



**REPUBLIC OF KENYA**  
**IN THE REPUBLIC OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**MILIMANI LAW COURTS**  
**PETITION NO. 179 OF 2012**

**BETWEEN**

**VIRGINIA NJERI KAMANGARA and ESTHER WANJA**

**as Administrators to the estate of**

**JOHN KAMANGARA MAINA (deceased) ..... PETITIONERS**

**AND**

**THE ATTORNEY GENERAL ..... RESPONDENT**

**JUDGMENT**

1. The petitioners bring this suit as administrators of the estate of one John Kamangara Maina (“the deceased”).
2. In a petition dated 20<sup>th</sup> April 2012, supported by the affidavit of Virginia Njeri Kamangara, the 1<sup>st</sup> petitioner, the petitioners seek the following orders:
  - i. *A declaration that the late John Kamangara Maina’s fundamental rights and freedom were contravened and grossly violated by the respondent’s Special Branch Police Officers who were Kenyan government servants, agents, employees and in its institution on 4<sup>th</sup> December, 1986 and for 61 days at Bondeni Police Station, Pangani Police Station and Nyayo House Torture Chambers and thereafter in Kenyan Prisons.*
  - ii. *A declaration that the Petitioners as administrators of his estate are entitled to the payment of damages and compensation for the violations and contraventions of the deceased’s fundamental rights and freedoms under the aforementioned provisions of The Constitution*
  - iii. *General damages and exemplary damages and moral damages on an aggravated scale under S.84(2) of the Constitution of Kenya 1969 Articles 23 and 29 Constitution of Kenya 2010 for the unconstitutional conduct by the Kenyan Government servants and agents awarded.*
  - iv. *Any further orders, writs, directions, as this Honourable Court may consider appropriate.*
  - v. *Costs of the suit, and interest.*

**The Facts**

3. The facts as gathered from the pleadings and depositions are that the deceased was on 4<sup>th</sup> December, 1986 arrested at his place of work at a garage in Nakuru town by two plain-clothes policemen. Before he was arrested, they passed through the deceased's house and searched it whereupon they found some of deceased's photographs with one Koigi Wamwere, which showed that they addressed the meetings together. The police allegedly commented that the deceased's house was the office of the President of Mwakenya Group. The deceased was taken to Bondeni Police Station where he stayed for a short while. He was later transferred to Nairobi where he was unable to communicate with his family, relatives or lawyers.
4. The deceased was then blindfolded and instructed to lie flat on the floor of the police Land Rover and he was driven to Nairobi and he was locked at Pangani Police Station and spent the night there without food or a blanket to cover himself, on the following day he was blind folded and driven around for hours and then was driven to an underground basement which he came to know later was the Nyayo House cells. He was interrogated daily by a panel of Special Branch Officers headed by a Mr. Opiyo who tortured him by beating him with slaps, whips, broken chair pieces of wood and made to do physical exercises while naked.
5. It is alleged that the deceased was locked in water-logged cells for 61 days wherein he was made to stay without food, water, sleeping mats, blankets or water for days. The deceased was then forced to sign a confession that he had taken oath to overthrow the government and he finally pleaded guilty to the offence of failing to prevent a felony. He was eventually taken to court on 27<sup>th</sup> February 1987 at 5.30 pm on the promise that he would be fined if he pleaded guilty to the charge.
6. The deceased was later charged and he pleaded guilty to the charge of failing to prevent a felony whereupon he was jailed for 15 months. He was then taken to Kamiti Prison where he served his term of 8 months and later transferred to Nakuru Prisons for three months where the prison wardens continued effecting acts of torture on the deceased.
7. As a result of the dehumanizing treatment the deceased suffered psychologically and economically as he lost his job. He could also not pursue his political interests. The petitioners aver that the conduct of the Special Branch Police Officers outlined above violated the petitioner's rights under the Constitution; namely, freedom from torture, cruel and degrading inhuman treatment contrary to **section 74** of the former Constitution. That his detention was also a violation of his right to personal liberty secured by **section 72** of the former Constitution.
8. The petitioners have furnished various documents including the Charge sheet dated January 1987 in which the deceased was charged with the offence of "*Neglect to prevent a felony C/S 392 of the Penal Code as read with section 36 of the same code.*" The charge sheet indicates the date of arrest as being the 4<sup>th</sup> December 1986 and the charge reads as follows;

*JOHN MAINA KAMANGARA: On divers(sic) dates between January, 1985 and 4<sup>th</sup> December 1986 at Nakuru in Nakuru district within Rift Valley province knowing that some person or persons were designing to commit a felony namely publishing and distributing a seditious publication entitled PAMBANA failed to take all reasonable means to prevent the commission thereof.*

9. According to the records presented before the court, the deceased was arraigned in court on 29<sup>th</sup> January 1987 before the Chief Magistrates Court at Nairobi being **Criminal Case No. 405 of 1987** in which he pleaded guilty to the charges.
10. On 15<sup>th</sup> April 2013, oral evidence was adduced by Ms Kamangara, the 1<sup>st</sup> petitioner and co-wife to Esther Njeri, the 2<sup>nd</sup> petitioner was cross-examined. Ms Kamangara swore that she was present when her late husband arrested on 29<sup>th</sup> January 1987. That five policemen came in a vehicle and two of them went into the house and arrested the deceased. That at the time they looked for their husband in Rongai, Nakuru, Nakuru Central Police Station but he was not there. She later read in

the newspaper that her husband had been charged and convicted and was serving his sentence. Ms Kamangara testified that when she visited her late husband in prison, he informed her that he was taken to Nyayo House where he was subjected to torture. He told her about details of his treatment while in incarceration including denial of food, denial to sanitation facilities, denial of basic needs such as water and food.

11. Ms Kamangara further told the court that as a family they were greatly affected by the absence of the bread winner of the family and that the children's education was affected. She stated her husband dealt with music and earned about Kshs100,000.00 monthly. Ms Kamangara admitted in cross-examination that she did not have records to show that the deceased had been held at Bondeni Police Station and that the police had searched and taken all the documents from the house.
12. The petitioners, in their written submissions dated 30<sup>th</sup> May, 2013 quoted the amount of Kshs 20,000,000 as compensation for degrading and inhuman treatment that was meted on the deceased by the respondent's servants and agents. They relied on the case of ***Otieno Mak'Onyango v Attorney General & another, HCC Misc Appl. No. 845 of 2003 (Unreported)*** and ***Oduor Ong'wen and 20 others v Attorney General, Petition No. 777 of 2008 (Unreported)***.

### **Respondent's Case**

13. The respondent opposed the petition through the Replying affidavit of one Henry Kipkosgei Barmao; a Senior Assistant Commissioner of Police and the Staff Officer Operations of the Kenya Police Service dated 11<sup>th</sup> April, 2013. The respondent also relied on the written submissions dated 3<sup>rd</sup> June, 2013.
14. The respondent contends that no documents have been attached to prove that the deceased was arrested on the said dates and detained at Bondeni Police Station. He also deponed that the Occurrence Book and the Cell Register have a lifespan of 10 and 15 years respectively. He denied all the allegations against the police and reiterated that the police force is one that is professional and that it is not in its policy to torture suspects.
15. The respondent has asked the court to dismiss the petitioner's claim on the basis that it is time barred having been instituted almost 26 years after the alleged violations took place. The authorities of ***James Kanyiita Nderitu v Attorney General and Another, Petition No. 180 of 2011 (Unreported)***, ***Peter Kagume & others v Attorney General Petition No. 128 of 2006 (Unreported)*** and ***Durity v Attorney General(2002) UKPC 20*** were cited in support of the proposition that the suit was time-barred and the court should not therefore accede to the petitioner's claims.
16. The respondent submitted that the petitioner's claims were based on hearsay and lacked evidence to back them. The respondent also cast doubt on the credibility of the petitioner's evidence and pointed to some inconsistencies in the petitioner's *viva voce* evidence adduced in court and the pleadings filed. That the petitioner claimed the husband was arrested on 4<sup>th</sup> December 1986 and taken to court on 27<sup>th</sup> February 1987 yet the charge sheet showed that he was arrested and arraigned in court the same day. Further, that the charge sheet indicated Central Station yet according to the petitioner's own testimony, the deceased was arraigned at Bondeni Police station and Pangani Police Station.

### **Determination**

17. The respondent submitted that the time period before the filing of the suit was inordinate. The question is whether the delay is inordinate and what effect this has on the suit. In a similar case in ***James Kanyiita Nderitu v Attorney General and Another, Nairobi Petition No.180 of 2011***, I stated as follows; "[45] I must state that it is well established the law concerning limitation of

actions cannot be used to shield the State or any person from claims of enforcement of fundamental rights and freedoms protected under the Bill of Rights (See **Dominic AronyAmolo v Attorney General Nairobi HC Misc. 494 of 2003 (Unreported)**, **Wachira Waheire v Attorney General Nairobi HC Misc. Civil Case no. 1184 of 2003 (OS) [2010]eKLR**, **OtienoMak’onyango v Attorney General and Another Nairobi HCCC No. 845 of 2003 (Unreported)**). Although there is no limitation period for filing proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under **section 84** of the Constitution, is entitled to consider whether there has been inordinate delay in lodging the claim. The Court is obliged to consider whether justice will be served by permitting a respondent, whether an individual or the State in any of its manifestations, should be vexed by an otherwise stale claim. Just as a petitioner is entitled to enforce its fundamental rights and freedoms, a respondent must have a reasonable expectation that such claims are prosecuted within a reasonable time.” (See also **Mohlomi v Minister of Defence [1996] ZACC 20, 1997 (1) SA 124, 129**, **Dominic Mutie Mwalimu, Criminal Appeal No. 127 of 2005(unreported)**, **JK v Republic, Eldoret High Court Criminal Case No. 83 of 2003**, and **Murithi Mugo v Republic Criminal Application No. 286 of 2006**).

18. The violations subject of this suit took place in the year 1986/1987. The petition was filed in the year 2012, a period of over twenty five years has lapsed since the cause of action arose. The deceased died in September 2001 and the petitioners obtained letters of administration in April of 2005. The petitioners have not explained as to the cause of delay in filing the suit. While I deprecate delay in filing the suit, this case may be distinguished from **James Kanyiita Nderitu case** which alleged violations leading up to and during the trial process, and which the petitioner had even appealed against the conviction. In that case the court noted that the **Police Standing Orders** require certain records to be destroyed after a period of time and the Occurrence Book which contains primary evidence of arrest would ordinarily be destroyed after five years. The court therefore upheld the contention that the respondent’s right to a fair trial would be prejudiced. In this case, there is however evidence of the arrest being the charge sheet and the proceedings which have not been challenged and which support the claim of arrest and detention. I therefore see no prejudice that will be occasioned on the respondents in this respect.

19. The petitioners claim that the deceased was arrested on 4<sup>th</sup> December 1986 and arraigned in court on the 27<sup>th</sup> February 1987. It is their case that the deceased was detained for a period of 61 days. This however contradicts with the evidence on record annexed in support of the claim which indicates the date of arrest as **4<sup>th</sup> December 1986** but shows that the deceased was arraigned in court on the **29<sup>th</sup> January 1987** as per the certified court proceedings annexed to the charge sheet. Using the charge sheet as the reference point gives a period of just about two months in detention. The evidence of the charge sheet is however only conclusive of the fact that the deceased was arrested and charged but is insufficient to draw conclusions of unlawful arrest as alleged by the petitioner. What is clear is that the deceased was kept in incarceration for longer period than what the Constitution provided. Keeping the deceased in detention for that period of time was in infringement of the right to freedom of liberty guaranteed under **section 72** of the repealed Constitution.

20. The other issue relates to the alleged cruel and inhuman treatment by the respondent’s agents. The petitioner has deposed to several acts of harsh and cruel treatment against the deceased. This, she says, was narrated to her by the husband while he was alive when she visited him in incarceration. No medical reports or other evidence was furnished to assist the court independently assess and verify the allegations of cruel and inhuman treatment to which the deceased was subjected.

21. Unfortunately, the evidence of harsh and cruel treatment constitutes inadmissible hearsay evidence. **Section 33** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** deals with statements by persons who cannot be called as witnesses. **Section 33** lays out the kind of statements that constitute exceptions to the hearsay rule. These exceptions can only be permitted once the conditions set out in the opening paragraph at **section 33** are met. It provides, *“Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured,*

*or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases – “ [Emphasis mine] These following statements constitute exceptions:*

- a. relating to cause of death;
- b. made in the course of business
- c. against the interest of maker
- d. an opinion as to public right or custom
- e. relating to existence of relationship
- f. relating to family affairs
- g. relating to a transaction creating or asserting, etc., a custom
- h. made by several persons and expressing feelings.

22.To my mind none of these exceptions apply to the petitioner’s case. The closest exception that may apply is that concerning statements relating to the cause of death. In this case though there is no evidence that the torture and inhuman treatment the deceased is said to undergone is what led to his death or is closely related to his death. In the circumstances, I find and hold that a case for violation of **section 75** of the former Constitution has not been made out by the petitioners.

23.It is settled law that specific losses must be pleaded and proved and hence I am unable to award the petitioner the sum of Kshs 100,000.00 as special damages for loss of income on account of the deceased’s business. Taking into account the evidence and in light of the cases cited and in order to vindicate the deceased’s breach of his fundamental rights, I award Kshs 500,000.00 as general damages for wrongful detention.

### **Disposition**

24.I find and hold that the deceased’s constitutional right was violated when he was kept in incarceration for longer period than what the Constitution provided. I therefore enter judgment for the petitioners in the following terms;

- a. **I declare that the deceased’s fundamental rights and freedoms under sections 72 of the Constitution were contravened and violated by the respondent’s agents.**
- b. **I award the sum of Kshs. 500,000.00 in general damages to the 1<sup>st</sup> and 2<sup>nd</sup> petitioners as legal representatives of the deceased’s estate.**
- c. **The petitioner shall have the costs of the petition.**
- d. **Interest on damages at court rates from the date of judgment.**

**DATED** and **DELIVERED** at **NAIROBI** this 26<sup>th</sup> day of July 2013

**D. MAJANJA**

**JUDGE**

Mr Wandaka instructed by Kinuthia Wandaka and Company Advocates for the petitioners.

Mr Ojwang, Litigation Counsel, instructed by the State Law Office for the respondents.