



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.1188 OF 2003 (O.S.)

BETWEEN

KARIUKI GATHITU.....PLAINTIFF

AND

THE HON. ATTORNEY GENERAL.....DEFENDANT

JUDGMENT

1. Before me is an Originating Summons dated 7th October 2003 filed by one Kariuki Gathitu (*now deceased*) under the provisions of **Section 84(1) and (2) of the Repealed Constitution** and **Rules 9 and 11 of the Constitution of Kenya** (Protection of Fundamental Rights and Freedoms of the Individual) **Practise and Procedure Rules, 2001** as read with **Chapter V of the Repealed Constitution**.
2. In the Summons, the Plaintiff seeks the following orders;
 - “i) A declaration that the Plaintiff's fundamental rights and freedoms under Sections 70, 72 (3&5), 74(1), 78(1), 79(1) & 80(1), 82(3), and 83 have been and were contravened and grossly violated by police officers and others in 1986 to 1988 and on diverse dates thereafter.*
 - ii) 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.*
 - iii. General damages, exemplary damages on an aggravated scale under Section 84 (2) of the Constitution of Kenya for the unconstitutional conduct by government servants and agents.*
 - iv. Any further orders, writs, directions, as this Honourable Court may consider appropriate.*
 - v. Costs of the suit, with interest at Court rates.”*
3. Before the Summons could be heard, the Plaintiff died and his wife and the Administratrix of his estate, Rose Gathitu, was substituted in his place.
4. In his Affidavit and which also formed the sole basis for the oral evidence tendered by his wife, it was his evidence that on 5th March 1986, he was at his place of work within the Institute of Computer Science, University of Nairobi when he was arrested without a warrant and taken to

Muthangari Police Station where he was locked up for 3 days. Subsequently, he was taken to his house where an extensive search was conducted and books and a type- writer were all carted away before he was locked up at the Nyayo House Cells where for 21 days he was allegedly subjected to the following treatment;

- i) *assault with pieces of wood and broken chairs by police officers.*
- ii) *he was forced to perform physical exercises which were unbearable.*
- iii) *he was verbally assaulted.*
- iv) *he was deprived of sleep and was handcuffed even in the confinement of the cell.*
- v) *the cell temperatures were deliberately changed from extreme cold to extreme hot at irregular intervals.*
- vi) *he was threatened with death unless he pleaded guilty to an unspecified offence (s).*
- vii) *the cell was constantly sprayed with cold water for days.*

5. After his ordeal aforesaid, he was detained without trial under the preservation of **Public Security Act** and held at Manyani Prison for two(2) years before he was released. During his incarceration, he alleges that he was confined solitarily in his cell for 23 hours a day and all the above actions caused him extreme psychological and physical pain and he developed depression which thereafter necessitated counseling and psychological assistance.

6. That he also lost his job and all because he held alternative political views to the prevalent ones at the time. Further, that his arrest and detention plus the inhuman and degrading treatment that he received were all contrary to **Sections 72, 74 and 78** of the **Repealed Constitution** and that he was entitled to the prayers elsewhere set out above.

7. The Respondent filed no response to the Summons although the Summons was heard ten(10) years after its filing for reasons that have nothing to do with the Court (I note that the Plaintiff died on 13/5/2005 and the present Plaintiff only took out letters of administration on 18/9/2009 and was substituted in the present proceedings on 16/11/2012 before hearing on 25/2/2013).

8. I note from the record however that the Respondent was represented on the date of hearing and cross-examined the Plaintiff but failed to tender any written Submissions even on points of law only and nothing substantive came out of the cross-examination.

9. It is now trite that although a party alleging a fact has the onus of proof of that fact, the opposing party is at the very least expected to file a response to those allegations of fact. Where such a party actually appears in the proceedings but neither in pleadings nor in oral evidence does he answer to those facts, then the Court can only but take it that those facts are actually uncontested. In the cross- examination of the Plaintiff nothing substantial came out that would sway this Court's mind to disbelieve the Plaintiff and I therefore accept all the facts as set out above to be true.

10. In stating so, I agree therefore with the findings in **Nairobi HCCC No.1408/2004, Rumba Kinuthia vs Attorney General**, where the Court stated as follows;

“Unfortunately, the Respondent did not treat this case with the seriousness that it deserves. Despite the fact that the Applicant made very serious allegations against the Respondent ... no Affidavit was filed in reply so that all the facts deponed to by the Applicant in his Affidavit are what the Court will take as representing the factual position”.

11. Having so said, the next question is, **what is the applicable law to the situation at hand?**

12. In that regard, **Section 72** of the **Repealed Constitution**, the applicable law at the time, obligated an arresting authority to present any suspect to a Court of law within 24 hours for misdemeanors and within 14 days for capital offences.

In this case, the Petitioner was presented to Court after 24 days and this was a clear breach of that Section.

13. Further, where a person is subjected to the kind of torture the Petitioner underwent, then his rights under **Section 74** of the **Repealed Constitution** (rights not to be subjected to torture or to inhuman and degrading treatment) were violated.

14. In stating so, I have read the following decisions on the same subject;

i) **Rumba Kinuthia vs. Republic (supra)**

ii) **Harun Thungu Wakaba & Others vs Attorney General, H.C. Misc, Application No.1411 of 2004**

15. In all of them, the High Court found favour in the argument that where the State deliberately breached the Constitution in the manner that its agents treated suspects of crime, the suspects were entitled to compensation for the wrongs committed against them.

16. However, this Court continues to hold the strong position that exemplary damages are not awardable in changed political circumstances and in Petitions of the nature of the one before me.

17. In that event I will award the Petitioner **Kshs.1.2 Million** as damages for violation of his rights and I do so taking into account the period of unlawful incarceration and the torture that the Petitioner was subjected to.

18. The final orders to be made shall therefore be that judgment is entered in favour of the Petitioner against the Respondent in the following terms;

“i) A declaration that the Plaintiff’s fundamental rights and freedoms under Sections 70, 72 (3&5), 74(1), 78(1), 79(1) & 80(1), 82(3), and 83 have been and were contravened and grossly violated by police officers and others in 1986 to 1988 and on diverse dates thereafter.

ii) 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 and is consequently awarded the global sum of Kshs.1.2 Million as damages.

iii) Costs of the suit, with interest at Court rates.”

19. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Petitioner present

Mr. Wamostsa for Respondent

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE