



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. APPLICATION NO. 1362 OF 2003

NJOROGE WANGUTHI.....PLAINTIFF/APPLICANT

V E R S U S

THE HON. ATTORNEY GENERAL.....DEFENDANT/RESPONDENT

JUDGMENT

Introduction

1. The matter before this court arises out of the ‘**Mwakenya**’ trials that took place in Kenya in the mid-eighties. In the Originating Summons dated 30th October, 2003, the applicant seeks the following orders:-

1. A declaration that the Plaintiff’s fundamental rights and freedoms under Section 70 72 (3&5), 74(1), 76, 77, 78(1) & 80(1) 82(3) have been and were contravened and grossly violated by police officers and other Government servants, agents, employees and institutions in 1986 and on diverse dates thereafter.
2. 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.
3. General damages, exemplary damages on an aggravated scale under S.84 (2) of the constitution of Kenya for the unconstitutional conduct by government servants and agents.
4. Any further orders, writs, directions, as this Honourable Court may consider appropriate.
5. Costs of the suit, with interest at court rates.

The application is supported by the affidavit of the plaintiff, **Njoroge Wanguthi** sworn on 14th October, 2003. A further affidavit sworn by the plaintiff on 19th January 2011 was filed by leave of the court on 26th January 2011.

2. While the respondent opposed the plaintiff’s suit, no affidavit in reply was filed. The respondent did, however, file written submissions dated 1st July 2009.

3. When the matter came up for hearing on the 15th of November 2011, Mr. Onyiso for the respondent indicated that he would be relying on the written submissions and would not be making oral submissions.

However, in the course of the hearing, Mr. Mutinda who held brief for Mr. Onyiso made oral submissions in response to the submissions by the petitioner's counsel.

The Petitioner's Case

4. Mr. Muhindi highlighted the plaintiff's submissions dated 27th January, 2011. The plaintiff's case is that he was a Library Assistant attached to the Ministry of Livestock Development in Kabete where he had been employed in 1973 initially as a clerk. He was arrested on 12th June, 1986 in Nyeri and held at the Nyeri Police Station allegedly for being a member of 'Mwakenya' Movement. He was later transferred to Nairobi and was mistreated by being blindfolded when being moved to Nairobi. He was held in various police stations without his name being entered into the occurrence book of any of them. He was later transferred to Nyayo House basement cells where he was beaten with crude weapons, broken sticks and whips while undergoing interrogations by a group of thirteen persons one of whom he names as being James Opiyo, a Special Branch Officer.

5. Finally, he was charged before the Senior Resident Magistrate's Court and jailed for 6 years. He has attached a copy of the Charge Sheet with the Court File No.2559/86 and the proceedings before H.M. Buchi, Chief Magistrate. The Charge Sheet shows the date of arrest as 12.6.1986 and the date of 'Apprehension Report to Court' as 26.6.1986. The date in the proceedings before the court is shown as 16.6.1986 though the date of sentence is shown as 26.6.1986. It was the plaintiff's case that his arrest and sentencing were, in the circumstances in breach of his fundamental rights.

6. From the copy of the proceedings before the Chief Magistrate, it appears that when he was charged in court, the plaintiff told the Chief Magistrate that he had been tortured but he was not offered medication. It was his case that as a result of the torture he was subjected to, he developed severe medical complications to the spine. He referred to annexure **NW2**, a medical report by a Dr. Mucee which shows that he is still undergoing treatment for the injuries he suffered.

7. The plaintiff contends that the kind of treatment he received at the hand of state officers was outlawed by the Constitution. It was also prohibited under International Law and he referred to the provisions of **Article 14** of the **International Convention Against Torture**, **Article 5** of the **African Charter on Human & People Rights**, and **Chapter V** of the old **Constitution of Kenya** in particular **sections 70, 72, 74, 77 and 80**.

8. The petitioner contended that as a result of his arrest and jailing, he lost a chance to move up in the Civil Service where he was employed. He calculates the loss he incurred to be in the tune of KShs.3.4 million and referred to a document annexed to his affidavit as annexure NW (a). He urged the court to grant him general damages of Kshs 8 million, exemplary damages of Kshs.2 million, the costs of the suit and interest. In support of the claim for exemplary, damages, the applicant argued that the application is brought under the old constitution which contemplates an award of exemplary damages at Section 84. Exemplary damages are awarded where the conduct of the respondent is brazen and decidedly against the law. He argued that the court has the leeway to award such damages.

9. He also relied on the decisions of the court in **Dominic Arony Amolo –v- The A- G Nairobi Misc. Application No. 494 of 2003**; **James Njau Wambururu-v- The A-G Nairobi HCCC No. 3829 of 1994** and **Felix Njagi Marete-v- The A-G Nairobi Misc. Case No. 668 of 1986** in support of his claim for damages.

10. In view of the fact that the respondent had not filed any replying affidavit to contradict the matters set out in his affidavits, he argued that the matters that he had placed before the court should be taken as not having been rebutted by the A.G.

The Respondent's Case

11. The position taken by the respondent in the written submissions dated 1st July 2009 is that the plaintiff has not adduced sufficient evidence in support of his claim to enable the court make a decision and there was a danger of awarding damages to persons whose rights were never violated. He does not

indicate the identity of the police officer who arrested him or the name of the Senior Resident Magistrate's court before whom he was arraigned or the case number. The respondent argued that in light of the scarcity of information on the matter, it should be stayed and the court direct that the case be referred to the Truth Justice and Reconciliation Commission to determine ways and means of redress for victims of gross human rights violations pursuant to Section 5(e) of the Act.

12. In addition, Mr. Mutinda in response to the petitioner's argument that his averments had not been controverted since no replying affidavit had been filed by the respondent argued that the burden of proof is on the applicant. The applicant must satisfy the court that the events he alleges occurred. With regard to the submission that the applicant missed a chance to move up the Civil Service, the respondent argued that that was not a constitutional issue but a purely employment matter. On the allegation that the applicant developed complications to the spine, it was the respondent's position that it has not been shown how this complication is related to the complaint which allegedly happened in 1986. The medical report relied on was made in 2008. Many things could have happened between 1986 and 2008. There has to be a connection between the events of 1986 and the medical position in 2008.

13. The respondent argued further that while the applicant had placed reliance on the constitution, no section or articles have been cited in support, thus proving that there is nothing constitutional in the matter. On the claim for general damages of KShs.7 million, the respondent submitted that general damages have never been assessed by a party and stating the amount to be awarded in the petition takes away the discretion of the court as it is the court which decides what to award based on the circumstances and previous awards. On the claim for exemplary damages, the respondent submitted that the matter before the court was a constitutional issue. Exemplary damages are given in civil matters, not in constitutional matters, and the applicant was seeking a double award. Article 23 of the Constitution refers to compensation as the relief a petitioner is entitled to. He cannot get both general and exemplary damages.

Findings

14. In addressing my mind to this matter, I am constrained to take the facts adduced by the plaintiff with regard to his arrest, detention and torture as uncontroverted by the respondent. While in his written submissions the respondent argues that the plaintiff has not adduced sufficient evidence to enable the court determine the matter, it should be noted that the respondent's submissions were filed in July 2009. No doubt following those submissions, the plaintiff applied and was granted leave to file a further affidavit which he did on 19th January 2011. The respondent did not file a reply to this affidavit nor did he file supplementary submissions to address the matters deponed to in this affidavit.

15. The plaintiff avers that he was arrested in Nyeri and held in Nyayo House for a period of 14 days. The charge sheet annexed to his affidavit dated 19th January 2011 as 'NW1' indicates the date of arrest as 12/6/86 and the 'Date Apprehension Report to Court' (sic) as 26/6/86. The proceedings before H.H. Buchi C.M in Criminal Case No. 2559 annexed to the affidavit with the charge sheet indicate that the plaintiff appeared in court on that date, pleaded guilty and was sentenced to six years' imprisonment. There is nothing in the plaintiff's affidavit to indicate when he was released, though a statement in the Medical Report of Dr. Geoffrey Mucee annexed to the affidavit of 19th January 2011 as NW2 indicates that he was released in mid-1990.

16. On the basis of the above information, I find and hold that the plaintiff was arrested and held for 14 days without charge at Nyayo House, and that he was sentenced to 6 years' imprisonment by the Chief Magistrate's court in Nairobi on a charge of distributing a seditious publication.

17. The next issue to consider is **whether the arrest, detention without charge and alleged torture was in contravention of the provisions of the repealed constitution of Kenya**. Contrary to the arguments by the respondent, the plaintiff has specified the sections of the repealed constitution which were violated by the state and seeks a declaration that his rights under sections 70, 72 (3&5), 74(1), 76, 77, 78(1) & 80(1) 82(3) were violated by the State. He also places reliance on the provisions of international and regional covenants to which Kenya is a party.

18. Section 70 entitled 'every person in Kenya' to the fundamental rights and freedoms of the individual without discrimination on the basis of race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex. Such rights were however subject to respect for the rights and freedoms of others and for the public interest.

19. The plaintiff was therefore entitled to protection of his fundamental rights and freedoms, and any act that limited his enjoyment of these rights and freedoms otherwise than in circumstances permitted by the constitution was a violation of his constitutional rights under the constitution.

20. The plaintiff avers that he was arrested in Nyeri on the 12th of June 1986 and was held without charge in various police stations and at Nyayo House between the 12th and the 26th of June 1986. He was not told what he was charged with, but according to the proceedings before the Chief Magistrate on the 26th of June 1986, his offence was distributing a seditious publication. Section 72(1) contained the general prohibition against deprivation of personal liberty save as provided in specified instances under the constitution. At section 72 (2), the Constitution provided that:-

'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.'

Section 72(3) required that:-

'A person who is arrested or detained.....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....'

This right is also protected under international law.

21. At section 77, the repealed constitution contained the constitutional guarantee to a fair hearing and required that if a person is charged with a criminal offence, then, unless the charge is withdrawn, he shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

22. Section 79 of the repealed constitution contained the constitutional protection for freedom of expression:

'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) ...'

23. Section 80 contained the constitutional guarantee to freedom of assembly and association, although, like the right guaranteed under section 79, the enjoyment of this right was subject to the public defence, safety, order and morality requirements.

24. From the evidence before the court, the plaintiff's constitutional rights under the provisions cited above were all violated by the state, and there is nothing before the court that would justify such violation, even assuming the public order, morality and safety derogation was permissible. The plaintiff was arrested but was not told the reason for his arrest, nor was he brought to court in the period prescribed by law for an offence of the kind he was charged with. Distribution of a seditious publication was not an offence 'punishable by death.' To hold the plaintiff in custody in excess of the 24 hours prescribed by the constitution was a violation of his constitutional rights.

25. It was the plaintiff's case that while in the custody of the state at Nyayo House he was subjected to torture while undergoing interrogation at the hands of some thirteen people, one of whom he identifies as a Special Branch Officer named Opiyo. As noted above, the respondent has not controverted the plaintiff's averments that he was subjected to torture.

26. Both the repealed constitution and international and regional covenants to which Kenya is a party prohibit torture and other cruel and degrading treatment. Section 74(1) of the repealed constitution provided that

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

27. While the constitution did not define the acts prohibited under section 74(1), the International Convention Against Torture defines torture to mean ***'.....any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.'***

28. A similar prohibition against torture is contained in Article 5 of the African Charter on Human and People's Rights:

'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.'

29. Finally, Article 7 of the International Covenant on Civil and Political Rights provides as follows: ***'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'***

30. The plaintiff was thus subjected to acts which, in the absence of evidence to the contrary as in this case, amounted to torture which is prohibited and was at the time prohibited by both domestic and international law.

31. In light of the above matters, I find and declare that the plaintiff's fundamental rights and freedoms under Section 70, 72 (3 & 5), 74(1), 76, 77, 78(1) & 80(1) 82(3) have been and were contravened and grossly violated by police officers and other government servants, agents, employees and institutions in 1986 and on diverse dates thereafter.

32. The plaintiff also seeks a declaration that he is entitled to the payment of damages and compensation for the violations and contraventions of his fundamental rights and freedoms. In view of the decisions of this court in the various cases alleging torture and other violations of rights in the sedition trials of the nineteen eighties, it is not in dispute that the plaintiff, upon a finding that his fundamental rights and freedoms under the constitution were violated, is entitled to damages for such violations. The authorities relied on by the plaintiff namely **Dominic Arony Amolo –v- The A- G, James Njau Wambururu-v- The A-G and Felix Njagi Marete-v- The A-G** (supra) as well as the decision of the court in the case of **Harun Thungu Wakaba & Others –v- The Attorney General High Court Misc. Appl. No 141 of 2004(O.S)** are clear on this. What this court needs to address itself to is the amount of damages to award the plaintiff.

33. There is no doubt that the plaintiff's constitutional rights were violated in the series of events starting from his arrest to his detention in custody for 14 days before he was charged in court. He asks the court to note the injuries he suffered and that he still suffers from complications of the spine as a result of the torture and relies on the medical report of Dr. Mucee in support.

34. At his appearance before the Chief Magistrate as shown by the proceedings annexed to his affidavit

of 19th January 2011, the plaintiff told the court that:-

'I was in C.I.D custody and developed nose bleeding, diarrhoea and stomach upsets. I was not offered medical attention and I fear I have infections I was treated roughly and would request for medical attention.'

35. I have also looked at the report which was prepared by Dr. Mucee in 2008. There is nothing before me to link the complications of the spine referred to in the medical report to the events of 1986. I am therefore not in a position to take the alleged complications of the spine into consideration in assessing the general damages to award the plaintiff.

36. The plaintiff also seeks damages on the basis that he lost a chance to advance in the civil service as a result of his arrest and incarceration. I am however, unable to take this into account also in assessing damages. It would be pure speculation to argue that the plaintiff would have advanced to certain levels in the civil service and earned certain amounts in the process.

37. In addition to general damages, the plaintiff asks the court to award him exemplary damages for the violation of his rights. The position with regard to the award of exemplary damages in constitutional matters is not settled. In the case of ***Cornelius Akelo Onyango & Others v The Attorney General Nairobi HC Misc. 233 of 2009 (Unreported)***, Musinga J. awarded exemplary damages on the authority of the decision in ***Obonyo-v- Kisumu Municipal Council [1971] EA 91***. In that case, the Court of Appeal adopted the rule in ***Rookes v. Barnard [1964] AC 1129*** where it was held that exemplary damages in tort may be awarded where there is ***'oppressive, arbitrary or unconstitutional action by the servants of the government'*** and where ***the defendant's conduct was calculated to bring him some benefit, not necessarily financial, at the expense of the plaintiff.'***

38. In ***Benedict Munene Kariuki-v- The Attorney General Petition No. 722 of 2009***, Majanja, J, in departing from the position taken by Musinga, J was of the view that ***'cases under section 84 of the Constitution are cases concerning the Constitution. It is unnecessary to consider an unnecessary element of "unconstitutional action" when the relief is awarded for unconstitutional conduct.'***

39. I would agree with the view taken by Majanja, J. As submitted by the respondent, exemplary damages are awarded in civil claims arising from tort as in the ***Obonyo v Kisumu Municipal Council case***. The case before me seeks damages for unconstitutional action, and to award both general and exemplary damages would be to make a double award.

40. In light of my findings set out above, I find in favour of the plaintiff and declare:

1. That the plaintiff's fundamental rights and freedoms under Section 70 72 (3&5), 74(1), 76, 77, 78(1) & 80(1) 82(3) have been and were contravened and grossly violated by police officers and other Government servants, agents, employees and institutions in 1986 and on diverse dates thereafter.

2. 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.

41. With regard to the damages due to the plaintiff and in light of awards in previous cases, I make a global award of Kenya Shillings Two Million (Kshs. 2,000,000.00) with interest thereon from the date of judgment until payment in full. The plaintiff shall also have the costs of the case.

Dated and Delivered at Nairobi this 20th day of January, 2012.

Mumbi Ngugi
Judge