



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**Petition 115 of 2011**

**HERMAN MARINE NDERI.....PETITIONER**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....RESPONDENT**

**J U D G M E N T**

1. Herman Marine Nderi, was a retired police officer who later ventured into business where he founded and managed a Security Firm in Nakuru. In his Petition dated 10<sup>th</sup> June 2011, it is his case that his successful business life was changed drastically after the events of 30<sup>th</sup> December 1986.
2. According to him, on that day, he was arrested within Nakuru Town by plain clothes policemen who then took him to his house where a thorough search was conducted. Certain personal documents, diaries and old newspapers were then carted away and he was then taken to Bondeni Police Station before he was driven away to a place he later discovered was Nyayo House in Nairobi.
3. It is his claim that he was thereafter subjected to torture by beatings using bare hands, whips, broken chairs and pieces of wood. He was also allegedly pricked with pins on his finger nails, electrocuted using exposed electric wires attached to his fingers as well as his private parts. He was also locked up in a dark cell for days and was kept without food, a sleeping mat, blanket or drinking water.
4. The Petitioner also claims that he was forced to admit to the offence of having taken an oath to overthrow the lawfully established Government of Kenya and when he refused to do so, he was taken to Court on 27<sup>th</sup> January 1986 at 6.00 p.m. and charged with the said offence. He denied the same and was remanded without bail and on the following day, he was induced to change his plea and was sentenced to 4 ½ years imprisonment.
5. While in prison, the Petitioner claims that he was segregated and held in solitary confinement, forced to walk in semi-nudeness and in tattered clothing aside from being forced to eat badly cooked food.
6. It is his case further that;

*(1) The Respondent's Special Branch Police Officers were entitled to arrest the Petitioner on suspicion of committing a cognizable criminal offence they have no lawful, legal or statutory power to torture the Petitioner, for 28 days in total violation of his Constitutional protection from torture or*

inhuman or degrading treatment as provided under Section 74(1) of the Constitution 1969 and or Article 29, Constitution of Kenya, 2010.

(2) *The Respondent's Special Branch Police Officers stationed at Nyayo House Offices were entitled to arrest the Petitioner on suspicion of committing a cognizable offence, they had no lawful, legal or statutory power to keep him in their custody for more than 24 hours for a bailable offence hence the incarceration of the petitioner for 28 days was contrary to the protection of the Petitioner's right to personal liberty as provided under Section 72(1) read with Section 72(3) and Section 72(5) of the Constitution 1969.*

(3) *The Respondent's Special Branch Police Officers were entitled to search the Petitioner's house for any illegal publications, they had no statutory power to confiscate forever, the Petitioners diaries and 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 72(1) read with Section 72(3) and Section 72(5) of the Constitution 1969.*

(4) *The Respondent's Special Branch Police Officers had power to arrest and charge the Petitioner with the criminal offence of taking unlawful oath to overthrow the Government before a competent court of Law as provided under Section 77(1) of the Constitution, the Respondent's servant had no lawful, legal or statutory power to arraign the Petitioner before Chief Magistrate Court at Nairobi at 6.00 p.m. which was outside the lawful Court sitting time and also after the expiry of 24 hours since his time of arrest was violation of his rights to personal liberty as provided under Section 71(1), 72(3) and d Section 72(5) of the Constitution 1969.*

(5) *The Respondent's Special Branch Police Officers had power to escort the Petitioner to Court, they had no lawful, legal or statutory power to deny him communication with members of his family, friends or advocates to organize his defence or to threaten him with death, detention without trial, charge of treason or to be returned to the Torture Chambers for further torture if he dared plead "not guilty". This was violation of his right under Section 77(c) and 77 (d). The Constitution 1969 and or Article 29, of the Constitution of Kenya, 2010.*

(6) *The Respondent's Prison Officers had statutory powers to guard the Petitioner while serving his 4 ½ years jail term, they had no lawful, legal or statutory power to hold him in segregation, solitary, confinement, to keep him semi-nude in tattered prison uniform ad to feel him with badly cooked food which was a violation of his protection form torture, inhuman and degrading treatment as provided by Section 74(1) of the Constitution 1969 and or Article 29, Constitution of Kenya, 2010.*

7. He now seeks the following Prayers;

***"(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 institution on 15<sup>th</sup> April, 1986 and for twenty eight (28) days at Nyayo House Torture Chambers and thereafter in Kenyan Prisons.***

***(2) 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.***

***(3) General damages exemplary damages and moral damages on an aggravated scale under Section 84(2) of the Constitution of Kenya 1969 Articles 23 and 29 Constitution of Kenya 2010 for the unconstitutional conduct by the Kenyan Government servants and agents awarded.***

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

***(5) Costs of the suit, and interest."***

8. In support of his case, he testified in open Court, and produced the charge sheet in Chief Magistrate's Court Criminal Case No.37/1987, Republic vs. Herman Marine Nderi in which his conviction is recorded.

9. The Respondent, the Attorney General filed no response to the Petition and called no evidence to rebut the Petitioner's allegations but in Submissions, Mr. Kakoi, learned Litigation Counsel raised the following issues;

(i) *That the Petitioner has failed to show how his rights under Sections 77(i), 79(i) and 74(i) of the Repealed Constitution were specifically violated. That there was no evidence given of any torture as alleged.*

(ii) *That the claim is time-barred since it was filed 25 years after the alleged actions on the part of agents of the Government of the Republic of Kenya.*

*He relied on the decision of Nyamu, J. (as he then was) in Kagume & Others vs. Attorney General, Petition No.128/2006 in support of the above argument.*

10. Having considered the Submissions by Mr. Wandaka, learned advocate for the Petitioner, I ought to deal with the last issue raised by Mr. Kakoi, above i.e.; whether the claim is time-barred.

11. I will not spend time on the question because the holding on the issue by Nyamu, J. in Kagume (*supra*) in my view does not express itself as the Law on the subject. The learned judge had opined as follows;

***“In view of specified time limitation in other jurisdiction the Court is in a position to determine what a reasonable period would be for an Applicant to file a Constitutional Application to enforce his or her violated fundamental rights. I do not wish to give a specific time frame but in my mind, a person whose constitutional rights have been infringed should have some zeal and motivation to enforce his or her rights. In litigation of any kind, time is essential as evidence may be lost or destroyed and that is possibly the wisdom of time limitation in filing of cases.”***

12. The judge never gave expression to what is the reasonable time frame for bringing actions for enforcement of fundamental rights and I refuse to be tied to that general statement.

Whereas parties are expected, generally, to bring their actions timeously, breach of fundamental rights may at times be continuous or the politico-social climate for doing so may be hostile. In the instant case, it is obvious to me, and the Petitioner said so in evidence, that until change of the political regime, he had no confidence that his plea would be heard. Rightly or wrongly that perception is not misplaced and this Court has said so before – see for example Harun Thungu Wakaba & Others vs. Attorney General & Others, H.C. Misc. Application No.1411 of 2004 per Okwengu, J.

13. Like in all societies in transition, Court must look to the history of the Country, understand the context in which certain claims are made and in violation of rights cases, ignore the legalistic and restrictive approach and see that in appropriate cases, appropriate remedies are made within the spirit of the Law.

14. I will not close the door to the claim by the Petitioner on account of limitation of time and I dare add that in cases where fundamental rights may have been breached, there ought not to be and there should not be a bar to the claim, solely on the ground of time unless it can be shown that the claim is generally so frivolous that time is only but one element to the frivolity.

15. The second issue to address is whether the Petitioner has been able to prove his case to the required standard. There is no evidence to rebut his allegations and while I agree that the Respondent has no obligation to prove anything, one piece of evidence cannot be contested; the Charge Sheet and proceedings in Chief Magistrate's Court Criminal Case No.37 of 1987.

16. In the Charge Sheet, it is recorded that the Petitioner was arrested on 30<sup>th</sup> December 1986 without a warrant of arrest. It is also recorded that the offence of taking an unlawful oath contrary to **Section 61 (b)** of the **Penal Code** was committed on 5<sup>th</sup> November 1985 close to a year before he was arrested. The Charge Sheet and the record of proceedings also show that he was arraigned in Court on 27<sup>th</sup> January 1987 when he pleaded not guilty to the single charge he was facing.

17. Pausing here for a minute, it is obvious that the Petitioner was held without charge from 30<sup>th</sup> December 1986 to 27<sup>th</sup> January 1987, a period of twenty eight (28) days. **Section 72(3)** of the **Repealed Constitution** in force at the time provided as follows;

“(1) ...

(2) ...

(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.”*

18. The offence under **Section 63(1)(b)** of the **Penal Code** is a felony and is punishable by a maximum sentence of ten (10) years’ imprisonment. **Why was the Petitioner kept in custody for twenty eight (28) days as opposed to twenty four (24) hours?** The Respondent was obligated in the present proceedings to show that the Petitioner was presented to Court within reasonable time but as I have said elsewhere above, no such evidence was tendered and the matter was simply brushed away.

19. I note that the Respondent’s main argument is that evidence of torture should have been presented by the Petitioner. By what means I don’t know. **Documentation? Medical records? Eye witnesses?**

20. It is common knowledge that torture was not being conducted post-1982 with meticulous record keeping accompanying the act. Neither were lawyers and relatives being invited as witnesses. It was something done in secrecy and in that I am reminded of the apt words of Mohamed, DP in Azanian People’s Organization (AZAPO) & Others vs. President of the Republic of South Africa & Others [1996] ZACC 16, when he stated as follows;

*“Most of the acts of brutality and torture which have taken place have occurred during an era in which neither the laws which permitted the incarceration of persons or the investigation of crimes, nor the methods and the culture which informed such investigations, were easily open to public investigation, verification and correction. Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof. Loved ones have disappeared, sometimes mysteriously and most of them no longer survive to tell their tales. Others have had their freedom invaded, their dignity assaulted or their reputations tarnished by grossly unfair imputations hurled in the fire and the cross-fire of a deep and wounding conflict. The wicked and the innocent have often both been victims. Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible, witnesses are often unknown, dead, unavailable or unwilling. All that often effectively remains is the truth of wounded memories of loves ones sharing instinctive suspicions, deep and traumatizing to the survivors but otherwise incapable of translating themselves in objective and corroborative evidence which could survive the rigours of the law.”*

21. The above words apply to the case before me and the Respondent's demand for evidence of torture is dismissed as being merely escapist of a constitutional obligation imposed on it.

22. From the evidence that I have detailed out above, it is more likely than not that the twenty eight (28) days that the Petitioner was being held unconstitutionally was also accompanied by the acts of torture that he has complained of otherwise **why would it take close to a month to charge him on a simple charge of taking an oath, close to a year before his arrest?**

23. To put the firm holding above on even firmer ground, on 27<sup>th</sup> January 1987, the Petitioner was denied bail and was remanded until 30<sup>th</sup> January 1987 ostensibly to allow "*further investigations*" to be undertaken. In fact on the following day, the Petitioner who was denied the charge was again presented before H.H. Buch Esq. Chief Magistrate and was promptly sentenced to imprisonment upon admitting the charge. **What prompted his change of mind? Why could the Police not wait until 30<sup>th</sup> January 1987 and produce him as ordered?** From where I sit, it is clear that something triggered the proceedings of 28<sup>th</sup> January 1987 and I am confident that it was both the inducement of a light sentence and/or fear of further torture. That he was sentenced to 4 ½ years as opposed to the mandatory 10 years is further evidence of that fact.

24. The Petitioner however failed to extrapolate on the events subsequent to the conviction. Save for a bare mention of the same in the Petition, neither in his oral evidence nor in Submissions by his advocates was the matter given any attention. It may have been true that he suffered in prison but what I have before me is not sufficient to make a definite finding in his favour.

25. **Section 74(1)** of the **Repealed Constitution** provided as follows;

***"(1) No person shall be subject to torture or to inhuman or degrading punishment or other treatment.***

***(2) ..."***

26. From the matters outlined above, the Petitioner's rights above were grossly violated and he is entitled to the declarations that he now seeks.

27. On damages, **Section 84(2)** of the **Repealed Constitution** provided as follows;

***"(1) ...***

***(2) The High Court shall have original jurisdiction –***

***(a) to hear and determine an Application made by a person in pursuance of Sub Section (1);***

***(b) to determine any question arising in the case of a person which is referred to it in pursuance of Sub Section(3), and may make such Orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of Sections 70 to 83 (inclusive)."***

28. In Dominic Arony Amoly vs. Attorney General. H.C. Misc. Application No.494/2003, it was the holding of the Court that monetary compensation was a fair and reasonable remedy of violation of fundamental rights. Subsequently, that holding was followed in many other decisions of the High Court save Kagume (supra) – see for example Harun Wakaba Thungu (supra). In all the instant case, I am minded to follow the reasoning of Musinga, J. in Gitari Cyrus Muraguri vs. Attorney General, Misc. Appl. No.1185/2003 where he awarded a victim of torture Kshs.3,500,000/- for malicious prosecution and Kshs.3,000,000/- as exemplary damages. In the instant case therefore, I deem it fit to grant an award of Kshs.3,500,000/- for torture, and all losses occasioned to the Petitioner (*including loss of his Security Firm business*) during the twenty eight (28) days that he was held unconstitutionally with the painful

accompaniment of torture.

29. He will also have the costs of the Petition.

30. In conclusion, the final Orders in this matter are;

***“(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 institution on 15<sup>th</sup> April, 1986 and for twenty eight (28) days at Nyayo House Torture Chambers and thereafter in Kenyan Prisons.***

***(2) 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.***

***(3) General Damages of Kshs.3,500,000/-.***

***(4) Cost of the Petition.***

31. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 2<sup>nd</sup> DAY OF AUGUST, 2012**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

*Irene – court clerk*

*Mr. Wandaka for Petitioner*

*No appearance for Respondent*

**Order**

*Judgment duly delivered.*

**ISAAC LENAOLA**

**JUDGE**

**Further Order**

*Copy of the judgment to be supplied on payment of court fees.*

**ISAAC LENAOLA**

**JUDGE**

**2/8/2012**