



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION 242 OF 2009

JAMES OMWEGA ACHIRA.....PETITIONER

VERSUS

ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

Introduction

1. The petitioner, Mr. James Omwega Achira, has brought this petition seeking various orders against the state for his arrest and incarceration at the infamous Nyayo House torture chambers in December 1986. In his Petition dated 16th April 2009, Mr. Achira alleges that his fundamental rights and freedoms as enshrined in sections 72(1), 72(2) 72 (3), 72 (5), 74(1), 77(1), and 79(1) of the former constitution were infringed by special branch police officers and other Kenya government servants, agents, employees and institutions on 15th December 1986 and for 14 days at Nyayo House Torture Chambers and thereafter in Kenyan prisons. He therefore seeks the following reliefs:

(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 institutions on 15th December 1986 and for 14 days at Nyayo House Torture Chambers and thereafter in Kenyan Prisons.

(ii) 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 Constitutions.

(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 this Honourable Court may consider appropriate.

(v) Costs of this suit and interest.

The Petitioner's Case

2. The petitioner avers in his affidavit sworn on the 16th of April 2009 that he was a journalism student at St. Augustine University in Tanzania when he was arrested in Kisii Town in the afternoon of 14th December 1986 by heavily armed plainclothes Special Branch Policemen, who took him to his house in Mongorishi where they conducted a thorough search of his house but failed to find anything unlawful. He

was then locked up by the then District Security Intelligence Officer, a Mr. Gerald Ndungu at Kisii Police Station for two days, the 15th and 16th of December 1986. He was then taken from there on the 17th of December, 1986 and driven, while blindfolded and tied up, to a place he later discovered was Kileleshwa Police Station.

3. At about 11.00 p.m, he was taken from Kileleshwa Police Station, again while blindfolded and tied up, to a place he later discovered was Nyayo House Torture Chambers. It is his claim that at Nyayo House he was forced to strip naked and was assaulted with slaps, blows, rubber whips, broken chair parts and tyre strips. He was also allegedly held in a dark cell where pressurized water was sprayed on him for several hours. Finally, he was locked up in a dark cell for days and was kept without food, a sleeping mat, blanket or drinking water.

4. The petitioner claims that he was forced to admit that he was an active member of the outlawed *Mwakenya* movement whose objective was allegedly to overthrow the lawfully established government of Kenya. He was taken to court on the 29th of January 1987 at 6.00 pm before the then Chief Magistrate H. Buch and charged in **Nairobi Criminal Case No. 404/87, R –v- James Omwega Achira** with being a member of an unlawful organisation, namely Mwakenya, contrary to section 6(9) of the Societies Act, Cap 108 Laws of Kenya. He admitted the charge as he had been advised to do by the police officers prior to being taken to court and was sentenced to 2 years' imprisonment. The petitioner produced the charge sheet in **Republic –v- James Omwega Achira Nairobi Chief Magistrate Court Criminal Case No.404/1987** in which the charges are stated, the photocopies of handwritten proceedings and judgment, and photographs taken of him in court, and a newspaper cutting from the Daily Nation newspaper of 30th January 1987 which run his story.

5. The petitioner states that after his conviction and sentence, he served in many prison institutions in which the prison warders continued with acts of torture against him by keeping him in 'semi-nude tattered prison uniforms' and fed him with badly cooked food. As a result, he suffered torture, trauma, psychological and mental anguish. He avers that he was released from prison on the 29th of May 1988.

6. The respondent filed no response to the Petition and called no evidence to rebut the petitioner's allegations. The petitioner submitted in this regard that his case remained unchallenged and he relied on **Nairobi HCCC 1408 of 2004 Rumba Kinuthia –v- Attorney General** where Wendoh J, considering a constitutional reference in respect of which no replying affidavit was filed stated:

\Despite the fact that the applicant made very serious allegations against the defendant, government agents, servants and police officers, no affidavit was filed in reply, so that all the facts deponed to by the applicant in his affidavit are what the court will take as representing the correct factual position.

7. As correctly submitted by the petitioner, in the absence of any evidence by the respondent to controvert the averments of fact by the petitioner, the court takes the position that the facts are as presented. The petitioner was arrested on 15th December, 1986 and was not charged in court until January 29, 1987. He was therefore held in violation of the provisions of Section 72(3) of the former constitution which provided as follows:

(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.”

8. The petitioner was charged with an offence that did not carry the death penalty. Consequently, under the provisions of the former constitution as set out above, he should have been charged in court within 24 hours of his arrest. If he was not so charged, then the responsibility was on the state to show why he was held without charge beyond the period permitted under the constitution. In the absence of any explanation from the state, I find and hold that the petitioner’s rights under Section 72 of the former constitution were violated following his arrest and detention from the 17th December 1986 to 29th January 1987 at the Nyayo House cells.

9. The petitioner alleges that while in the custody of state and state agents, he was subjected to torture and cruel, degrading punishment. He has given in some detail as set out above the acts that he was subjected to. Section 74 (1) provides that:

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

10. The High Court has held in several decisions that the acts to which those incarcerated at the Nyayo House cells were subjected to amounted to torture and cruel, degrading punishment. See the case of *Harun Thungu Wakaba & Others v The Attorney General Nairobi HC Misc. Appl. 1411 of 2009(OS)*; *Wachira Waheire 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* and *Cornelius Akelo Onayngo & Others v The Attorney General Nairobi HC Misc. 233 of 2009 (Unreported)*. This court therefore finds and holds that the petitioner was subjected to torture and cruel, degrading punishment in violation of his rights under section 74 of the former constitution.

11. The petitioner alleges that his rights under section 77 of the former constitution were violated by the respondent. The section provided as follows:

‘If a person is charged with a criminal offence, then, unless the charge is withdrawn the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.’

12. The Court of Appeal has held in the case of *Julius Kamau Mbugua -v-Republic Criminal Appeal No 50 of 2008* (unreported) that section 77 protected rights in the course of the trial. The petitioner was in this case convicted on his own pleas of guilty, and so there was no violation of the rights set out under section 77 of the former constitution.

13. The petitioner alleges that his rights under section 79(1) of the repealed constitution were violated by the respondent. The section provides as follows:

‘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) and freedom from interference with his correspondence.

14. The petitioner contends that the respondent’s Special Branch Police Officers while searching his house confiscated his diaries, old newspapers, and other literatures and correspondence which were not used as evidence in the criminal case contrary to the protection of the petitioner’s right to freedom of expression to read, to receive ideas and information without hindrance as provided under Section 79(1) of the former constitution. He was also denied an opportunity to communicate with members of his family, friends or advocates to organize his defence. This was in violation of his right under section 79(1) of the constitution. The totality of the evidence by the petitioner indicates clear breaches of, and intention to violate and hinder the petitioner in his enjoyment of the rights that the then constitution guaranteed to him. There can be no doubt that the acts of the respondents interfered with his freedom of expression as

set out in section 79(1) of the former constitution.

Damages

15. It is now settled law that a party whose constitutional rights are found to have been violated by the state is entitled to damages. The quantum of damages is in the discretion of the court, taking into account the nature of the violations. This court has found that the state did violate the petitioner's rights under Sections 72, 74 and 79 (1) of the former constitution. The petitioner is therefore entitled to damages in respect of the violations.

16. The High Court has awarded damages for violation of constitutional rights in a number of cases that have come before it arising from incarceration in Nyayo House. In the case of **Haruni Thungu Wakaba -v- The Attorney General Misc Appl. No. 1411 of 2004**, Okwengu J, awarded the petitioners who were incarcerated and had their rights violated in circumstances similar to the petitioner's amounts in general damages for each of the 20 applicants ranging between Kshs 1,000,000 and Kshs 3,000,000.00. In the case of **Rumba Kinuthia -v- Attorney General (supra)** which is a similar case based on similar facts, Wendoh J made an award of Kshs 1, 500,000.00 as general damages.

17. The petitioner also seeks exemplary damages for the violation of his rights by state agents. However, the view of this court is in line with the reasoning in the case of **Benedict Munene Kariuki and 14 Others -v- the Attorney General High Court Petition No. 722 of 2009** that no exemplary damages should be awarded in addition to general damages in respect of violation of constitutional rights.

18. The petitioner claims that he was held in Nyayo House for 14 days, but the evidence indicates he was held for 42 days. In awarding damages to the petitioner in this matter, I agree with the view of the court in the case of **Dominic Arony Amolo-v- Attorney General – High Court Misc. Appl. No. 494 of 2003** that the violation of the petitioner's rights as set out above were part of the same transaction and make a global award in respect of all the violations. In light of the awards made in similar cases as set out above, and taking into account the 42 days he was held in Nyayo House, I make a global award of **Kshs 2,500,000.00**.

19. The petitioner shall also have the costs of this petition plus interest on damages from the date of judgment until payment in full.

Dated, delivered and signed at Nairobi this 30th day of July 2012.

**MUMBI NGUGI
JUDGE**