



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

Petition 240 of 2009

MWANGI

MATHENGE.....PETITIONER

V E R S U S

THE HON. ATTORNEY

GENERAL.....RESPONDENT

JUDGMENT

Introduction

1. The petitioner, Mr. Mwangi Mathenge, seeks compensation for violation of his constitutional rights following his arrest, incarceration and subsequent imprisonment in the late eighties.
2. In his petition dated 16th April, 2009, he seeks the following orders:-
 1. **A DECLARATION** that the Petitioner's Fundamental Rights and Freedom were contravened and grossly violated by the Respondent's Special Branch Police Officers who were Kenyan Government servants, agents, employees and in its institution on 28th December, 1986 and for 36 days at Nyayo House Torture Chambers and thereafter in Kenyan Prisons.
 2. **A DECLARATION** that the Petitioner 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 and moral damages on an aggravated scale under S. 84(2) of the Constitution of Kenya for the unconstitutional conduct by the Kenyan government servants and agents be awarded.
 4. Any further orders, writs, directions, as this Honourable Court may consider appropriate.
 5. Costs of the suit and interest.

The petition is supported by an affidavit sworn by the petitioner on the 16th of April, 2009.

3. The respondent opposes the petition on the grounds:

1. **THAT** the application is an abuse of court process.
2. **THAT** the application herein lacks clarity and precision in setting out alleged violations.
3. **THAT** the claim herein is stale as the applicant is guilty of Laches.
4. **THAT** the application is devoid of merit.

No replying affidavit has been sworn in opposition to the petition.

4. Pursuant to directions given by Musinga, J on 20th May, 2011, the petitioner's evidence was taken viva voce. The case was heard on the 13th of October and the 7th of December 2011. The petitioner's evidence was taken on the 13th and 7th December, 2011 while the 20 witnesses, Mr. Robert Imwana, testified on 7th December, 2011. Mr. Wawaka appeared for the petitioner while Ms Riany appeared for the Respondent.

The Applicant's Case

5. According to the petitioner who is now 80 years old, he was a businessman operating a butchery in Nakuru Slaughter House in 1986. He was also the KANU treasurer Nakuru Town. The KANU Chairman in Nakuru was one Kariuki Chotara who did not allow anyone to talk and who said that the applicant and others were opposing him when they spoke against the one party system. He also accused them of supporting Maina Kinyati and others and of being members of MwaKenya, then a proscribed movement.

6. On 28th December, 1986, he was arrested at night and taken to Menengai Police Station where he was held until 30th December, 1986. He was then collected in a landrover and transported, while lying on the floor and blindfolded, to a house. He found policemen and was told to produce his identity card. He later came to learn that the house was Nyayo House. The following day at 4.30 pm, he was taken up in a special lift while blindfolded, to another room. He found ten people in that room who asked him what he knew about MwaKenya, Mikaru Ng'ang'a and Maina Kinyatti. He was asked to undress and sit down and was subjected to a severe beating with pieces of wood till he lost consciousness. He regained consciousness to find himself lying in water, naked, in a room about 12x10 ft. He was beaten and sprayed with water, and he remained in this room for three days with no food or water to drink and no toilet facilities.

7. After 3 days he was again taken up to the same room and interrogated. When the men interrogating him saw he had wounds, he was taken to another room and given a bed and food, but he was not taken to hospital and his family did not know where he was.

8. He was held in the room with water and subjected to torture for a period of 12 days, and in total he was held by the police for 36 days. He spent the other days in a room and was given good food.

9. On the 3rd of February, 1987, he was taken to court at about 7.30 p.m. and charged in Criminal Case No. 453 of 1987 with taking an unlawful oath and he admitted the charges. He states that he pleaded guilty as he was afraid that he would be killed if he did not. He did not have legal representation. He was jailed for 4 years.

10. He served his prison term initially at Kamiti Prison where he stayed for 6 months then he was taken to Manyani Prison. While at Kamiti, he was kept in isolation and unable to mix with other prisoners. In Manyani, he was exposed to mosquitoes and had no clothes, and he was made to work on the land. He spent 2½ years in Manyani.

11. The petitioner did not appeal against his sentence.

12. The petitioner asked the court to award him damages for the torture he suffered. He said he lost 6 fingernails because of being kept in water, and did not get good medical treatment or see a doctor in the entire period that he was in Nyayo House. He only saw his family 4 months after his arrest, and 2 of his children dropped out of school for lack of fees. His business from which he stated he used to earn net profits of Kshs 30,000 also collapsed.

13. The petitioner also claimed that he was affected psychologically and physically by his arrest and imprisonment. He was a member of KANU but never went back to politics as he was arrested because of politics.

The Respondent's Case

14. The respondent did not file any reply in opposition to the petitioner's case but confined itself to impeaching the credibility of the petitioner. In the written submissions dated 15th December 2011, the respondent pointed out the discrepancies that had emerged from the cross-examination of the petitioner between his evidence on oath and the averments in his affidavit sworn on 16th April 2009. Such discrepancies as pointed out by the respondent included the date of arrest. The petitioner had stated that he was arrested on 28th December 1986 while the charge sheet shows the date of arrest as 30th December 1986.

15. The respondent also pointed at the discrepancy between the averments in the affidavit that the petitioner was arrested at 6.20 p.m. by 5 special branch officers and put in a green land rover and his statements on oath that he was arrested by 6 special branch officers at 10.00 p.m. and put in a blue land rover.

16. On the allegation that the petitioner's rights under the old Constitution were violated, the respondent took the position that an arrest for committing or being suspected of being about to commit a criminal offence does not amount to a violation of one's constitutional rights to personal liberty. There was also, in the respondent's view, no evidence that the petitioner had been subjected to torture and with regard to his allegation that he had been subjected to discrimination, the petitioner had stated in his evidence that he had been subjected to the same treatment as everyone else while in Nyayo House.

17. Finally, the respondent contended that the petitioner was time barred as he had filed this petition 23 years after his arrest and referred the court to the case of **Lt. Col. Peter Ngari Kagume & 7 Others -v- A-G High Court Constitutional Petition No. 128 of 2006**

Findings

18. I will deal first with the argument by the respondent that the petitioner is time barred for bringing this petition 23 years after the events that form the basis of his complaint. The issue of limitation of time in respect of petitions for enforcement and protection of constitutional rights has been raised by the respondent and found unsustainable in several decisions of this court in the last few years. I refer in this regard to, among others, the cases of *Dominic Arony Amolo -v- The Hon. Attorney General (supra)*, *Harun Thungu Wakaba & Others v The Attorney General Nairobi HC Misc. Appl. 1411 of 2009(OS)*, *Wachira Weheire 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*, *Cornelius Akelo Onayngo & Others v The Attorney General Nairobi HC Misc. 233 of 2009 (Unreported)*.

Credibility

19. The respondent has called to question the veracity of the petitioner in view of the discrepancies in his evidence, particularly with regard to the date and time of his arrest, the number of officers who arrested him, and the colour of the vehicle that he was transported in to Nyayo House. It is noteworthy, however, that the respondent does not dispute the fact that the petitioner was arrested; just that he was not

arrested on the date and time that he says he was arrested.

20. I observed the demeanour of the petitioner in the witness stand. Aside from the fact that he is now 80 years old, the events of 1986 are more than a quarter century in the past and his memory may have faded with regard to some details, the petitioner struck me as a truthful person. He was quite candid, for instance, about the fact that he was given a bed and good food some of the time he spent at Nyayo House, and that he was not tortured for most of the time he was there. Further, in the absence of evidence from the respondent to contradict the petitioner's evidence, I have no basis for disbelieving him.

21. The petitioner produced the charge sheet as exhibit 1 and the proceedings from his appearance in court and a letter with regard to the proceedings were produced by the petitioner's second witness, **Robert Imwana**, an employee of the judiciary, as exhibit 2 and 3. There can be no doubt therefore that the petitioner was arrested, either on the 28th or 30th of December 1986, and that he was charged in court and imprisoned on the 3rd of February 1987. He was therefore in the hands of state agents between 34 and 36 days.

Violation of Constitutional Rights

22. The petitioner was charged with taking an unlawful oath contrary to section 61(b) of the Penal Code. This was not a capital offence, and the petitioner should therefore have been charged in court within 24 hours of his arrest as provided under section 72(3) of the old Constitution which provided that-

(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 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.'

23. For the State to hold him for a period in excess of thirty days was a clear violation of his constitutional rights.

24. The petitioner has averred in his affidavit in support of his petition and in his oral testimony the treatment that he was subjected to in the period of 12 days out of the 36 that he was in detention at Nyayo House. He was beaten, denied food and water, and kept in a cell with cold water. His evidence has not been controverted and was not shaken in cross examination. This court has found in the various cases arising out of the Nyayo House torture chambers that the kind of treatment meted out on detainees in those cells amounted to torture and cruel, inhuman and degrading treatment that was expressly prohibited by the Constitution at Section 74 and the various international conventions to which Kenya is a party. See in this regard the cases of **Harun Thungu Wakaba & Others v The Attorney General** and **Cornelius Akelo Onayngo & Others v The Attorney General** cited above. I therefore find that the petitioner's rights under section 74 were violated in the period that he was incarcerated at Nyayo House.

25. The petitioner has alleged violation of his rights under sections 76, 77, 79 and 80 of the constitution. No evidence was adduced to support the alleged violation of his rights under Sections 76, 79 and 80. With regard to section 77, the petitioner was convicted on his own pleas of guilty. He was not subjected to a trial, and so the safeguards set out in section 77 with regard to the trial process were not at issue. See in

this regard the decision of the Court of Appeal in **Julius Kamau Mbugua -v-Republic Criminal Appeal No 50 of 2008 (unreported)**. I therefore find that no violation of the rights under these sections were violated.

26. In light of the above findings, I declare that the petitioner's rights under sections 72(3) and 74 of the constitution were violated by the respondent.

Entitlement to Damages

27. It is now settled that this court has jurisdiction to award damages under Section 84 of the old Constitution where the court finds a violation of the constitutional rights of a petitioner. Such damages are within the court's discretion.

28. The petitioner urges the court to award him damages and refers to the case of ***Gitari Cyrus Muraguri-v- Attorney General Misc. Appl No 1185 of 2003*** where Musinga, J made an award of Kshs 7,907,011. He submits that his torture, jailing and suffering were more severe than in Muraguri's case and he deserved a more generous award.

29. I note from the judgment of Musinga J in the ***Gitari Cyrus Muraguri v Attorney General*** case that he made awards under different heads including exemplary damages, general damages for malicious prosecution, special damages and loss of earnings. Many of the heads of damages awarded in that case were not pleaded or proved in the current case, and there is no basis for awarding a similarly high award. Further, the injuries allegedly inflicted during torture were not borne out by medical evidence.

30. I take the view, however, that the awards made in the case of ***Harun Thungu Wakaba & Others v The Attorney General (supra)*** where the facts were similar to the present case and in which awarded damages ranging between Kshs.1,000,000 and 3,000,000 provide a better guide in the award of damages in this matter. I therefore make an award of Kshs 2,000,000 in damages for the violation of the petitioner's rights as set out above.

31. The petitioner shall also have the costs of this petition and interest on the damages from the date of judgment till payment in full.

32. I am grateful to the Counsel appearing for the parties in this matter for their diligence in prosecuting their respective cases.

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

Mumbi Ngugi
Judge.