



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**PETITION 780 OF 2008**

**ODUNGI RANDA ONG'OMBE ..... PETITIONER**

**VERSUS**

**ATTORNEY GENERAL ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The petitioner moved this court by a petition dated 10<sup>th</sup> December 2008 seeking various orders and declarations in respect of alleged violation of his constitutional rights following his arrest and incarceration in December, 1986. The petition, which is supported by his affidavit sworn on 10<sup>th</sup> December 2008, seeks the following orders:

**(a) 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 2<sup>nd</sup> December 1986 and for 17 days at Nyayo House Torture Chambers and thereafter in Kenyan prisons.**

**(b) 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.**

**(c) 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.**

**(d) Any further orders, writs, directions, as this Honourable Court may consider appropriate.**

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

2. The respondent entered appearance on the 13<sup>th</sup> of March 2009 but did not file a reply or take any further part in the proceedings. Consequently, the facts as presented by the petitioner are uncontroverted.

**The Petitioner's Case**

3. The petitioner alleged that he was arrested in Kisumu without an arrest warrant on 2<sup>nd</sup> December, 1986 by 6 plain-clothes Special Branch officers who took him to his residence at Kakola, Nyando. They searched the premises without a search warrant and carried away among other personal effects two books

which he said were titled *'Two Menthosin India'* by Jaramogi Odinga and *'On Neocolonialism by Kwame Nkurumah'*. They then locked him up at Kisumu Railways Police Station where he remained until the 5<sup>th</sup> of December 1986. On the 6<sup>th</sup> of December 1986, he was removed together with others who were also held in custody and driven around different places. He later discovered that he had been taken from Kisumu to Spring Valley Police Station in Nairobi where he arrived at 11.00pm. He was on 7<sup>th</sup> December 1986 locked up in solitary confinement in a dark cell which he later learnt was a cell known as basement cell no. 7 of Nyayo House. The petitioner claimed that at the material time, Nyayo House was not a gazetted police station.

4. The petitioner states that he was detained at Nyayo House from the 7<sup>th</sup> to the 24<sup>th</sup> of December 1986. During the time he was in custody, he was subjected to routine torture which comprised of beatings with whips, broken furniture, slaps, blows and rubber whips with the aim of forcing him to admit that he belonged to the clandestine movement called *Mwakenya*. He was forced to strip naked during his interrogation and subjected to blows and kicks to his back and all over his body as a result of which he suffers from back ache, stomach ulcers and poor eye sight, He claims further that while being interrogated, he was sprayed with pressurized water for several hours.

5. The petitioner states that he remained in the dark cell for 17 days between the 7<sup>th</sup> of December 1986 to the 24<sup>th</sup> of December 1986 during which period he was denied access to legal counsel, relatives, friends and medical attention despite being unwell.

6. He states that he was charged in court on 24<sup>th</sup> December 1986 with being a member of a clandestine movement known as *Mwakenya*. He admitted the charges as he had been advised to do by the Special Branch Police Officers in order to avoid more acts of torture. He was sentenced to four years' imprisonment. He produced a charge sheet in respect of **Nairobi Chief Magistrate Court Criminal Case No.5984/1986, Republic -v-Odunga Randain** in which the charges are stated as taking an unlawful oath contrary to section 61(b) of the Penal Code and failure to prevent a felony contrary to section 392 as read with section 36 of the Penal Code. He also produced photocopies of barely legible handwritten proceedings and the judgment of the court. He appealed against his sentence and his appeal was rejected summarily.

7. The petitioner stated that while serving his sentence, he continued to suffer solitary confinement, was dressed in 'semi-nude' tattered prison uniform and fed on poorly cooked food, thus subjecting him to physical and physiological torture. He also claimed that his family suffered excruciating psychological torture and emotional distress because they lost contact with him.

8. The petitioner submitted that in apprehending him for any crime he may have committed, the police officers were to be guided by the Kenya Police Act, Cap 84 Laws of Kenya. The Police Act did not allow the state through its officers to arrest him without stating to him the offence he is alleged to have committed. This was also required under the express provisions of section 72(2) of the repealed constitution which provides as follows:

**'A person who is arrested or detained shall be informed as soon reasonably practicable, in a language that he understands, of the reasons for his arrest and detention.'**

9. The petitioner also submitted that police officers were constitutionally bound to take him to court within 24 hours as provided under section 72 of the repealed constitution. The petitioner was arrested on the 2<sup>nd</sup> of December 1986 but was not charged in court until the 24<sup>th</sup> of December 1986. He was therefore kept in police custody for 22 days, a clear violation of his rights under section 72 of the constitution. The failure by the respondent to inform the petitioner of the charges against him and to charge him in court within the period provided for in the former constitution were a clear violation of his rights under Section 72(1), 72(3) and Section 72(5) of the former constitution.

10. The petitioner also alleges that for the 17 days that he was held at the Nyayo House cells, he was subjected to torture and other cruel, inhuman and degrading treatment. He submits that this was in

violation of his rights under section 74 of the former constitution which prohibits torture. It is now undisputed that the acts to which those incarcerated at the Nyayo House cells were subjected to amounted to torture and cruel, degrading punishment. This court has so held in the case of **HarunThungu Wakaba &**

**Others –v- The Attorney General Nairobi HC Misc. Appl. 1411 of 2009(OS); WachiraWaheire-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 AkeloOnayngo& Others -v- The Attorney General Nairobi HC Misc. 233 of 2009 (Unreported).** In the circumstance, I find and hold that the petitioner was subjected to torture, cruel and degrading treatment contrary to section 74 of the former constitution.

11. The petitioner alleges that his right to a fair hearing as provided under section 77(1) of the former constitution was violated. The provision required that when a person is charged with a criminal offence, he shall be afforded a fair hearing within a reasonable time by an independent and impartial court. The petitioner in this case pleaded guilty to the charge, and he was not therefore subjected to a trial. The Court of Appeal has held in the case of **Julius KamauMbugua -v-Republic Criminal Appeal No 50 of 2008** (unreported) that section 77 protected rights in the course of the trial. As the petitioner was convicted on his own plea of guilty on the day he was charged in court, and in light of the interpretation given by the Court of Appeal to the provisions of section 77 of the former constitution, in the above case there was no violation of the rights set out under section 77.

12. Having found that the petitioner's rights under sections 72(1), (2), (3) and (5) and section 74 of the former constitution were violated by the respondent, I now turn to consider the remedy that the petitioner is entitled to. Judicial precedents with regard to the arrests and incarceration in the Nyayo House torture chambers in the 1980s and 1990s are unanimous that they amounted to violations of constitutional rights, and that those whose rights were violated are entitled to damages.

13. In the present case, the petitioner was incarcerated in Nyayo House for 17 days during which time he was subjected to acts of torture. The level of damages awarded in similar circumstances has varied, with awards of Kenya shillings 1,000,000-3,000,000 being made by Okwengu, J to the petitioners in the case of **HarunThungu Wakaba -v- The Attorney General, Misc Appl. No. 1411 of 2004**; Wendoh, J making an award of Kshs 1,500,000.00 in the case of **Rumba Kinuthia -v- Attorney General (supra)** while Majanja, J awarded damages of Kshs2,000,000.00 as general damages to the petitioners in **Benedict MuneneKariuki and 14 Others-v- the Attorney General High Court Petition No. 722 of 2009**.

14. In the circumstances of this matter, and bearing in mind the finding of the court in the case of **Dominic AronyAmolo-v- Attorney General – High Court Misc. Appl. No. 494 of 2003** that the violation of the petitioner's rights in that matter were part of the same transaction, I find that the violations in this matter with regard to sections 72 and 74 of the former constitution were part of the same transaction and make a global award of Kshs 2,000,000.00.

15. The petitioner shall also have the costs of the petition together with interest on damages from the date of judgment until payment in full.

**Dated, Delivered and Signed at Nairobi this 30<sup>th</sup> day of July 2012.**

**MUMBI NGUGI  
JUDGE**