



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

Petition 147 of 2011

JOSEPH WANYOIKE THUOPETITIONER

AND

THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

Introduction

1. The petitioner was at a time material to this case, a civil servant serving as an orthopaedic technician at the Maralal Hospital. He brings this petition to enforce his fundamental rights and freedoms which he claims were violated when he was detained and tortured in 1986.
2. The petitioner's petition was filed on 29th August 2011 and supported by his affidavit sworn on 26th August 2011. The petitioner seeks several declaratory reliefs in relation to his arrest on 11th July 1986 and subsequent detention. He also seeks payment of damages and compensation.
3. The Attorney General entered appearance on 16th September 2011 but has never filed any affidavit to controvert the matters alleged by the petitioner. In the circumstances, the facts as set out in the petition, 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.

The Petitioner's Case

4. According to his sworn testimony the petitioner states that on 11th July 1986, the petitioner was assigned to provide first aid at the Maralal Stadium. At around 2 pm the stadium was surrounded by about twenty policemen. He was arrested and driven away by the ambulance he was using and taken to Maralal Police Station cells. After two days he was taken to Rumuruti, thereafter Gilgil and on the following day he found himself at Nakuru Railway Police cells where he was detained. He was detained between 11th and 14th July during which time he was taken to Marmanet Forest where he was beaten and

threatened with death unless he confessed that he was a member of the clandestine Mwakenya group.

5. While at the Railway Police Station in Nakuru orders were given that nobody should be allowed to see him and he should not even be taken to hospital if he fell sick. He was thereafter instructed to lie flat on the floor of the Police Land Rover and he was driven to Nairobi and he was locked at Kileleshwa Police Station. On the following day he was blindfolded and driven around for hours and then was driven to underground basement which he came to know later was Nyayo House dark cells.

6. That the petitioner was interrogated daily by a panel of Special Branch Offices who tortured him beating him with slaps, whips, broken pieces of wood, pinched his ears, ordered to use his index finger to rotate, pricked with pins on his finger nails, electrocuted by inserting his fingers in exposed electric wires and also his private parts.

7. The petitioner states that he was locked in a dark cell for days and hours and kept without food, sleeping mat, blankets or drinking water for some days and after being tortured he was threatened to sign a confession that he had taken oath to overthrow the Government.

8. The petitioner was eventually taken to court on 29th July 1986 on promise he would be fined if he agreed to the charges. He pleaded not guilty. He was tried and convicted on two counts and sentenced to 5 months imprisonment on each count and taken to Nakuru Prison where the prison warders continued humiliating him. The petitioner was segregated and held in solitary confinement and he was dehumanised by being forced to walk semi-nude in tattered prison uniform and eat badly cooked food.

9. The petitioner appealed against the conviction and sentence which was heard on 5th December 1986 and was set free. After that period the petitioner was released out of the cells and found himself with grey hair and was even diagnosed of having developed high blood pressure and ulcers and has been on medication since.

10. That by reasons of the matters aforesaid, the petitioner suffered physical, psychological, pain, loss of his business and damage which up to now affects him. He states that he was deserted by friends who would flee when he went to social places as they could also be arrested as Mwakenya adherents.

Findings

11. According to the uncontested evidence of the petitioner, he was arrested and kept in custody without trial from 11th July 1986 to 29th July 1986. 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.

12. 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

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

14. 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.15,000,000/= as compensation for the degrading and inhuman treatment that was meted on him by the servants and agents of the government. I was referred to the case of ***Gitari Cyrus Muraguri v Attorney General Nairobi HC Misc. Appl. No. 1185 of 2003 (Unreported)*** where the Hon. Justice Musinga awarded the petitioner Kshs.7,907,011/=.

15. In the case of ***Rumba Kinuthia & others v. The AG 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 AkhahukwaMuyela v AG Nairobi Petition No. 783 of 2008 (Unreported)* and *Israel OkemoAgina v. AG Nairobi Petition No. 1374 of 2003 (OS)* the sum of Kshs. 2 million was awarded. The facts in those cases are similar to this case.

16. I also 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. Taking what I have stated into account, I award Kshs. 1.5 million as damages.

Conclusion

17. In conclusion, I give judgment for the petition as follows:-

(i) I declare that the petitioner's fundamental rights and freedoms under sections 72(3) and 74(1) of the former Constitution were contravened and violated by the respondent.

(ii) I award the petitioner the sum of Ksh.1,500,000.00 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 31st day of July 2012.

D.S. MAJANJA

JUDGE

MrWandaka instructed by KinuthiaWandaka& Company Advocates for the petitioner.

MrBitta, Senior Litigation Counsel, instructed by the State Law Office for the respondent.