



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.487 OF 2012

BETWEEN

SAID FONDO KALUME.....PETITIONER

AND

THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

1. The Petitioner in his Petition dated 4th October 2012 alleges that on or about the 27th of November, 1989, he was arrested at Kerugoya Safari Club by persons he believed to be from the Criminal Investigations Department and the Special Branch and he was taken to Kerugoya Police Station where he was locked up.
2. He believes that he was arrested because he held differing political views from those of the Government of the day and that at the time of the said arrest, he had Kenya Shillings Nine Hundred and Forty Thousand (Kshs.940,000/=) in a briefcase and that the officers who arrested him insisted that these monies were to be used to fund a group of men staying in Mount Kenya forest and who were scheming on how to overthrow the Government of Kenya.
3. That on or about the 28th of November, 1989, he alleges that he was taken to Nyeri Police Station where he was detained for about 3 days after which he was transferred to Embu Police Station where he was held for another 3 days before being moved to Meru Police Station where he was detained for a further 5 days.
4. After his ordeal at Meru, the Petitioner states that he was transferred to the infamous Nyayo House Torture Chambers and it is there that the Petitioner claims that he was subjected to acts of torture, inhuman and degrading treatment by being stripped naked, forced to sleep on a water logged floor and tied with chains on both legs and hands while being beaten by broken chairs, rubber whips and other crude weapons. He states that he was held at the said chambers for 45 days.
5. He also claims that after the above ordeal, he was moved to Elburgon where he was detained for another 14 days, after which he was taken to Busia where the Petitioner claims that the Police interrogated other persons that he ordinarily used to transact business with. The Petitioner further states that he was thereafter ferried back to Nyayo House where he was detained for another two days and subsequently conveyed to Kilifi where he was interrogated for another 14 days and back

to Nyayo House for a further 21 days.

6. In an interesting turn of events the Petitioner alleges that he was tipped by an unnamed person that he would be ferried to Mombasa for further interrogation and that during his travel to Mombasa the police officers guarding him allowed him to answer a call of nature and this is when he managed to escape into a thicket at the Tsavo National Park and he disappeared never to be re-arrested. In view of the foregoing the Petitioner now prays for the following orders;

“a) 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 Kenya Government Servants, Agents and/or employees ... on or about 27th of November, 1989 at Kerugoya Police Station, various police stations thereafter and at Nyayo House until 16th March, 1990.

b) 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.

c) General damages, exemplary damages and moral damages on an aggravated scale under Section 84(2) of the Constitution of Kenya, 1969 for the unconstitutional conduct by the Kenyan Government, its agents and/or servants be awarded.

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

e) That the Petitioner be refunded his money that was snatched from him by the Special Branch Policemen. (sic)

f) Costs of the suit and interest.”

7. The Respondent did not file any response to the Petition, neither did he reply to the Affidavits filed by the Petitioner nor did he tender any Submissions stating its position on the matter. In the circumstances, while it is trite law that it is the duty of the alleging party in any legal proceeding to prove an assertion of fact, there has been no evidence filed by the Respondents that would negate any of the allegations raised by the Petitioner. Indeed it is the duty of the Respondent as the Legal Adviser of the Government to answer and defend any allegations brought against its client. In the event none comes forth, as is the case here, then I am persuaded to believe that the Petitioner was arrested for no sufficient reason and detained in a number of Police Stations for more than twenty four hours contrary to **Section 72(3) of the Repealed Constitution**. This Court is also convinced that the Petitioner was stripped naked, forced to sleep on a water logged floor and tied with chains on both legs and hands while being beaten by broken chairs, rubber whips and other crude weapon during his incarceration at the Nyayo House Torture Chambers as claimed.

8. With those facts in mind, this Court would also need to establish whether the fundamental rights and freedoms of the Petitioner were thereby violated and in that regard the Petitioner urges the point that the Respondents violated the following fundamental rights and freedoms:

- a. **Protection of right to Personal Liberty as provided by Section 72(1), (3) and (5) of the Repealed Constitution,**
- b. **Right to protection from torture, inhuman and degrading treatment as provided by Section 74(1) of the Repealed Constitution,**
- c. **Right to freedom of expression as provided by Section 79(1) of the Repealed Constitution,**
- d. **Right to Provisions to secure protection of the Law as provided by Sections 77(1) and (2) of the Repealed Constitution,**
- e. **Right to assembly and communication as provided by Section 77(2)(c) and 77(2)(d) of the Repealed Constitution.**

9. In **Wanyiri Kihoro vs. The Attorney General Civil Appeal No.151 of 1987**, Kwach JA quoted with approval the holding in **Njuguna s/o Kimani and others v Reginam (1954) XXI EACA 316 at page 319** where it was stated that;

“The notion that the police can keep a suspect in unlawful custody and prolong their questioning of him by refraining from formally charging him is so repugnant to the traditions and practice of English law that we find difficulty in speaking of it with restraint. It must be recognized that once a police officer has made up his mind to charge any person, it is his duty to inform that person as soon as practicable and thereafter to produce him before a Magistrate as required by Section 32 or Section 35 of the Criminal Procedure Code”.

The learned Judge further added that;

“The Constitution of Kenya does not permit the police, or any other law enforcement agency for that matter, to break the law in order to detect crime”.

I am in full agreement with the erudite holdings above.

10. Further, in **Dominic Arony Omolo vs. The Attorney General Miscellaneous application Number 494 of 2003**, the Court found that the continued imprisonment of the Applicant between 27 September, 1984, and 5 November, 1984, was in breach of his right to liberty contrary to **Section 72** of the **Repealed Constitution** and that he was entitled to damages. **Section 72** provided that;

“(1)No person shall be deprived of his personal liberty save as may be authorized by law.....

(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 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”. (Emphasis added)

It is obvious that the above provision was violated in the case of the Petitioner and the facts set out above speak for themselves.

10. My position is also fortified by the decision in **Benson Thuku Karanja vs. The Attorney General Petition 237 of 2010** whose facts are very similar to the present one. The Petitioner in that case was arrested and held at Nakuru Police Station for some days and then transferred to Menengai Police Station before being transferred to Muthaiga Police Station and finally to the Nyayo House Torture Chambers. He was not charged in a Court of law but was released after being tortured extensively. He was awarded compensatory damages for breach of his fundamental rights and freedoms. Like the Petitioner he was subjected to blows and kicks and beatings with broken chairs and whips and he was kept in a dark cell flooded with cold water.
11. For the above reasons, I find and hold that the Petitioner was subjected to torture, inhuman and degrading treatment.

12. The Petitioner has also submitted that contrary to the suspicions of the officers, the monies he had on him when he was arrested were meant to be paid out to workers that he had employed in his timber yard. He further asserted that at Busia Police Station, the officers interrogated persons that were believed to be doing business with him and it is obvious that the Petitioner must have ordinarily engaged in legitimate business with other persons for the furtherance of an economic activity and it is my belief that freedom of association goes to the root of the identity of an individual. Clearly in the circumstances and in my view, the Respondent infringed on the Petitioner's rights as provided for in **Section 79 (1)** of the **Repealed Constitution**.

In view of the foregoing, I find that the Petitioner's fundamental rights and freedoms as provided for in **Sections 72 (1), (3) & (5); Section 74 (1); Section 77 (1)** and **Section 79 (1)** of the **Repealed Constitution** were infringed and violated by the Respondent. He is also entitled to damages under **Section 72 (6)** of the **Repealed Constitution** and turning to quantum of damages payable, the Petitioner has prayed for an award of Kshs.25 Million as general, exemplary, punitive and moral damages. He however does not justify why this amount in his view is a suitable relief for the treatment meted out to him by the Respondents. While his evidence is uncontroverted, he has not produced any medical reports or expert witness evidence so that one can assess the extent, if at all, of the torture and inhuman treatment that he was subjected to. That limitation necessitates a restraint as to what I can award him in damages and all I can do is look to previously decided cases on the subject.

As for the issue of exemplary damages, the question was well addressed in the case of **Bernard Wachira Waheire vs. The Attorney General Nairobi HCCC No. 1184 of 2003** where the Court did not find it appropriate to award aggravated and exemplary damages in cases of this nature and stated thus;

“In the light of the acknowledged change in the government, and the attempts at dealing with human rights violation, we find it inappropriate to award exemplary or aggravated damages.”

I agree and will adopt the same position in this matter.

13. In the end therefore and noting all the facts as set out above, the law as I have understood it, the final orders to be made are as follows;

14. Judgment be and is hereby entered for the Petitioner against the Respondent in the following terms;

a) *A declaration is hereby issued that the Petitioner's fundamental rights and freedoms were contravened and grossly violated by the Respondent's Special Branch Police Officers who were Kenya Government Servants, Agents and/or Employees on or about 27th of November, 1989 at Kerugoya Police Station, various police stations thereafter and at Nyayo House until 16th March, 1990.*

b) *The Petitioner is awarded a global sum of **Kshs.5 Million** as damages for violation and contravention of his fundamental rights.*

c) *The Respondent shall pay the Petitioner **Kshs.940,000/-** which was unlawfully taken away from him at the time of his arrest.*

d) *The Petitioner shall have the costs of the Petition plus interest thereof.*

e) *Orders accordingly.*

SIGNED AT NAIROBI THIS 26TH DAY OF AUGUST, 2013

ISAAC LENAOLA

JUDGE

**DATED, SIGNED AND DELIVERED ON BEHALF OF LENAOLA, J. ON THIS 30TH DAY OF
AUGUST, 2013**

MUMBI NGUGI

JUDGE