



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PETITION NO 76 OF 2013

THOMAS MUSYOKI MUTUSEPETITIONER

VERSUS

THE HONOURABLE ATTORNEY GENERALRESPONDENT

JUDGMENT

1. In his petition dated 1st February 2013 and supported by his affidavit sworn on the same date, the petitioner alleges violation of his constitutional rights under ‘**Section 28, 29 (a-f), 31, 32, 33, 39, 43, 48, 49(1)(a, b, c, d & f)** and **50**’ of the Constitution of Kenya. The events said to have given rise to this petition occurred in 1982 when the petitioner was a student at the University of Nairobi.
2. In the said petition, the petitioner seeks the following orders:
 - A. ***THAT this Honourable Court issue a declaration that the Petitioner’s fundamental rights and freedoms under Section 28, 29 (a-f), 31, 32, 33, 39, 43, 48, 49(1)(a,b,c, d & f) and 50 of the Constitution of the Republic of Kenya have been and were contravened and grossly violated by Police officers and other Kenyan Government servants, agents, employees and institutions on dates specified above and./ or in the Petitioner’s Supporting Affidavit herein attached and on diverse dates thereafter.***
 - B. ***THAT this Honourable Court declare that the petitioner is entitled to the payment of damages and compensation for the violations and contraventions of his fundamental rights and freedoms under the constitutional provisions stated in A above.***
 - C. ***THAT an award of general damages and exemplary damages on an aggravated scale, under Section 23(3) of the constitution for the violations aforementioned.***
 - D. ***THAT the costs of this humble Petition be provided for.***
 - E. ***For such other Order(s), writs and/or directions as this Honourable Court shall deem fit and just.***
3. The state did not file any response to the petition or challenge it in any way, even though there was ample time for it to do so. The matter was first mentioned before me on 27th February 2013 when Mr. Wasuna, Counsel for the petitioner, in the absence of the respondent, sought directions on the hearing of the matter. I directed that the matter should be mentioned on 15th March 2013, and a notice to issue to the respondent. On that day, Mr. Ojwang appeared for the respondent but there was no appearance for the petitioner, and a mention date was taken for the 15th of April

2013. The matter was again mentioned on 15th April 2013 when a Ms. Mutua held brief for Mr. Wasuna while Ms Ndungu held brief for Mr. Wamotsa for the Attorney General. Ms. Mutua indicated that the petitioner had filed submissions on the petition and had served the Attorney General, while Ms. Ndungu requested for 21 days to enable the respondent file his response and submissions to the petition. The respondent was granted a further 14 days to file his response and submissions.
4. When the matter next came before me on 15th May 2013 in the presence of Mr. Wekesa holding brief for Mr. Wasuna for the petitioner and Mr. Wamotsa appearing for the respondent, a further mention was given for the 29th of May 2013. The respondent had not filed a reply by the time the matter came up again on 29th May 2013. On that day, Mr. Wamotsa indicated that the respondent had not filed submissions or any other document in the matter and was not intending to file anything. He sought a date for judgment in the matter, a request that was echoed by the petitioner's counsel. This matter is therefore totally unchallenged by the respondent, whether on matters of fact or of law.
 5. The petitioner's case is that early in the morning of 1st August 1982 at around 2.00 a.m., while he was at the Nairobi Campus of the University of Nairobi where he was a student, he heard gunshots coming from town which he assumed were from a shootout between police and gangsters. At around 6.30 a.m, he and other students headed towards the University Way/Uhuru Highway roundabout where they found a group of students and noticed military Land Rovers full of soldiers firing in the air upon which he realised that the government must have been overthrown. He states that a Volkswagen Combi stopped at the roundabout and some of the students started roughing up the occupants; that he and two others rescued the occupants, one of whom his colleague had recognised as a Mr. D. Matt; that they accompanied him to his home in Riverside Drive after which he instructed his driver to take them back to the University.
 6. The petitioner states that upon reaching the Museum Hill roundabout, they were stopped by military officers who commandeered the vehicle, took it to Embakasi and handed the petitioner and the other students to other military officials who took them to their barracks. He avers that later that evening, they were transported to Kamiti Maximum Prison.
 7. The petitioner depones that at Kamiti, he realised that he was with three other students from the University of Nairobi namely Ephantus Kinyua Kiria, Johnstone Kituyi Simiyu, and one Nyang'au. He alleges that they were not fed for two days as more detainees were brought in; that they were constantly counted like livestock and beaten; that they were kept in very difficult conditions and had no idea why they were being detained; and that they were harassed by senior military officers.
 8. The petitioner states that after two weeks or so, four individuals arrived and told them that they were taking them home; that they were instead taken to the Embakasi General Service Unit Training School; that they were held there for several days where they were guarded day and night; that they were transported often to the city for interrogation at Nyati House by Special Branch Officers and were tortured and harangued severely and that the torture consisted of '*incessant beatings and berating*' so that they could admit to a scheme to overthrow the government.
 9. According to the petitioner, he was, on or around 30th September 1982, together with sixty seven other students split into four groups, brought before a court and charged with sedition; that they were thereafter detained at Industrial Area Remand Prison in an overcrowded cell; that they were subjected to skin searches while naked and vicious beatings with chains; and that there were lots of lice and bed bugs in the rooms.
 10. On or about 20th February 1983 in the evening, he and six others whom he names as Johnson Kituyi Simiyu, Ephantus Kinyua Kiria, Jeff Anthony Mwangi Kwirikia, Watson Wahinya Boore and Francis Ong'ele Opalla were taken by a contingent of military vehicles to Kamiti Maximum

Security Prison and kept in D Block at the prison. On 23rd February 1983, he appeared in court before H.H. Buch charged with participating in a demonstration likely to excite disaffection against the government of Kenya and sedition contrary to section 87.1.a of the Penal Code. He avers that he was jailed for 5 years, and that he served the sentence in Kamiti Prison where he was prisoner number KAM/167/83.

11. He has made various depositions with regard to the conditions in Kamiti; that he preferred an appeal in March 1984 against his conviction in Criminal case No 2433 of 1982 but the appeal was dismissed on 9th April 1984. He was released from prison on 16th of July 1986.
12. The petitioner alleges that his attempt to gain re-admission to the university was rejected, but that he went back to the University in 2004 when the National Rainbow Coalition came to power and granted the students an amnesty, and completed his degree course in 2005. He avers that he left his 'jua kali' business, which he had been running successfully, with his sons when he went back to the university; that as a result he suffered losses and went bankrupt; and has to beg for survival for himself, his children and grandchildren.
13. The petitioner therefore claims that he is entitled to restitution and reparations from the state for its acts of omission and commission that led to his economic and social losses

Determination

14. The petitioner places reliance on the provisions of the Constitution promulgated in 2010 with regard to events that happened in 1982. The Supreme Court has held in the case of **Samuel Kamau Macharia & Another -vs -Kenya Commercial Bank Limited & 2 Others [2012] eKLR** that the provisions of the Constitution of Kenya 2010 do not have retrospective application. Consequently, the petitioner cannot allege violation of the provisions of the said Constitution with regard to events that took place decades before its promulgation.
15. This court takes the view, however, that if the events complained of disclose violation of any of the petitioner's rights, and such rights were protected under the former constitution which was in force up to 2010, then it should consider his petition against the provisions of that constitution.
16. The petitioner seeks declarations that his fundamental rights and freedoms under Section 28, 29(a-f), 31, 32, 33, 39, 43, 48, 49(1)(a, b, c, d & f) and 50 of the Constitution violated by police officers and other Kenyan Government servants in the events and circumstances set out in his petition and affidavit in support which I have set out above. He also seeks '**general damages and exemplary damages on an aggravated scale, under Section 23(3) of the constitution.**'
17. The former constitution guaranteed the fundamental rights and freedoms of the individual under sections 70-83, which were contained in Chapter V of the constitution. Section 70 contained the general guarantee of the right to life, liberty, security of the person and the protection of the law; freedom of conscience, expression, assembly and association; privacy of his home and other property, and from deprivation of property without compensation. At section 72, the constitution prohibited deprivation of liberty except as authorized by law.
18. At section 72(2), the constitution required that a person who had been arrested is informed as soon as reasonably practicable, in a language that he understands, the reasons for his arrest or detention. With regard to an arrested person, the constitution provided at section 72 (3) 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 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.'

19. Section 72(5) of the constitution contained the constitutional right to bail except in the case of persons facing capital charges:

(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.

20. The constitution prohibited, at section 74, subjecting any person to torture or inhuman or degrading punishment or other treatment, while section 77 guaranteed to everyone charged with a criminal offence the right to a fair hearing within a reasonable time.

21. In the matter before me, the petitioner depones that he was arrested on 2nd August 1982 and was held in various places before he was charged in court on 30th September 1982. He was therefore held for 28 days longer than the period allowed under the provisions of section 72(3) of the constitution before finally being charged in court. As there has been no explanation offered for the delay in charging him in court, the conclusion that is inevitable is that he was held in custody in violation of his constitutional rights under section 72(3).

22. From his averments, he was not released on bail after he first appeared in court to face criminal charge. It is not clear from his pleadings whether he applied for bail and was denied, or he did not bother to. There is therefore no evidence before me on the basis of which I can make a finding on whether or not there has a violation of section 72(5).

23. The petitioner alleges that he was subjected to torture while in detention. He has, however, not adduced any evidence in support of his allegations, save his depositions that they were beaten and harangued, and that in Industrial Area prison, they were subjected to skin searches and lived in poor conditions with lice and bedbugs. I am therefore unable to find a violation of the provisions of section 74.

24. The petitioner also alleges violation of a right to a hearing, which is now guaranteed under Article 50 of the Constitution, but was then provided for under section 77. It appears from his averments, however, that there was a hearing at which he was represented by Counsel. He depones at paragraph 16 of his affidavit as follows:

'THAT we were all charged with participating in a demonstration likely to excite disaffection against the government of Kenya as by law established. Sedition section 87.1.a of the Penal Code. I was represented by Gibson Kamau Kuria and within three weeks all cases were over. Wahinya Mwangi, Opala and Simiyu each got six years while Kinyua and I got 5 years each. My lawyer Kamau Kuria was annoyed by the fact that the state counsel then Bernard Chunga confided in him that they had very weak cases against us, although he got a promotion after a job well done.'

25. There was, therefore, no violation of his right to a hearing in light of the above deposition.

26. The petitioner also complains about the conditions in prison. However, while at Kamiti, he was serving a sentence imposed by a court of law, after an unsuccessful appeal. There is therefore no basis for the court to inquire into the conditions in prison.
27. In closing, I must make some observations with regard to the conduct of the respondent in this matter. As I indicated earlier, the matter is totally unchallenged by the state which, in my view, is a situation to be deprecated. The respondent, as the representative of the public interest, has a responsibility to take interest in matters that have an impact on the public purse. It is to work against the public interest for matters against the state in which parties seek monetary compensation for alleged violation of constitutional rights to proceed undefended, or with very lukewarm opposition.
28. In this particular case, the claim alleging violation of rights was lodged in 2013, more than 30 years after the events complained of. While it was possible to argue that one could not bring a claim during the KANU dictatorship, more than ten years have elapsed since it ended, and countless claims against the state have been brought and disposed of. This is one case where the dicta of Nyamu J in **Peter Ngare Kagume -vs- The Attorney General & Others High Court Petition No. 128 of 2006** may well have been successfully invoked with regard to delay in filing claims regarding violation of constitutional rights. However, the respondent has chosen not to participate in the matter by filing a response or submissions on the issues raised.
29. In the circumstances, I find and hold that there was a violation of the petitioner's rights under section 72(3) of the constitution in his arrest and incarceration between 2nd August 1982 and the date he was charged in court on 30th September 1982, and in line with the provisions of the constitution, he is entitled to damages for the violations.
30. In assessing the damages that I should award the applicant, I am guided by the awards made in the many cases that have come before the High Court in the last decade alleging violation of constitutional rights. Among these are **Rumba Kinuthia -v- Attorney General Nairobi HCCC 1408 of 2004**; **Bernard Wachira Waheire -v- Attorney General Nairobi HCCC No 1184 Of 2003** and **Harun Thungu Wakaba & 20 Others -v- Attorney General Nairobi HCCC 1411 of 2004 (OS)** in which general damages ranging between Kshs 1.5 million and 2.5 million were awarded. In the present case, I believe that a global award of Kenya Shillings One Million Five Hundred Thousand (Kshs 1,500,000.00) is sufficient recompense for the violations that I have found. The petitioner shall also have interest on damages from the date of judgment until payment in full, as well as the costs of the suit.

Dated Delivered and Signed at Nairobi this 16th day of August, 2013

MUMBI NGUGI

JUDGE