



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION 43 OF 2011**

**OTIENO ALBERT WAMBOGO.....PETITIONER**

**AND**

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

**JUDGMENT**

**Introduction**

1. The petitioner Otieno Albert Wambogo was, at the time material to this case, an accountant at Nestle Foods Kenya Ltd by then known as Food Specialities Kenya Ltd.
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 undated statement and a witness statement made by one Samuel Muga Walter Kolale dated 16<sup>th</sup> January 2012. The petitioner also produced in evidence a list of documents dated 16<sup>th</sup> January 2012 to which are attached the petitioner's testimonials; certificates from University of Nairobi and documents showing that he was employed at Food Specialists Kenya Ltd and Nestle Foods Kenya Ltd.
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 17<sup>th</sup> October 2011, 18<sup>th</sup> November 2011 and 16<sup>th</sup> December 2011. In the circumstances, the facts as set out in the petition, affidavit and the 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. The petitioner testified that on 10<sup>th</sup> September, 1992, he was at an open bus stage at Umoja Estate reading a newspaper in the company of friends. Suddenly he was arrested by Kenya Police Special Branch officers bundled into a caR and taken to his house. His house was ransacked. Several books and magazines were taken. He was taken to Turkoman Carpet House.

7. The petitioner states that he was held for a total of 47 days from 12<sup>th</sup> September 1982 until 29<sup>th</sup> October 1982 when he was taken to court. He was charged with being in possession of a prohibited book. He pleaded guilty and was sentenced to one year in prison.

8. While in custody, he was interrogated daily during the first week on matters relating to the aborted coup in August 1982. He would be ordered to write statements but when the statements did not amount to a confession or implicate anyone, he was beaten and the statement torn. He would then be ordered to write another.

9. The petitioner gave evidence of how he was ordered to spin on his toes. This was very painful. He was beaten using whips, timber planks, kicks, and blows by the Special Branch officers who took special care not to inflict visible physical injuries. He was also denied medical care. The petitioner avers that he was denied food and toiletries during his time in custody.

10. The petitioner also testified how he was held incommunicado during his time in custody. He was transferred from one police station to another under false names. He was taken Muthangari, Kilimani, Kileleshwa, Langata and Turkoman Carpet House under false names so that his family and friends could not trace him. During all these times he was subjected to severe beatings.

11 As a result of the unlawful incarceration, the petitioner states that he lost his employment and opportunity to grow professionally. He was also denied the company of his family during this period. The petitioner avers that he has suffered physical and psychological injury for which he now seeks relief

### **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. 100 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 give 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 this 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.