



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Petition 784 of 2008

IN THE MATTER OF SECTION 84(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER SECTION

72(1), 72(3) AND 72(5), 74(1), 77(1) AND 77(2) AND 79(1) OF THE CONSTITUTION OF KENYA

BETWEEN

PITALIS OWENYO JUSTUS

AGUTU.....PETITIONER

VERSUS

THE HON. ATTORNEY

GENERAL.....RESPONDENT

J U D G M E N T

Introduction

1. The Petition dated 10th December 2008 is premised on the provisions of **Section 84(1), (12) and (6)** of the **Constitution** (*repealed on 27th August 2010*) and **Rules 11, and 12** of the **Constitution** of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) **High Court Practice and Procedure Rules, 2006** as read together with **Chapter V** of that **Constitution**.

Case for the Petitioner

2. In his Petition and in Submissions by Mr. Agina, Counsel for the Petitioner, the Petitioner's case is as

follows;

3. That on 4th December 1986, he was arrested in Nakuru and taken to his house where a search was conducted but nothing illegal was found. Thereafter, he was taken to Nairobi while blind-folded and locked up at the Central Police Station. The next day, he was taken to the Nyayo House Basement where he was kept in a dark cell for thirteen (13) days without food, water or beddings. During that period, it is his case that he was tortured by being slapped, beaten with whips, broken chairs, and pieces of wood and his hand was fractured during the torture sessions. That he was also threatened with death and ultimately, he broke down and confessed to being a member of an illegal society known as “*Mwakenya*”.

4. On 17th December 1986, the Petitioner added, he was taken to Court, charged with sedition and on his own plea of guilty, was sentenced to serve four (4) years’ imprisonment. It was his case that the plea of guilty was not voluntary and that he did so to avoid further torture.

5. In any event, he also stated that upon being taken to Kamiti Prison to serve his sentence, the torture continued, with prison warders segregating him and holding him in solitary confinement, forcing him to walk semi-nude in tattered clothing and feeding him on badly cooked food.

6. That as a result of all the above actions on the part of agents of the Republic of Kenya, he suffered trauma, loss of a job and his family was deeply traumatized with his wife dying due to lack of proper medical care and his five (5) children falling out of school for lack of fees. He also lost his job and fortune and continues to suffer to-date.

7. It is also the Petitioner’s case that;

All the suffering that was occasioned on him was because he was suspected of holding political opinions different from those of the Ruling KANU Party and Government.

8. He now seeks the following Orders;

(i) ***A declaration that his (Petitioner’s) Fundamental Rights and Freedoms 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 4th December 1986 and for thirteen (13) days at Nyayo House Torture chambers and thereafter in Kenyan Prisons.***

(ii) ***A declaration that he is entitled to the payment of damages and compensation for the violations and contravention of his Fundamental Rights and Freedoms under the aforementioned provisions of the Constitution.***

(iii) ***General damages, exemplary damages and moral damages on an aggravated scale under Section 84(2) of the Constitution of Kenya for the unconstitutional conduct by the Kenyan Government servants and agents be awarded.***

(iv) ***Any further orders, writs, directions, as the Court may consider appropriate.***

(v) ***Costs of the suit and interest.***

9. **Case for the Respondent**

The Respondent filed no formal response to the Petition but in Submissions, Mr. Onyiso for the state argued that the case was stale and ought not to be entertained. He relied on the decision of Nyamu, J. in Peter Ngari Kagume & 7 others vs Attorney General [2009]eKLR for that proposition.

10. On quantum, he urged the point that should the Court deem it fit to allow the Petition, then a sum of Kshs.1–2 Million is agreeable following the decision in Harun Thungu Wakaba & others vs The Attorney General, Misc. Civil Application No.1411 of 2004 where the sums of Kshs.1 Million to Kshs.3 Million

were awarded to victims of torture at Nyayo House in a case with facts similar to the present one.

11. **Opinion on Issues for Determination**

From the Petition and the Submissions in response, it is obvious to me that there is no denial by the Republic of the facts as set out by the Petitioner. No evidence has been placed before me to move me to find that;

- (i) *the Petitioner was not arrested and tortured as he claims, and*
- (ii) *that his incarceration at Kamiti prison was not characterized by solitary confinement and mistreatment as he has pleaded, and*
- (iii) *that he has not suffered physical and mental trauma.*

I am aware of course that the *onus probandi* is always on the Plaintiff and the burden cannot shift; he who claims, must prove. In this case, I am satisfied that the Petitioner has discharged that burden and I accept his evidence in that regard.

12. The second issue is whether there was breach of the following **Constitutional Rights**;

- (a) *right to protection from torture, inhuman and degrading treatment as provided by **Section 74(1)** of the **Constitution**,*
- (b) *right to protection of personal liberty under **Section 72(1)** as read with **Section 72(3)** and **(5)** of the **Constitution**,*
- (c) *right to freedom of expression as provided by **Section 79(1)** of the **Constitution**,*
- (d) *right to assembly and communication as provided by **Section 77(2)(c)** and **77(2)(d)** of the **Constitution**.*

13. I need not repeat the evidence tendered by the Petitioner and which I have accepted as true. In Dr. Odhiambo Olel vs AG, HCCC No.366/1995 (Kisumu), Tanui, J. found that where the Plaintiff was treated in the same manner as the Petitioner herein, he was entitled to compensation for breach of his rights. Similarly, in Dominic Arony Amolo vs AG, High Court Misc. Appl. No.494/2003, a former Airforce officer who was held against his wishes was found to have had his right to personal liberty violated and that he was held in servitude contrary to the Constitution. He was awarded damages in compensation

14. In Harun Thungu Wakaba vs AG, [2010] eKLR, twenty one individuals suffered the same fate as the present Petitioner and Okwengu, J. found that the rights of the Plaintiffs had been violated and proceeded to award them damages commensurate with their pain and suffering during the torture sessions at Nyayo House Basement.

15. The Wakaba case is in all forms with the present case and I am persuaded that the rights of the petitioner as set out above were violated as alleged. I have read the case of Peter Ngari Kagume (Supra) and I am not persuaded that it is an expression of the Law on the subject at hand. That is all I wish to state in that regard.

16. The third issue to address is the issue of quantum of damages and on that issue, I am on familiar territory. I say so because as I said earlier, in the Wakaba case, the circumstances were similar to the present one and reading it, the case of one Samuel Kaberere Njenga (HCCC No.1187/2003) is at par with this one because the Plaintiff was held incommunicado at Nyayo House Basement for fourteen (14) days before he was taken to Court and charged before being bonded to keep the peace for one year. He did not suffer a prison sentence like the Petitioner but was awarded Kshs.1.5 Million for the torture, inhuman and

seven (7) degrading treatment over the fourteen (14) days.

17. I will follow the decision in Njenga because the illegality complained of by the Petitioner related largely to the period before his confinement at Kamiti Prison and the evidence of torture was largely at Nyayo House as opposed to Kamiti Prison. However, unlike Njenga, he suffered the further indignity of solitary confinement at Kamiti Prison.

18. Having so said therefore and noting the Submissions by Mr. Onyiso, I am satisfied that a global award of Kshs.2.5 Million is adequate and reasonable compensation in the circumstances of this case.

19. Lastly, having so held, it follows that the final Orders to be issued in this case are;

(i) A declaration is hereby issued that the Petitioner is entitled to the payment of damages and compensation for the violations and contravention of his Fundamental Rights and Freedoms under Sections 72, 74, 77 and 79 of the repealed Constitution.

(ii) General damages under Section 84(2) of the repealed Constitution are quantified as Kshs.2.5 Million and the Respondent is ordered to pay that sum to the Petitioner.

(iii) The Respondent shall also pay the costs of the Petition.

20. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 16TH DAY OF MARCH, 2012

ISAAC LENAOLA

JUDGE
CORAM

ISAAC LENAOLA – JUDGE

Miron – Court Clerk

Mr. Agina for the Petitioner

Mr. Wasike hold brief for Mr. Bitta for Respondent

ORDER

Judgment duly read.

ISAAC LENAOLA
JUDGE
16/3/2012