



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HC MISC. CIVIL CASE NO 565 OF 2005

MUGO THEURI .....  
.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

**Introduction**

1. This is another of the many matters that have come before this court in the last decade that pertains to the violation of citizens' rights by state officers in the now infamous Nyayo House cells. The applicant alleges violation of his rights under various sections of the former constitution by agents of the state following his arrest on 22<sup>nd</sup> September 1986 and his subsequent trial and imprisonment.
2. In his application brought by way of Originating Summons dated 7<sup>th</sup> February 2004 and supported by his affidavit the same date, the applicant seeks the following orders:
  1. ***A declaration that the Plaintiff's fundamental rights and freedoms under Sections 70 72(3) & 5), 74(1),76,77,78(1),79(1) & 80(1) 82(3) have been and were contravened and grossly violated by police officers and other Government servants, agents, employees and institutions in 1986 and on diverse dates thereafter.***
  2. ***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 constitution.***
  3. ***General damages, exemplary damages on an aggravated scale under Section 84(2) of the constitution of Kenya for he unconstitutional conduct by government servants and agents***
  4. ***Any further orders, writs, directions, as this Honourable Court may consider appropriate.***
  5. ***Costs of the suit, with interest at court rates.***
3. The applicant also filed a further affidavit sworn on 27<sup>th</sup> February 2012 in reply to the affidavit in response to the application filed by the respondent. He also relied in support of his case on a

witness statement made by his sister, Mrs. Jane Wairimu Karanja, on 21<sup>st</sup> March 2012.

4. The respondent opposes the application and has filed an affidavit in reply sworn by Julius K. Ndegwa, a Senior Deputy Commissioner of Police II, on 27<sup>th</sup> July 2011.
5. The application was heard by way of viva voce evidence following which both parties filed written submissions in support of their respective cases dated 20<sup>th</sup> June 2012 and 14<sup>th</sup> May 2013 respectively.

### **The Case for the Applicant**

6. The applicant's case as it emerges from his pleadings and oral evidence in court is that he was unlawfully arrested by state officers, held at Nyayo House in contravention of his constitutional rights, and subjected to treatment that was in violation of his rights under the former constitution of Kenya. He therefore claims general and exemplary damages for the violation of his constitutional rights.
7. The applicant, who was 59 years of age at the time of hearing of this matter, states that he was working as a journalist for the Standard Newspaper partly in Nairobi and partly in Nakuru at the time of his arrest; that on 22<sup>nd</sup> September 1986, he was in Nakuru where he was working as a reporter; that he went to the Nakuru Law Courts to cover a case and found some people who said they were looking for him and asked him to accompany them, which he did. He states that he was taken to Nakuru Central Police Station and told that he was needed in Nairobi; that he was put in a cell where he was held between 9.00 a.m. to 3 p.m., then put in a land rover and driven to Nairobi.
8. The applicant states that in Nairobi, he was taken to Central Police Station where he spent the night, and the next day, he was taken from the cell and blindfolded; that he was driven around for several hours then taken to a building and put in a room in the said building; that he spent the night in the room alone, and the following day, he was again blindfolded, taken out of the room and put in a lift; then taken to another room, put in a chair and the blindfold removed.
9. According to the applicant, he was subjected to questioning by about 7 men in mufti who were in the room; that he knew some of the men were policemen as he had encountered them in his work as a journalist. He named a Mr. Wachira whom he had been drinking with before moving to Nakuru; that they were initially friendly and he chatted and joked with them for about an hour; that thereafter they started asking him what he knew about Mwakenya, Pambama, and anti-government activities; that they then started questioning him in a hostile manner, started to slap him, made him undress and do press – ups; that some of them started beating him up with kicks, slaps and broken chair legs until he collapsed.
10. The applicant contend that, after he collapsed, he was blindfolded and taken, while naked, to another room which was flooded with cold water; that the room had no furniture and he had to lie on the floor; that he was denied food, water and toilet facilities. He claims further that he was interrogated for many hours without food, drink or sleep and held incommunicado in contravention of his right to protection from inhuman and the applicant avers that he was not allowed to have contact with anyone, and that he was held and violently tortured in Nyayo House for 49 days. He states that he thought the torture would go on until he admitted something so he negotiated with those who were questioning him and said that he would confess to having taken an oath degrading treatment under section 74 of the constitution.
11. He was therefore taken before the Chief Magistrate's Court where he pleaded guilty to the charge of taking an unlawful oath and failing to prevent a felony and was sentenced to imprisonment for a term of 4 years and 18 months respectively, the sentences to run concurrently. A copy of the charge sheet and proceedings in the criminal case against the applicant, Criminal Case No 5316 of 1986 R –vs- Mugo Theuri was produced in court by Ms. Mary Anne Wamaita, an Archivist working in the Chief Magistrate's Court Archives. The applicant did not appeal either against his

conviction or sentence.

## **The Case for the Respondent**

12. The respondent did not call any witnesses but relied on the affidavit sworn by Julius K. Ndegwa, a Senior Deputy Commissioner of Police II and Director of Operations. According to the respondent, it has no records with regard to the alleged arrest of the applicant and events subsequent thereto; that there is no report or record at Nakuru Central Police Station, Nairobi Central Police Station or any other police station of the applicant's arrest; or that he was transferred to Nairobi subsequent to his arrest.
13. The respondent avers that Police Occurrence Books are destroyed 10 years after the last entry; that Police Cell Registers are destroyed 5 years after the last entry, and that it is impracticable to locate, retrieve and authenticate the relevant entries in the Occurrence Book and Cell Registers given that the alleged events occurred over 18 years prior to the filing of the application. He avers that the Nyayo House Torture chambers are alien to the Kenya Police; that it has never been a police station or a police cell and any allegation that the applicant was held there by the Kenya Police are untrue.
14. The respondent contends that the Kenya Police does not have, and did not have at the material time, a suspect referral arrangement or a suspect-handling arrangement with the Nyayo House operatives or any other private agency outfit; that it is professional and executes its statutory mandate competently and proficiently; that it does not condone torture of suspects and respects the human rights of individuals as enshrined in the Constitution.
15. In the written submissions, the respondent contends that the applicant pleaded guilty to the charges preferred against him and did not appeal. He cannot therefore complain or ask for damages after a conviction by a valid court order; that he has not proved that he was subjected to torture while held by the police, and that his claim is time barred. The respondent has relied on the cases of **Peter Ngari Kagume -vs- The Attorney General & Others High Court Petition No. 128 of 2006** and **Durity -vs- Attorney General (2002) UKPC 20** with regard to delay.

## **Determination**

16. The main issue for determination in this matter is whether there was in his arrest, detention prosecution and imprisonment, a violation of the applicant's rights under Sections 70, 72(3) and (5), 74(1), 76, 77, 78(1), 79(1), 80(1) and 82(3) of the former constitution. If the answer to this issue is in the affirmative, the court would be called upon to determine whether there has been such delay in filing and prosecuting this claim as to disentitle the applicant to relief.
17. The applicant's evidence, which was not controverted in material respects even in cross-examination, is that he was arrested in Nakuru on 22<sup>nd</sup> September 1986; that he was held in Nakuru Central Police Station overnight, and transported to Central Police Station Nairobi, where he was held for some days before being taken, blindfolded, to a building that he later realised was Nyayo House. He was held in the said building for a period of 49 days during which he was subjected to acts of torture which he has detailed in his affidavit and in his evidence before the court. On 7<sup>th</sup> November 1986, as the court record from the Chief Magistrate's Court indicates, he was charged in court, pleaded guilty and sentenced to 4 years imprisonment, which he served in various prisons before he was released in 1989.
18. The constitutional guarantees of fundamental rights and freedoms of the individual were set out at sections 70-83 of the former constitution. Section 70 guaranteed to every person in Kenya the fundamental rights and freedoms set out in the constitution, subject only to the rights and freedoms of others and for the public interest. Article 72 contained the constitutional guarantee to personal liberty and provided at section 72. (1) as follows:

***‘No person shall be deprived of his personal liberty save as may be authorized by law...’***

19. Section 72(3) required that a person who had been arrested and detained for the purpose of bringing him before a court:

***‘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.’***

20. Section 72(5) of the former constitution contained the constitutional entitlement of an accused person to release on bail unless he was charged with an offence punishable by death, in which case he was not entitled to bail. Section 73 of the former constitution prohibited subjecting anyone to slavery or servitude, or to forced labour, while Section 74 prohibited subjecting anyone to **‘torture or to inhuman or degrading punishment or other treatment.’**

21. I believe that there can be no dispute that the acts of the respondents violated the rights of the applicant under sections 72(1), (3) and (5) of the former constitution. He was arrested and held by state officers for a period of 49 days, far in excess of the period provided for under the constitution. The respondents contend that they have no records about the arrest and detention of the applicant by state officers. However, the fact that he was produced in court and charged with an offence by the state at the end of this period, if nothing else, confirms that he was in the hands of state officers for the period that he alleges that he was so held.

22. I am also persuaded that the applicant’s rights under Section 74 were violated by the respondent in the period that he was detained unconstitutionally. There has already been a line of cases that have found that the detention of persons at the Nyayo House cells was accompanied by, and would appear to have been intended for, the purpose of extracting confessions from those so held through torture. No other reasonable explanation for the indefinite detention, and then the arraignment in court that was invariably followed by a plea of guilty has ever been proffered by the state. See in this regard the decisions of the court in **Harun Thungu Wakaba -v- The Attorney General Nairobi HC Misc Appl 1411 of 2009 (OS); Rumba Kinuthia -v- Attorney General Nairobi HCCC 1408 of 2004; Bernard Wachira Waheire -v- Attorney General Nairobi HCCC No 1184 of 2003.**

23. The applicant has also alleged violation of his rights under sections 76(1) and 77(1) of the Constitution. Section 76 contained the constitutional guarantee against unlawful searches of one’s person or property. No evidence was adduced in support of this allegation, and I therefore make no findings with regard thereto.

24. With regard to section 77(1) relating to the right to a fair trial, the applicant was convicted on his own plea of guilty on the date that he was charged in court, so there was no trial conducted. As the Court of Appeal held in the case of **Julius Kamau Mbugua –vs- Republic, Court of Appeal Criminal Appeal No. 50 of 2008**, the rights guaranteed under section 77 were trial-related, and where a trial had not taken place, one could not allege violation of the rights guaranteed under that section.

25. The applicant has also alleged violation of the right to freedom of expression, assembly and movement guaranteed under sections 79, 80 and 81 of the constitution. He has also alleged violation of the non-discrimination provisions of section 82. However, he has not presented evidence to support the allegation of violation of these rights. Consequently, I have no basis for

making a finding that these rights were violated.

26. The applicant has also alleged violation of his rights under section 73 of former constitution during the period that he was imprisoned at Kamiti and Kibos Prisons. However, given that he was serving a sentence of a court against which he had not appealed, I am unable to inquire into the conditions and circumstances in the said prisons.
27. The state has contended, in reliance on the case of **Lt. Col Peter Ngari Kagume and Others -v- Attorney General** (supra), that this matter is time-barred as the alleged violations occurred more than fifteen years before the matter was filed. I think that this issue has been settled in favour of the applicant in light of the decisions that I have set out above: that there is no time limitation in respect of claims for violation of constitutional rights.
28. It has also been recognized that in respect of the Nyayo House torture cases, it was not possible for those who fell victim to state abuses to file claims in the then prevailing repressive political regime. It was only after the opening up of the political space in 2003 that parties were able to lodge their claims against the state. In the present case, the matter was filed in 2005, and I can find no basis for denying the applicant relief on the basis that there was delay in lodging his claim for compensation.

### **Conclusion**

29. Having found violation of the applicant's rights under sections 72 and 74 of the former constitution, I believe that he is entitled to damages for such violations. The jurisprudence that has emerged over the years in matters similar to this is that a person whose rights were violated by the state is entitled to an award of damages for such violations. See the cases of **Dominic Amolo Arony -vs- The Attorney General High Court Misc. Civil Case No. 494 of 2003; Harun Thungu Wakaba -v- The Attorney General; Rumba Kinuthia-v-Attorney General** and **Bernard Wachira Waheire -v- Attorney General** (supra).
30. The level of damages awarded in respect of violations of constitutional rights have varied. In arriving at an appropriate award in this matter, I am guided by the decisions of the court in the case of **Rumba Kinuthia -v- Attorney General; Bernard Wachira Waheire -v- Attorney General** and **Harun Thungu Wakaba & 20 Others -v- Attorney General** cited above in which awards of general damages ranging between Kshs1.5 m and 2.5m were made. In this case, the applicant was held for a period of 49 days, and in my view a global award of Kenya Shillings Two Million (Kshs 2,000,000.00) is reasonable recompense for violation of his rights as detailed above. The applicant shall also have the costs of the suit.
31. I am greatly indebted to Counsel for the parties in this matter, Mr. Ngugi Muhindi (now deceased), who had the conduct of this matter on behalf of the applicant, and Mr. Kakoi for the respondent.

**Dated, Delivered and Signed at Nairobi this 31<sup>st</sup> day of July 2013**

**MUMBI NGUGI**

**JUDGE**

**Mr. Nyamweya instructed by the firm of Ngugi Muhindi & Co. Advocates for the Applicant**

**Mr. Kakoi instructed by the State Law Office for the Respondent.**