<sup>th</sup> April 2012 on which their Learned Counsel, Mrs. Sirai, relied on at the hearing of this petition. Their contention is that this petition is an abuse of the court process, has no legal basis and ought to be dismissed.

6. The respondents allege that the petitioner was informed of the reasons for his arrest and that he was duly booked in the Occurrence Book. They rely on the petitioner's own annexure **JON9**, a medical report, in which he informed the doctor that he had been arrested for obstructing traffic. They allege that he was not denied a copy of the OB and aver that he has not proved that he requested for one; that the petitioner has not established that the injuries he sustained were directly as a result of torturous acts by the police and that the medical report did not attribute the injuries he sustained to torture or inhuman treatment.

7. The respondents also argue that the treatment that the petitioner was subjected to did not meet the legal definition of torture; that the period during which he was detained was less than the 24 hours permitted under the Constitution as he was unlawfully confined from 9.00pm to 3.00pm the following day. They nonetheless submitted that an award of Ksh. 100,000.00 would be sufficient as damages to the petitioner and relied on the case of **Robert Kisiara Dikir and 3 Others -v- Officer Commanding Keiyan General Service Unit, Petition No. 119 of 2009** where Musinga J (as he then was) awarded the petitioners Ksh.250,000.00 each for wrongful confinement and Ksh.200,000.00 as exemplary damages for being held incommunicado for 4 to 5 days.

### **Determination**

8. Article 23 and 165 of the Constitution vest in this court the jurisdiction to hear and determine a petition alleging violation of constitutional rights, and to grant appropriate relief. At the hearing of this matter, it was contended on behalf of the respondents that the Constitution does not have retrospective application; that since this petition has been brought under the provisions of the Constitution of Kenya, 2010, promulgated on 27<sup>th</sup> August 2010, while the events complained of occurred on 15<sup>th</sup> and 16<sup>th</sup> March, 2010, the petition ought to be dismissed.

9. The petitioner has responded, correctly in my view, that the prohibition of torture contained in the Constitution of Kenya 2010 was contained also in Section 74 of the former constitution, and that any right that was provided for under the former constitution and was carried over in the new Constitution is still protected-See **Duncan Otieno Waga -v- The Attorney General High Court Petition No. 94 of 2011**.

10. In determining this matter therefore, even though it has been brought under the provisions of the Constitution of Kenya 2010, I will apply the constitutional provisions as they existed at the time the alleged facts constituting the alleged violations occurred.

11. It is noteworthy that the respondents, while opposing the petition, have not filed an affidavit in opposition. The respondents have given no reason for their failure to file an affidavit in response and, given that the events complained of occurred fairly recently, it cannot be that they were not able to identify the officers involved in the incident. They have therefore not controverted the petitioner's version of events as contained in the affidavit in support of his petition, and the court will therefore take his averments as representing the truth of what occurred on the night in question.

12. What emerges from these facts is that the petitioner was arrested in Kangemi and taken to Kabete Police Station. He was slapped by one police officer on the way to Kabete Police Station, and at the station, he was again physically assaulted. The medical report and the photographs annexed to his affidavit attest to this. The diagnosis in the report is '**Soft Tissue Injury 2 Physical assault**' while the

treatment is shown as ‘**Analgestics.**’ The petitioner was held between 9.30 p.m on 15<sup>th</sup> March 2010 and 6 p.m. on 16<sup>th</sup> March 2010.

13. Was there any justification for the arrest, detention, assault or torture of the petitioner by the police? If there was no justification, did these acts on the part of the officers of the respondents amount to violations of the petitioner’s rights?

### **Arrest**

14. The petitioner has alleged that his arrest was without due regard to the law and in violation of his rights under Articles 29 and 49 of the Constitution. He contends therefore that the respondents violated his rights under Article 29(a) of the Constitution and Articles 9 and 6 of the Universal Declaration of Human Rights 1948 and African Charter on Human and People's Rights respectively. While Articles 29 and 49 of the Constitution were not in force at the time of the petitioner’s arrest, the constitution then in force contained similar provisions at Section 72 as follows:

***72. (1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases-***

***(a)...***

***(b)...***

***(e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offense under the law of Kenya;***

***(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 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.***

15. The former constitution thus gave the police power to arrest a person when he was suspected of committing or of being about to commit an offence. The petitioner has relied on the decision in **Joseph C Mumo -v- Attorney General and Another, H.C.C.C No. 250 of 2004**, where it was held that there has to be tangible evidence which confirms the basis of the reasonable grounds for suspicion of the commission of an offence, but not having the benefit of hearing the respective parties with regard to the arrest, it is difficult to make a finding that there was or was not reasonable basis for the arrest. I therefore find no violation of the petitioner’s rights arising from his arrest.

16. Apart from providing the circumstances under which the deprivation of liberty was permissible, the former constitution also gave specific injunctions about what was to happen following such arrest. The person who was arrested was to be informed ***as soon as reasonably practicable***, of the reasons for his arrest. In this case, the petitioner was arrested at about 9.00 p.m. on 15<sup>th</sup> March 2010 and released at about 6.p.m on 16<sup>th</sup> March 2010. He was therefore held for less than 24 hours, and was released without charge. Though the petitioner alleges that he was not informed the reason for his arrest, his own document

'JON9'- the Medical Report from Nairobi Women's Hospital dated 26<sup>th</sup> March 2010-indicates the reason for his arrest as being obstruction of traffic, a fact that could only have been relayed to the doctor by the petitioner. It is apparent therefore that the arrest of the petitioner was in accordance with the then constitution, and there was no violation of the provisions of Section 72 with regard to the deprivation of liberty.

### **Right to Information**

17. The petitioner has alleged a violation of his right to information as guaranteed under Article 35(1) of the Constitution. As stated earlier, the Constitution does not have retrospective application. The former constitution did not guarantee the right to information held by the state, and so at the time the events complained of occurred, there was no such right guaranteed by the constitution. However, even had there been such a guarantee, I am unable, from the facts before me, to establish a violation of this right. The petitioner has not placed any facts before the court that would show that he requested for the OB and the said OB was denied. The petitioner has relied on the decision of Musinga, J (as he then was) in **Peter M Kariuki -v- Attorney General, Petition No. 403 of 2006**, but in my view, the facts of this case with regard to the right to information differ considerably from those confronting the court in the above case.

### **Allegations of Torture**

18. The petitioner claimed that he was subjected to acts of torture by the agents of the respondents in violation of his protection against torture as stipulated by Article 25(a) of the Constitution. He alleged that he was slapped on the face by one of the police officers who arrested him thus making him lose control of his motor vehicle and land in a ditch. Thereafter, upon arrival at the police station he was flogged with an electric cable, his hands and knees were hit with batons and his genitalia and neck stepped on. He produced in evidence photographs showing the injuries he sustained and a newspaper cutting from the Standard Newspaper of 24<sup>th</sup> March 2010 which he averred highlighted his ordeal. He also produced a medical report from the Nairobi Women Hospital dated 26<sup>th</sup> March 2010 which indicates that he suffered soft tissue injuries and was put on analgesics, defined in the Concise Oxford English Dictionary as medicine or drugs for the relief of pain.

19. While the newspaper cutting has no evidential value, the medical report, in the absence of evidence to the contrary, is sufficient to indicate that the petitioner did suffer some minor injuries at the hands of the respondents. The question is whether, as the petitioner alleges, what he was subjected to amounts to torture and cruel and degrading treatment which was prohibited under Section 74 of the former constitution.

20. The United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment defines torture as:

**'any act by which severe pain or suffering whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.'**

21. In **Samwel Rukenya Mburu -v- Castle Breweries, Nairobi HCC 1119 of 2003**, Visram J (as he then was) held that:

**'Prohibition against torture, cruel or inhuman and degrading treatment implies that an "action is barbarous, brutal or cruel" while degrading punishment is "that which brings a person dishonour or contempt."**

This definition was upheld most recently, by a 3 Judge bench in the case of **R.M -v- Attorney General &**

**4 Others, Petition No. 705 of 2007.** In **Harun Thungu Wakaba -v- Attorney General Misc Applic No. 1411 of 2004**, which dealt with the alleged torture of persons held at Nyayo House, Okwengu J (as she then was) held that:

**'As I have stated above, the actions such as being stripped naked, assaulted with leather whips, broken chairs, metal bars, slaps, kicks and blows and being kept in a dark cell...were all acts of torture which were a violation of Wakaba's right to protection from inhuman treatment as provided for under Article 74(1) of the constitution.'**

22. The petitioner in this case was arrested by police officers allegedly because he had committed a traffic offence: as can be gleaned from his medical report, the offence of obstructing traffic. He was slapped and beaten by these officers, and it can only be concluded that such beatings were being inflicted as punishment for his having committed the said traffic offence. Where such acts are committed by police officers acting in the course of their duty and in their official capacity, they fall squarely within the definition of torture set out above. Not only are they prohibited by the Constitution but the Police Act at Section 14 A (2) expressly prohibits police officers from subjecting any person to acts of torture, cruel, inhuman or degrading treatment. I therefore find and hold that the petitioner was subjected to torture contrary to Section 74 of the former constitution.

### **Damages**

23. The petitioner has sought various declarations from this court, and has also sought special, general and exemplary damages against the respondents. With regard to the special damages claim for Kshs 3,000, the petitioner has not produced any documents in support of his claim, alleging that the receipts were lost. Without any documents to back this claim, I am unable to make an award in respect of this amount.

24. The petitioner has asked the court to make an award of Kshs 1.5 million for the violation of his rights by the respondents. From the medical report adduced before me, the petitioner suffered what appear to be minor soft tissues injuries for which he was treated with analgesics nine days after they were inflicted. In the circumstances, an award of Kshs 150,000 is, in my view, sufficient to vindicate the petitioner for the violation of his right to be free from torture and other cruel and degrading treatment.

25. The petitioner has also made a claim for exemplary damages. However, as this court has observed in **David Njuguna Wanyoike -v- Attorney General Petition No. 792 of 2008 and Odungi Randa Ongombe -v- Attorney General Petition No 780 of 2008** the making of such an award in a constitutional petition would amount to making a double award. I therefore decline to make an award of exemplary damages.

26. As the petitioner has succeeded partly in his claim against the respondents, he shall have the costs of this petition.

27. In closing, I would like to observe that it is a matter of concern that this incident occurred and there was no attempt by the state to investigate the matter, identify the individual officer(s) responsible for the violations, and take appropriate disciplinary action against them to deter future violations. It demonstrates a failure on the part of the state to meet its constitutional obligation to protect the human rights of its citizens, particularly from violation by its officers, and the state must become alive to this obligation.

**Dated Delivered and Signed at Nairobi this 14<sup>th</sup> day of March, 2013.**

**Mumbi Ngugi**  
**Judge**

**Mr. Odera instructed by the firm of Tonny M. Odera Advocates for the Petitioner**

**Mrs. Sirai instructed by the State Law Office for the Respondents**