



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.141 OF 2011

BETWEEN

JOHN MURETHII KIAGAYU.....PETITIONER

AND

THE HON. ATTORNEY GENERALRESPONDENT

JUDGMENT

Introduction

1. In his Petition dated 13th August 2013, the Petitioner, John Murethii Kiagayu alleges violation of his rights as set out in **Sections 72, 76, 77, 79 and 80** of the **Repealed Constitution**. He claims that his rights were infringed while he was serving as a Prison Warder No. 12858 in the Kenya Prisons Service.

Case for the Petitioner

2. In his affidavit sworn on 24th August 2013, he alleged that he was arrested while on duty and serving at Homa Bay Prison on 6th June 1987 and that upon his arrest, he was blindfolded, placed in a green Land Rover motor-vehicle and driven to a place he later discovered was the Nyayo House Basement and placed in a completely dark cell. The next morning, he was once again blindfolded, put in a small lift and taken before a panel of interrogators on the 24th floor of Nyayo House and he was forced to strip naked and was then assaulted by being beaten with rubber whips, metal bars, broken chair parts, and suffered from kicks and blows. He was later placed in the dark cell where pressurized water, hot and cold air was sprayed on him for several hours in order to compel him to admit to being a member of “Mwakenya”, an outlawed movement and that he was involved in anti-government subversive activities with the intention of overthrowing the Government of the day. He stated that he was locked in the dark cell for 15 days and was kept without food for 5 days, and without a sleeping mattress, blankets or drinking water for the entire period of his ordeal.
3. He was later charged on 24th July 1987 in **Republic v John Murethii Kiagayu Nairobi's CM's Court Criminal Case No. 2992 of 1987** with the offence of being a member of an unlawful

organisation, “Mwakenya”. He denied the charge and was taken back to Nyayo House and he claimed that the torture was intensified and he was blindfolded and laid on the floor of a motor vehicle which was driven at a very high speed on rough roads and after 3 days of torture, he was taken back to Court on 27th July 1987 and time this time he pleaded guilty and was sentenced to three years imprisonment. He claimed that he was told that he could not appeal against the sentence and he did not. He served the whole of it.

4. He claimed that as a result of the torture and cruelty subjected to him, he has suffered physically, psychologically and economically. He states that his life has been messed up and he is still stigmatized, suffers trauma, sleep disorders, poor health, immense loss of memory and social damage which has affected his social relations to date. In his Petition, he now seeks the following reliefs;

“(a) General damages for compensation for torture and unlawful imprisonment by the Government agents.

(b) A declaration that the proceedings in Criminal case No. 2992 of 1987 was unlawful therefore null and void.

(c) The termination from the employment was unlawful and should be reinstated and his salary paid in full;l and or be reinstated to his employment.

(d) Any further orders, directions of this Honourable Court may deem fit and just to grant

(e) Costs of this Petition with interests at Court rates.”

The Respondents Case

5. The Respondent, the Attorney General filed no response to the Petition. I note from the record however that he was represented at the hearing and cross-examined the Petitioner but failed to tender any written submissions even on points of law only and nothing substantive came out of the cross-examination that can be stated here. In the circumstances I can do no better than reiterate earlier sentiments expressed in **Kariuki Gathitu v Attorney General Petition No. 1188 of 2003**, where the Court stated as follows;

“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 facts. 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.”

On the same issue, Wendoh J had earlier on stated in **Rumba Kinuthia vs Attorney General Nairobi HCCC 1408 of 2004** as follows;

“Despite the fact that the applicant made very serious allegations against the defendant, government agents, servants and police officers, 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 correct factual position”.

6. I am in agreement and having said so, I must now determine whether the uncontested facts as set out above disclose any violation of the Petitioner's rights under the Repealed Constitution.

Determination

7. In that regard, the Petitioner was arrested on 6th June 1987 but was not charged in court until 24th July 1987. He was therefore held in custody for a period of 48 days. The applicable law at the time, being **Section 72(1)** as read together with **Section 72(3)** and **72 (5)** of the Repealed Constitution, obligated the 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 48 days late for an obvious misdemeanor. That was in clear violation of **Section 72** of the **Repealed Constitution** which provided as follows:

“(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”

Clearly, the above provision was breached and I will therefore find in favour of the Petitioner as regards his unlawful confinement

8. The Petitioner also alleged that while in custody, his right not to be subjected to torture and other cruel and degrading treatment protected by **Section 74(1)** of the **Repealed Constitution** was violated. **Section 74 (1)** provided that:

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

9. The issue of what amounts to torture and cruel, degrading treatment has been the subject of judicial adjudication before this court in several cases. The court has previously held that the beatings, interrogation and confinement in dark cells of those arrested and held in the now infamous Nyayo House Basement Cells amounted to torture and cruel degrading treatment. I need not repeat the findings of the court in such cases as *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*. The facts as set out above and which were uncontested point to violation of **Section 74** of the **Repealed Constitution** and in the circumstances, I find and hold that the Petitioner was subjected to torture, cruel and degrading treatment contrary to **Section 74(1)** of the **Repealed Constitution**.

10. The Petitioner further alleged that his right to a fair hearing as provided under **Section 77(1)** of the former constitution was violated. This Section required that when a person is charged with a criminal offence, he shall be afforded a fair hearing within a reasonable time by an independent and impartial court. The Court of Appeal in the case of *Julius Kamau Mbugua -v- Republic Criminal Appeal No 50 of 2008* held that **Section 77** of the **Repealed Constitution** protected rights in the course of the trial. In the instant case, the Petitioner on being arraigned in Court for

the second time pleaded guilty to the charges read to him and he was subsequently sentenced on a plea of guilty. He admitted in cross examination that the proceedings in Court were conducted in Kiswahili and he understood that language. In light of the interpretation given by the Court of Appeal to the provisions of **Section 77** of the **Repealed Constitution**, I do not find a violation of the Petitioner's right to a fair hearing under **Section 77** of the **Repealed Constitution**. I say so well aware that he may have been forced to plead guilty but he failed to appeal and raise that issue. He also failed to notify the trial Court of his ordeal and I find it difficult to hold in his favour in the circumstances. I will similarly decline to declare his criminal trial unlawful because I have seen little to warrant such a finding. I am not sitting an appeal over that case, in any event.

11. The Petitioner also claimed that his rights under **Sections 79** and **80** of the **Repealed Constitution** were violated **Section 79** protected the freedom of expression while **Section 80** protected the right to freedom of assembly and association. I do not see how these rights were violated because the Petitioner failed to tender any evidence in that regard and in fact said nothing about the issue. That being so, I am unwilling to belabour the same and for good reason.

12. Having found a violation of the Petitioner's rights under **Sections 72 and 74** of the **Repealed Constitution** this Court must award the Petitioner an appropriate remedy. The Petitioner was incarcerated in Nyayo House for 48 days during which time he was subjected to acts of torture. The amount in damages awarded in similar circumstances has varied, with awards of Kenya shillings 1,000,000-3,000,000 being made by Okwengu, J to the Petitioners in the case of **Harun Thungu Wakaba -v- The Attorney General, Misc Appl. No. 1411 of 2004**; Wendoh, J made an award of Kshs.1,500,000.00 in the case of **Rumba Kinuthia -v- Attorney General (supra)** while Majanja, J awarded Kshs.2,000,000.00 as general damages to the Petitioners in **Benedict Munene Kariuki and 14 Others -v- the Attorney General High Court Petition No. 722 of 2009**.

13. In all the above cases, the High Court has been reluctant to award exemplary damages for reasons that they are not awardable in changed political circumstances and in a Petition such as the one before me. I do not see any good reason to depart from that reasoning. In that event, I award the Petitioner **Kshs.2,500,000/-** for violation of his rights under **Sections 72 and 74** of the **Repealed Constitution**. I do so taking into account the period of 48 days which he was in unlawful incarceration, the torture subjected to him and the suffering he continues to undergo as a result of that torture.

14. Sadly, this Court cannot grant the Petitioner's prayer that he be reinstated to his former job or that his salary paid in full. Let the Petitioner canvass such issues in the right forum/Courts as established under **Article 162(2)** of the **Constitution**.

15. The final orders to be made are that Judgment is entered in favour of the Petitioner against the Respondent in the following terms;

(a) General damages of **Kshs.2,500,000/-** as compensation for torture and unlawful imprisonment by government agents.

(b) The Petitioner shall have the costs of this Petition together with interest on damages and costs from the date of Judgment until payment in full.

16. 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. Ogoro for Petitioner's

Miss irari for Respondents

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE