



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**MILIMANI LAW COURTS**

**Petition 41 of 2011**

**FRANCIS ONGELE O'PALLA.....PETITIONER**

**AND**

**THE ATTORNEY GENERAL.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The petitioner, Francis Ongele O'palla was, at the time material to this case, a final year Bachelor of Education student at the Kenyatta University College, Nairobi.
2. These proceedings were commenced by a petition dated 10<sup>th</sup> March 2011 supported by the petitioner's affidavit sworn on the same date. There is also the petitioner's statement dated 16<sup>th</sup> January 2012 and a witness statement made by one David Onyango Oloo dated 20<sup>th</sup> January 2012. The petitioner also produced in evidence a list of documents dated 6<sup>th</sup> January 2012 to which are attached the petitioner's transcripts from Kenyatta University.
3. The petitioner's case concerns the unfortunate events surrounding the 1982 attempted coup. Several persons, among them the petitioner, were arrested and detained on suspicion of being involved in the attempted coup. The petitioner seeks the following reliefs:
  - A. *That this Honourable Court issue a declaration that the petitioner's fundamental rights and freedoms under Section 28, 9(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 dated 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 Plaintiff is entitled to the payment of damages and compensation for the violation and contraventions of his fundamental rights and freedoms under the constitutional provisions stated in A above.*
  - C. *For 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.*

4. Though, the petition is framed under the Constitution, the acts that are subject of the case occurred in 1982. The petition must therefore be determined in accordance with the former Constitution as the Constitution is not retrospective in its application. (See the case of *Joseph Ihuro Mwaura & 82 Others v Attorney General & Others Nairobi Petition No. 498 of 2009 (Unreported)* at paragraph 26). I shall therefore construe the petition as being brought under the former Constitution and any reference to the Constitution shall be the former Constitution.

5. The respondent, though represented by counsel at these proceedings, did not defend this matter by way of grounds of objection or a replying affidavit despite the matter having come up for directions on 9<sup>th</sup> November 2011 and 16<sup>th</sup> December 2011. In the circumstances, the facts as set out in the petition, supporting affidavit and petitioner's evidence are uncontroverted. The effect of this is that I must take the facts as true and correct so that my only task is to consider whether they constitute a violation of the petitioner's rights and if so what relief I should grant.

### **Petitioner's case**

6. On 4<sup>th</sup> September 1982, officers of the Kenya Police and Special Branch went to the petitioner's rural home in West Seme Kisumu. The petitioner was identified by the local sub-chief. His hut and that of his mother were ransacked. He was later taken to Kisumu Police Station. He was held there until 20<sup>th</sup> September 1982 without charge. He was not allowed any visitors. The cell in which he was held was overcrowded, cold and inhospitable to the extent that he contracted ringworms on his head and thighs.

7. He was brought to Nairobi and taken to Turkoman Carpet House where he was interrogated about his knowledge of the attempted coup and student politics at the University. He denied such knowledge. He, together with his fellow students, were later taken to the GSU Training School in Embakasi.

8. At the GSU facility, the petitioner testified that he was further interrogated on his associations at Kenyatta University where he was a student. He was frequently whipped with a belt, beaten, forced to do press ups naked in order to answer questions put to him correctly by confessing and implicating others.

9. At the facility, the petitioner stated that the detainees were housed in a classroom and forced to lie on their blankets on a cold floor under the watchful and menacing eyes of the General Service Unit paramilitary officers. The officer threatened them with death. During this period, the interrogation also involved locking him in a guardroom which was essentially like a box chamber where he was forced to lie on the cold floor in the dark. He was disoriented by this experience.

10. Afraid of the experience he went through, he was forced to sign statements at Turkoman Carpet House. He was taken to court before the Chief Magistrate, pleaded guilty and was convicted. The petitioner was sentenced to jail for 6 years after being in police custody for a period of six months. He completed his sentence and was released from prison on 21<sup>st</sup> March 1987.

11. The petitioner claims that while in prison he suffered indignities like being stripped naked during searches in front of other prisoners young and old. He contracted tuberculosis from which he recovered. As a result of his experiences he suffered physically, mentally and psychologically. He has also lost his opportunity to graduate from Kenyatta University. He claims damages.

### **Findings**

12. According to the uncontested evidence of the petitioner, he was arrested and kept in custody without trial from 4<sup>th</sup> September 1982 to about March 1983. During this time he was neither charged nor detained under the preservation of **Public Security Act (Chapter 57 of the Laws of Kenya)**. This is clear breach of **section 72(3)** of the Constitution and I so find.

13. The evidence of harsh treatment by agents of the respondent while in custody is uncontested. This treatment is unjustified and amounts to torture and inhuman treatment contrary to **section 74(1)** of the Constitution.

### **Relief**

14. I have found that the petitioner's rights have been infringed and the only issue for consideration is what relief I should grant.

15. Apart from declarations which follow from the findings, I will award damages. The petitioner's counsel has urged me to award the sum of Kshs. 50 million. Counsel did not refer me to any decisions nor provide a basis for this sum apart from stating that the facts of the case justified the award.

16. In the case of ***Rumba Kinuthia & others v Attorney General Nairobi*** HCCC No. 1408 of 2004 (Unreported), seven claimants who underwent similar experiences as the petitioner were awarded Kshs.1.5 million each. In the cases of ***Nelson Akhahukwa Muyela v Attorney General Nairobi*** Petition No. 783 of 2008 (Unreported) and ***Israel Okemo Agina v Attorney General Nairobi*** Petition No. 1374 of 2003 (OS) (Unreported) the sum of Kshs. 2 million was awarded in similar circumstances.

17. In considering the award I should make I have taken into account the fact that I did not have the advantage of medical reports to assess the nature and extent of the injuries sustained as a result of the torture nor evidence of special damages. I am aware that money can never take away the petitioner's suffering but doing the best I can in light of what I have stated I award **Kshs. 2 million** as general damages.

### **Conclusion**

18. In conclusion, I enter judgment for the petitioner as follows:-

- (i) I declare that the petitioner's fundamental rights and freedoms under section 72(3) and 74(1) of the Constitution were contravened and violated by the respondent.**
- (ii) I award the petitioner the sum of Kshs.2,000,000.00 as general damages for the violation of his fundamental rights.**
- (iii) I award costs of this suit to the petitioner.**
- (iv) The petitioner is awarded interest on damages at court rates from the date of judgment.**

**DATED and DELIVERED at NAIROBI this 27<sup>th</sup> day of January 2012.**

**D.S. MAJANJA**

**JUDGE**

Mr Omondi instructed by Wasuna & Company Advocates for the petitioner

Mr Moimbo, Litigation Counsel, instructed by the State Law Office for the respondent.