



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

PETITION NO 192 OF 2012

BETWEEN

DICK JOEL OMONDIPETITIONER

AND

THE HON. ATTORNEY GENERALRESPONDENT

JUDGMENT

Introduction

1. The Petitioner, **Dick Joel Omondi** has filed this Petition seeking various orders as against the State for his arrest and incarceration at Siaya Police Station and later, confinement at Kibos Maximum Prison in 1988 for allegedly being a member of the outlawed 'Mwakenya' movement. The Petition is expressed to be brought under **Sections 72(1), 72(3), 72(5), 74(1), 77(1), 72(2), 79(1) and 84(1)** of the Repealed Constitution and in it has sought the following orders;

“1) 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 Kenyan Government servants, agents and/or employees and in its institutions on or about 20th November 1988 at Siaya Police Station.

2) 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.

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

4) Any further order, writs, directions as this Honourable Court may consider appropriate.

5) Costs of the Petition and interest.”

The Petitioner's Case

1. The Petitioner claimed that on or about the 20th of November 1988, at around 4.00pm, he was arrested at his house in Bungasi in South Mumias by Criminal Investigation Department (CID) Officers. He also claimed that a search of his house was conducted without a search permit or warrant and the officers found a copy of "Beyond" Magazine and they forced him to write his name on it. He was then led into a waiting white Land Rover, sandwiched in the front seat of the said motor vehicle which had four occupants and driven to Siaya Police Station where he was led into a dark room which looked like a hall and had some u-shaped hooks or nails embedded unto the floor.
2. He was then blind folded and had his clothes removed and his legs chained to the said hooks, with his hands being tied to his back and he was made to sit on a cold floor with his legs being continuously hit, while being branded a member of 'Mwakenya' and questioned on his relationship with Raila Odinga and those allegedly working with him to overthrow the government. He was also questioned as to his relationship with the Anglican Church and especially Bishop Alexander Muge and Bishop Okullu who were alleged to be funding rebels including the Petitioner. At midnight he claimed that his handlers returned and untied his legs but left his hands tied. He stated that his wife was only allowed to visit him in the morning and thereafter he was segregated in a room with lights on for the duration he was detained, which affected his eyesight necessitating him to use spectacles until today.
3. He was later taken to Siaya Law Courts where he was charged with the offence of being in possession of a prohibited publication. He allegedly pleaded guilty under duress and was convicted and sentenced to serve two years in prison. He was taken to Kodiaga Prison and later transferred to the Kibos Maximum Prison where he was held in solitary confinement before his wife through the firm of M/S Olago Oluoch & Co. Advocates filed an appeal being **Kisumu High Court Criminal Appeal No. 363 of 1989** whereafter Justice Riaga Omolo (as he then was) reduced the sentence to one year in prison. He served the remainder of his sentence at Kibos Maximum Prison.
4. He claimed that while in prison, he was still held in solitary confinement and was never availed with sanitary facilities and was instead made to use an open 'potty' which was emptied every three days thus having a bad stench and causing great discomfort and endangering his health. He also claimed that he was not availed with beddings and was left to sleep on the cold floor for the entire period of incarceration and had only one old blanket which he used both as a cushion against the cold floor and the half side to cover himself. He also claimed that he was taken critically ill for 3 weeks and was taken to old Nyanza General Hospital where he was chained to the bed and seen by a certain Doctor Chek. He was diagnosed with a severe condition that required specialized treatment and care but none was availed. He now claims that to date he continues to take "neurobine" medicine to contain the condition.
5. The Petitioner alleged that he suffered physically, psychologically and economically because he lost his teaching job, and means of survival and his family and friends suffered untold stigma and trauma.

The Respondent's Case

6. In response to the Petition, the Respondent, the Attorney General, filed a replying affidavit sworn by Kipsogei Barmao, a Senior Assistant Commissioner of Police on 14th June 2013. He stated that the Petitioner had not exhibited any evidence to substantiate any of the allegations made in the Petition with regard to his alleged arrest, unlawful confinement, cruel and inhuman treatment by the police. He further stated that from the police records, the Petitioner was never arrested by the police or CID officers; never taken to Siaya Police Station or detained by the police; his home was never searched and he was never forced to write his name on "Beyond" magazine on the 20th November 1988 or any other date as alleged by the Petitioner.
7. He further denied that any torture, threats or inhuman and degrading treatment, death threats,

solitary confinement, unlawful arrest and unlawful confinement and coercion to plead guilty to any offence by the Petitioner, were ever made by the police, which he claimed is a disciplined and professional force and in executing its statutory mandate cannot condone the acts complained of by the Petitioner.

8. He also claimed that the Petitioner was in any event charged with an offence known in law and due process was followed up to his conviction, sentence and appeal and his detention was thus legal.
9. He also took issue with the period of time it had taken, approximately 23 years, from the date of the cause of action to the date of filing the case. He alleged that the inordinate delay has put the Police Department at a great disadvantage and prejudice in making a reply to the allegations in the Petition since crucial evidence such as the Police Occurrence Book are destroyed ten years after any entry is made and police cell registers, 5 years after the last entry. He thus claimed that it was not practical to locate, retrieve and authenticate the relevant entries in the occurrence book as well as cell registers since the cause of action allegedly arose.
10. He thus urged me to dismiss the Petition with costs.

Determination

11. The Respondent even after entering appearance and filing the replying affidavit sworn by Kipkosgei Barmao, failed to appear in court to controvert the evidence of the Petitioner who testified on 4th June 2013. It therefore follows that in the absence of any evidence by the 1st Respondent to controvert the averments of fact by the Petitioner and cross examination to test the veracity of those averments, the court takes the position that the facts are as presented and the Petitioner's case remains unchallenged. With that in mind, I now proceed to examine the facts and determine whether they disclose any violation of the Petitioner's Fundamental rights and freedoms as alleged.

Right to liberty

12. The Petitioner was arrested on 20th November, 1988 by CID officers and he testified that he was held for one night at a police cell before being arraigned in court to answer charges in Siaya Magistrate's Court. **Section 72(3)** of the former **Constitution** provided 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 offence 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”.

13. The Petitioner was charged with an offence that did not carry the death penalty. Consequently, under the provisions of the Repealed Constitution as set out above, he should have been charged in court **within 24 hours of his arrest**. From the Petitioner's own testimony, he claimed that he was held in incarceration for only one night. He was arrested at around 4.00pm on 20th November, 1988 and a simple mathematical count would reveal that having been held for one night at the police cell, he was detained within the 24 hours stipulated by the Constitution. In the circumstances, I am unable to find that he was held without charge beyond the period permitted under the Repealed

Constitution and I am unable to find a violation of the Petitioner's rights under **Section 72** of the Repealed Constitution.

Right to bail or bond

14. The Petitioner claimed that he was denied his right to conditional release upon payment of cash bail and bond but I note that he was arrested on 20th November 1988 and arraigned in Court the next morning. He thus spent less than 24 hours at the police cell. The right to conditional release is a constitutional right as stipulated by **Section 72(5)** of the **Repealed Constitution**. The Petitioner having been detained for committing a non-capital offence was entitled to cash bail or bond but having been detained for only the one night I am unable to find that the said action violated his rights under **Section 72(5)** of the **Constitution**.

Protection from torture, cruel & degrading punishment

15. The Petitioner alleges that while in the custody of the CID officers, he was subjected to torture, cruel and degrading punishment. **Section 74 (1)** provides that;

“No person shall be subject to torture or to inhuman or degrading punishment or other treatment.”

I have elsewhere above given in some detail the alleged acts of torture that he was subjected to which included being held in a dark room, blindfolded, naked, with his legs chained into u-shaped hooks that were on the floor, while his hands were tied to his back. He was also hit on his feet using sticks and whips, cold water being poured into the cell he was held in and forced to sleep on the cold floor without blankets. These acts have been held by the High Court in the cases of **Harun Thungu Wakaba & Others v The Attorney General Nairobi HC Misc. Appl. 1411 of 2009(OS); Wachira Waheire v The Attorney General Nairobi HC Misc. 1184 of 2003(OS), Rumba Kinuthia & Others v The Attorney General, Nairobi HC Misc. Appl. No. 1408 of 2004 and Cornelius Akelo Onyango & Others v The Attorney General Nairobi HC Misc. 233 of 2009** with in respect to the acts those held at the infamous Nyayo house were subjected to, as amounting to torture, cruel and degrading treatment. These acts subjected to, those held at Nyayo house are similar with the acts subjected to the Petitioner by CID officers. For that reason, I find no reason to depart from those findings and I therefore find and hold that the Petitioner was subjected to torture and cruel, degrading treatment in violation of his rights under **Section 74** of the **Repealed Constitution**.

Right to fair trial

16. The Petitioner also alleges that his rights under **Section 77** of the Repealed Constitution were violated by the Respondent who allegedly denied the Petitioner due protection of the law and forming an opinion that he had committed a crime and forcing him to plead guilty to trumped up charges which were against the law. The section provided as follows:

“If a person is charged with a criminal offence, then, unless the charge is withdrawn the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.”

17. The Court of Appeal has held in the case of **Julius Kamau Mbugua -v-Republic Criminal Appeal No 50 of 2008** (unreported) that **section 77** protected rights in the course of the trial. I agree with the Respondent's response that the Petitioner was in this case convicted on his own plea of guilty, and so there was no violation of the rights set out under **Section 77** of the Repealed Constitution - See also **Odungi Randa Ong'ombe v Attorney General Petition No. 780 of 2008** and **Stanley Waweru Kariuki v Hon. Attorney General, Petition No. 1376 of 2003.**

I say so well aware that he may have pleaded guilty under duress but he neither raised that issue in

the trial Court nor did he raise the issue on appeal. It would be difficult on the circumstances to invalidate his trial which was before a competent Court and where no evidence of bias or partiality in the case of the Court has been alleged or proved at all.

Freedom of expression and Association

18. The Petitioner further alleges that his rights under **Section 79(1)** of the Repealed Constitution were violated by the Respondent. The Section provided as follows;

“Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.”

19. The facts as they are reveal that the Petitioner was detained in custody for the mere perception that he was associating and sharing ideas and opinions with people perceived to be anti-the government of former President Moi. He was indeed found to be in possession of 'Beyond' magazine which was a prohibited publication. While the Petitioner has the right to freedom of expression to read, to receive ideas and information without hindrance as provided under **Section 79(1)** of the former constitution, I do not find a violation of this right. The publication he was found with i.e. “Beyond” magazine and which was the subject of his prosecution was an outlawed publication. It was thus illegal to have it and the Petitioner cannot lawfully claim that his right in that regard was violated as he was found in possession of a magazine that was illegal at the time. It is very difficult, in this judgment to declare lawful, what was otherwise lawful at the time. This Court can only declare unlawful what was also patently unlawful at the time and what was lawful must be best declared so.

Damages

20. It is now settled law that a party whose constitutional rights are found to have been violated by the state is entitled to damages. The quantum of damages is in the discretion of the Court, taking into account the nature of the violations. This court has found that the State did violate the Petitioner's rights under **Section 74** of the **Repealed Constitution**. And he is therefore entitled to damages in respect of those violations.

21. The High Court has awarded damages for violation of constitutional rights in a number of torture cases that have come before it. In the case of **Haruni Thungu Wakaba -v- The Attorney General Misc Appl. No. 1411 of 2004**, Okwengu J, awarded the Petitioners who were incarcerated and had their rights violated, general damages for each of the 20 applicants ranging from Kshs.1,000,000.00 to Kshs.3,000,000.00. In the case of **Rumba Kinuthia -v- Attorney General (supra)**, Wendoh J made an award of Kshs.1,500,000.00 as general damages.

22. The Petitioner also seeks exemplary damages for the violation of his rights by state agents. This Court has previously declined to award exemplary damages in addition to general damages for reasons that there is no justification for such an award in changed political circumstances - See **Benedict Munene Kariuki and 14 Others -v- the Attorney General High Court Petition No. 722 of 2009, Samuel Waweru Kariuki (supra)**. I adopt the same position in the present case.

23. The Petitioner has established that he was tortured while held at Siaya Police Station by CID officers and in awarding damages to him, I agree with the view of this court in the case of **Dominic Arony Amolo-v- Attorney General – High Court Misc. Appl. No. 494 of 2003** that the violation of a Petitioner's rights which are as a result of the same transaction, a global award in respect of all the violations is the best. In light of the awards made in similar cases as set out above, and taking into account the night of torture endured by the Petitioner, the health and career losses he has since and doing the best I can in the circumstances, I make a global award of

Kshs.250,000.00.

24.The Petitioner shall also have the costs of this Petition plus interest on damages from the date of judgment until payment in full.

25.Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 18TH DAY OF DECEMBER, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Mr. Matwere for Petitioner

Miss Irari for Respondent

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE