



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISCELLANEOUS CIVIL CASE 1375 OF 2003
IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF CONSTITUTION REFERENCE UNDER S. 84 OF THE CONSTITUTION
OF KENYA**

MICHAEL DANSON MAHUGUPLAINTIFF/APPLICANT

VERSUS

ATTORNEY GENERALDEFENDANT/RESPONDENT

JUDGMENT

1. In the Originating Summons dated the dated 30th October 2003 which is supported by the affidavit of the applicant sworn on the 29th day of October 2003, the applicant seeks the following orders:

1. A declaration that the Plaintiff's fundamental rights and freedoms under Sections 70, 72 (3& 5), 74(1), 76,77,78(1), 79(1) & 80(1) 82(3) have been and were contravened and grossly violated by police officers and other Government servants, agents, employees and institutions in 1987 and on diverse dates thereafter.

2. A declaration that the Plaintiff 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 on an aggravated scale under section 84(2) of the constitution of Kenya for the unconstitutional conduct by government servants and agents.

4. Any further orders, writs, directions, as this Honourable Court may consider appropriate.

5. Costs of the suit, with interest at court rates.

2. The application was filed on the 7th of November, 2003, and on the 18th of November, 2003, the State entered appearance by a Memorandum of Appearance signed by M. Kimani, Ag. Chief Litigation Counsel.

3. Nothing was done with regard to the matter by either of the parties for the next seven years or so until

the 10th of June 2010 when a Notice of Change of Advocates dated 25th of May 2010 was filed by the firm of KinuthiaWandaka& Co. Advocates together with an application for directions. No affidavit in opposition to the Originating Summons was filed by the respondent and no other document apart from the Memorandum of Appearance has ever been filed by the state in this matter.

4. When the matter came up for mention on the 23rd of February 2012, a Ms. Kenyani appeared for the state and indicated that she had no instructions on the matter but would take directions. The court granted the state 21 days to file its reply to the application and fixed the matter for mention on the 20th of March 2012 for directions on the hearing.

5. On the 20th of March, 2012, there was no appearance for the state nor had any reply to the application been filed. The court therefore directed the applicant to file his submissions and to serve the Attorney General for hearing on the 21st of May 2012.

6. There was no appearance for the Attorney General on the date fixed for hearing and the matter proceeded on the basis of oral evidence by the applicant and the pleadings and submissions filed in the matter.

7. The applicant's case is that he was a businessman operating a photographic studio business in Nakuru, a deacon in the Church and a court assessor, an upright citizen, and was not a member of an unlawful organization known as Mwakenya.

8. He was arrested on 6th February 1987 at around 11 a.m. from his business premises and taken to Bondeni Police Station in Nakuru. In the afternoon he was taken to his home and business premises where the police carried out a search

9. He was later that day taken to Menengai Police Station in Nakuru where he spent a night and on the following day he was carried, blindfolded, in the back of a pickup and taken to Kabete Police Station in Nairobi. From there he was taken on the 8th February 1987 to the Nyayo House basement cells where he was subjected to interrogation on his alleged membership of an organisation known as Mwakenya.

10. He states that he was subjected to torture on denial of the allegations by being forced to strip naked and being assaulted with whips and broken furniture. He was also sprayed with very cold water while naked and was kept in a water-logged cell for 11 days without clothes, food or water. He remained in the Nyayo House cells for 39 days after which he was promised that if he 'co-operated' and pleaded guilty he would only be fined or given a bond but if he did not he would be killed or detained.

11. The applicant states that he agreed to plead guilty to whatever charge was preferred against him and did so to a charge of taking an oath and belonging to an unlawful organization when he appeared before the Chief Magistrate's Court on the 13th of March 1987. He was sentenced to 4 years' imprisonment on the 16th of March 1987.

12. The applicant produced the charge sheet showing he was taken to court on 13th March 1987 and was therefore in custody for 35 days, 34 of them in Nyayo House. He spent four years in jail at Kamiti Prison where he states he was kept in Cell D where insane prisoners and those jailed for being members of Mwakenya were kept. He alleges that his businesses in Nakuru, Kapsabet and Eldoret suffered as a result of his arrest and imprisonment.

13. The applicant alleges violation of his rights under Section 72(3) and 77 of the former constitution. He alleges that as a result of his incarceration, he lost his means of livelihood. He told the court that he used to earn Ksh150,000/- p.m. He had 10 employees in his businesses and his net profit was Kshs50,000/- p.m.

14. He asked the court to award him damages for the unlawful detention in Nyayo House, exemplary and

aggravated damages and costs.

15. In his submissions on behalf of the applicant, Mr. Wandaka submitted that cases under the constitution have no time bar and relied on the decision of the court in the case of **Dominic Amolo Arony and Gitari Cyrus Muraguri-v-The Attorney General Misc. Appl. No. 1185 of 2003**. He urged the court to award the applicant damages of Kshs15,000,000 arguing that the applicant in this case suffered many years of incarceration; that he was a church elder, and that though he did not appeal against his sentence, he admitted the offence due to extreme torture.

Violation of Constitutional Rights

16. The applicant seeks various declarations pertaining to violation of his rights under the former constitution. The former constitution contained at section 70 various guarantees and protection of fundamental rights and freedoms. The citizen was entitled, as provided at section 70(a), to life, liberty, security of the person and the protection of the law. He was entitled to freedom of conscience (section 78); of expression (section 79) and of assembly and association (Section 80). If arrested for any offence other than for a capital offence, he was entitled to be brought before a court within twenty- four hours of his arrest (section 72(3)). Section 74(1) of the former constitution guaranteed to every Kenyan freedom from torture or to inhuman or degrading punishment or other treatment while section 77 contained the constitutional guarantees to a fair trial.

17. The applicant alleges, and this has not been denied by the respondent, no pleadings having been filed by the respondent-that he was arrested, held in custody for 35 days, subjected to various acts of torture, and brought before a court where he pleaded guilty and was jailed for a period of four years. He indicates that his arrest was on the basis of his alleged membership of an organisation known as Mwakenya.

18. From the pleadings before me, the oral evidence of the applicant, and the submissions on his behalf, I find and hold that the state did violate the applicant's rights under sections 70(a) to equal protection of the law; to freedom of conscience and association, to protection from torture, cruel and degrading treatment under section 74(1); and to his right to be brought before a court within 24 hours of his arrest guaranteed under section 72(3) of the former constitution.

19. The applicant also seeks declarations with regard to alleged violation of his rights under section 82(3) of the former constitution, but this section contains a definition of the meaning of the term 'discriminatory' and there is no discrimination that can be discerned from the material before me.

Damages

20. Having found that the applicant's rights were violated by the state as set out above, I now turn to a consideration of the damages that he is entitled to. The applicant has sought general, exemplary and aggravated damages, and in his submissions before me, he also sought what he referred to as 'loss of earnings'. He filed in court what he referred to as 'The Petitioner's List of Exhibits' which included the proceedings before the Chief Magistrate's Court, a medical report from a Dr. Mwangi, and a computation of what he considered to be his loss for the four years he was in prison. These last two items were not included in his pleadings, and there is therefore no basis on which awards can be made in respect thereof.

21. With regard to exemplary and aggravated damages, this court has held in the case of **Benedict Munene Kariuki and 14 Others -v- The Attorney General High Court Petition No. 722 of 2009** that-

In my view, these cases under section 84 of the Constitution are cases concerning the Constitution. It is unnecessary to consider the element of "unconstitutional action" when the relief is awarded for unconstitutional conduct. It is also clear that the principle in Obongo v Kisumu Municipal Council (Supra) was a case in tort so that the issue of "unconstitutional action" was an additional factor and the court would consider in awarding exemplary damages.

22. This is a view that I subscribe to, and so I make no award in respect of exemplary and aggravated

damages.

23. The applicant in this case pleaded guilty to the offence that he was charged, with, and did not lodge an appeal against his conviction and sentence. I find no basis, therefore, for considering the period in which he served his prison sentence in my award of damages for violation of his constitutional rights. The period during which he served a lawful sentence of a court of competent jurisdiction does not amount to a violation of his constitutional rights. In this respect, his case is distinguishable from the case of **Dominic Arony Amolo-v-Attorney General (supra) Nairobi HCCC Misc Application No 494 of 2003** in which the petitioner had been kept in prison for a further 9 days despite the fact that the High Court had allowed his appeal and ordered his release.

24. In assessing the damages that the applicant in this matter should be awarded, I am guided by the awards made in the case of **Rumba Kinuthia-v-Attorney General Nairobi HCCC 1408 of 2004; Bernard Wachira Waheire-v-Attorney General Nairobi HCCC No 1184 Of 2003** and **Harun Thungu Wakaba & 20 Others-v- Attorney General Nairobi HCCC 1411 of 2004 (OS)** in which general damages ranging between Kshs 1.5 m and 2.5m were awarded and make a global award of Kenya Shillings Two million (Kshs 2,000,000.00).

25. The applicant shall also have the costs of the suit together with interest from the date of judgment until payment in full.

Dated, Delivered and Signed in Nairobi this 19th day of July 2012

MUMBI NGUGI
JUDGE