



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)

Petition 340,341,342,343,344,345,346,347,348,349 & 350 of 2009

JENNIFER MUTHONI NJOROGE & 10 OTHERS.....PETITIONERS

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

J U D G M E N T

1. Introduction

On 18th July 2010, Musinga, J. ordered that Petitions Nos.340/2009, 341/2009, 342/2009, 343/2009, 344/2009, 345/2009, 346/2009, 347/2009, 348/2009, and 350/2009, be heard jointly and subsequently on 16th March 2012. I ordered that all Petitioners should appear and tender their evidence orally. On 14th May 2012, they did so and for clarity's sake, the Petitioners' individual cases are as follows;

(i) *Petition No.340/2009 – Jeniffer Muthoni Njoroge versus Republic*

The Petitioner was a Secretary at the Njoro Education Department office and on 1st November 1990, she was arrested by plainclothes policemen, taken to her house at Piare Settlement Scheme where a thorough search was conducted before she was driven to Nairobi. On the way, the police officers demanded the whereabouts of her husband as they pinched her on the thighs. She was unable to tell them where her husband was and on Nairobi, she was blindfolded and then taken to a cold and dark place which she later learnt was the Nyayo House basement. She was there for seven (7) days and suffered physical assault during interrogation as she was stripped naked, beaten with rubber whips, broken chairs, tyre strips and was slapped and kicked. She was asked to explain her husband's whereabouts and she knew that he had escaped to Uganda in a bid to avoid being called as a witness in the case against one Koigi Wamwere and others who had all been charged with treason.

She was released two days later and her complaint is that she was subjected to torture, cruelty and inhuman and degrading treatment contrary to **Article 74** of the **Repealed Constitution** and is entitled to declarations that her fundamental rights and freedoms were breached and she was entitled to general and exemplary damages for the unconstitutional conduct of the Government of Kenya and its agents.

(ii) *Petition No.341/2009 – Njoroge King'ori versus Republic*

The Petitioner, Njoroge King'ori was arrested on 8th October 1990 at his house within Umoja Estate in Nairobi, a search conducted and an assortment of books related to socialism and communism were taken away and the police officers meanwhile kept demanding that he points them to where he had hidden guns. He was later blindfolded and taken to Nyayo House where he was kept for twenty two (22) days. In that period, he was denied food, sleeping mat or drinking water and was beaten and tortured to force him

to admit that he was working with Koigi Wamwere, Rumba Kinuthia and Mirugi Kariuki to overthrow the Government of Kenya.

It is his case that the actions of the government and/or its agents amounted to a gross violation of his fundamental rights and freedoms and he was entitled to damages and declarations to that effect.

(iii) Petition No.342/2009 – Thomas Kanyi King’ori versus Republic

The Petitioner in this case was arrested on 24th November 1990 at Ruai in Nairobi and the police officers demanded to know the whereabouts of his brother, Njoroge (*Petitioner in No.341/2009*). His house was searched and thereafter he was taken to Jogoo Road police station and later to Nyayo House where he was locked up for eighteen (18) days without food or drinking water.

He was beaten and questioned on the whereabouts of his brother, as well as Koigi Wamwere, Mirugi Kariuki and Rumba Kinuthia and it is his case that he was subjected to torture, inhuman and degrading treatment contrary to **Section 74** of the **Constitution**. He now claim claims declarations that his fundamental rights were violated and that he is also entitled to damages for those violations.

(iv) Petition No.343/2009 – James Mwangi Kariithi versus Republic

Mwangi was arrested on 25th October 1990 at Nakuru Police Station, taken to his house in Molo and after it was searched, he was locked up at Nakuru Police Station, Kileleshwa Police Station and later at Nyayo House. He was tortured, and held incommunicado for nineteen (19) days and it is his case that he was entitled to certain declarations relating to reach of his fundamental rights and freedoms and he was also entitled to damages for those breaches.

(v) Petition No.344/2009 – Josphat Munene Warui versus Republic

Warui was arrested on 4th Mach 1994 at South B in Nairobi, taken to the Kenya Army Headquarters and later to Nyayo House. The next day, under the leadership of one James Opiyo, police officers physically assaulted him and then he was taken to Naivasha Maximum Prison on allegations of belonging to a proscribed organization called Mwakenya. No lawful detention order had been issued for his incarceration but he was unlawfully held for eighty three (83) days and then released but not before the torture being continued at the Prison.

It is his plea that the said actions were unconstitutional and should be so declared and damages paid for the contraventions of his fundamental rights and freedoms.

(vi) Petition No.345/2009 – James Muruga Wamburu versus Republic

The petitioner was arrested on 21st August 1988 at Malaba and later taken to Spring Valley Police Station where he was locked up for seven (7). Thereafter, he was taken to Nyayo House where police officers led by one James Opiyo tortured him on allegations that he was associated with “Mwakenya”, Koigi Wamwere and that he had been trained in military tactics in Libya and for fourteen (14) days he was held incommunicado as he was being tortured.

He claims that the actions above were in violation of his fundamental rights and freedoms and a declaration to that effect should be made alongside an order for payment of damages for the violations aforesaid.

(vii) Petitioner No.346 of 2009 – Gacheche wa Miano versus Republic

Gacheche was arrested on 25th April 1986 at Karatina and after his house was searched, he was taken to Nyeri Provincial Police Headquarters, then to Nyayo House where he was repeatedly tortured and threatened with death if he failed to confess that he was a member of an unlawful organization called

Mwakenya. He was held for incommunicado for seventy (70) days without food or water, before being detained without trial until 3rd July 1986.

That all these actions amounted to a violation of his fundamental rights and freedoms and that he is entitled to declarations in that regard as well as general damages for the violations.

(viii) Petition No.347/2009 – Odindo Opiata versus Republic

Opiata was arrested on 27th March 1986 at his house and after a search was conducted, magazines, books, newspapers and other material was taken away and then he was taken to Muthangari Police Station and locked up. Later, he was taken to Nyayo House and James Opiyo led a Squad of interrogators who tortured the Petitioner and claimed that he was a member of the Mwakenya organization. He was held incommunicado for fourteen (14) days before he was taken to the Chief Magistrate's Court on 10th April 1986. He was charged with the offence of being in possession of seditious material and upon threat of more serious charges being preferred and/or death, he pleaded guilty and was sentenced to serve four (4) years imprisonment. In prison, he was segregated and forced to serve his sentence in complete indignity.

It is his case that his rights under **Section 74(1)** of the **Constitution** and he was entitled to declaration to that effect and damages for his suffering.

(ix) Petition No.348/2009 – Kimani wa Nyoike versus Republic

Wanyoike was arrested on 23rd September 1988 outside his home in Athi River and locked up at Muthangari Police Station before he was taken to Nyayo House where for twenty eight (28) days he was subjected to torture on allegations that he was a member of Mwakenya, an unlawful organization. Afterwards, he was coerced with death threats to admit to the charge of concealing a felony. He was sentenced to serve 20 months imprisonment which he served at Nairobi Remand and Allocation Prison, Kamiti Maximum Prison and later Manyani Prison and he was treated without any dignity at all.

All the actions, he pleaded, amounted to a violation of his fundamental rights and he was entitled to declarations in that regard as well as damages for the alleged breaches.

(x) Petition No.349/2009 – Charles Kuria Wamwere versus Republic

The Petitioner was arrested on 19th September 1009 and driven to Nairobi where he was taken to Nyayo House where James Opiyo led a team of police officers who tortured him on allegations that he was a member of Mwakenya. For eleven (11) days he was kept without being taken to Court and when he was finally arraigned before the Chief Magistrate's Court, coerced into admitting to being a member of the Kenya Patriotic Front, an unlawful society. He was sentenced to serve four (4) years in prison and his punishment continued during his imprisonment and it is case that his fundamental rights were violated and he deserves declarations that they were so violated and damages as compensation for the said violations.

(xi) Petition No.350/2009 – Kimunya Kamana versus Republic

Kamana was arrested on 1st January 1987 held in a solitary cell at Menengai Police Station, Rongai Police Station, and after a stint at Pangani Police Station, he was taken to Nyayo House where James Opiyo and other police officers brutally and mercilessly tortured him for thirty (30) days before being taken before the Chief Magistrate, Nairobi, where he was coerced into pleading to charges of taking an unlawful oath and being a member of Mwakenya. He was sentenced to serve four (4) years' imprisonment where the torture continued in violation of his fundamental rights and freedoms. He sought declarations to that effect and damages for his suffering.

2. Case for the Respondent

Save for the fact that the Respondent, the Attorney-General entered Appearance in each of the above Petitions, no specific answer was made to the allegations of fact made by each Petitioner and the Replying Affidavit of Julius Ndegwa made no attempt to do so. Later in Submissions, the following issues were raised;

(i) that the Petitioners have not given sufficient evidence to prove the facts that they have asserted.

(ii) that should damages be awarded, then the quantum should be moderate and on the lower side as compared to other awards made in the past.

3. The Issues for Determination

Having summarized the facts relating to each Petition, it is clear to me that two issues generally arise;

(i) whether the Petitioners have proved their respective cases to the required standard, and

(ii) whether they are entitled to the declarations they have sought and whether damages as prayed are payable to them.

4. On the first issue, it is to be noted that each Petitioner has raised serious issues; that they were each arrested, subjected to physical pain by use of tools of torture at the Nyayo House basement (*commonly now referred to as Nyayo House Torture Chamber*) and that their only crime was the suspicion that they were known to, associated with, or related to persons who, jointly with them were plotting the overthrow of the government of Kenya. All were also said to be members of unlawful organizations known as Mwakenya or Kenya Patriotic Front. Some of the persons whose association with the Petitioners was deemed unlawful included Koigi Wamwere, Mirugi Kariuki and Rumba Kinuthia. Some were released without trial after a number of days in custody, others were taken to Court and pleaded guilty to charges related to the unlawful organizations while Gacheche wa Miano was detained without trial as was Josphat Munene Warui.

5. All these allegations were not controverted and when some of the Petitioners testified before me, they were not even cross-examined by the Respondent and to my mind that was the opportunity for the veracity of their claims to be tested and broken. Once this was not done, I am left with no option but to believe their side of the story.

6. The Respondent, in Replying Affidavits sworn by Julius Ndegwa, Senior Deputy Commissioner of Police stated that no Police Station exists at Nyayo House and the alleged torture is refuted. That no records exist of the Petitioners' arrests and alleged torture.

7. My answer and finding to those statements is that the Courts must be alive to the history and context in which a case is pleaded. It is a matter of public notoriety that no Police Station exists at Nyayo House but equally, it is a matter of public notoriety that the Kenya Police in yester years kept no records of certain persons in their custody.

It is also a matter of public notoriety that Nyayo House had Chambers in which "*dissidents*" were routinely held and more likely than not, tortured. The Petitioners' evidence before me was sufficient to convince me that they were indeed held there, unlawfully.

8. I have elsewhere above, indicated the matters in which the Petitioners were arrested for. All of them were offences that in all cases taken to Court attracted prison terms of four (4) years and less. **Section 72(3) of the Repealed Constitution** 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.”

9. The Onus of proving that the Petitioners were held within a reasonable period lies with the Respondent who has failed to do so and it is my finding that once the Petitioners were held beyond 24 hours and no explanation is offered, then their rights were violated.

Similarly, once I have found that they were indeed tortured, held incommunicado and some not even taken to trial, then they were subjected to inhuman and degrading treatment and their rights under **Section 74** of the **Repealed Constitution** were violated.

10. In finding as I have above, I am in agreement with Mohamed in AZAPO vs. President of the Republic of South Africa when he held 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.”

11. The above holding is attractive to me because it addresses the difficulties that suspects have in bringing forth the usual evidential material expected of them in trials. **When one is arrested and tortured mercilessly, where is the opportunity to take photographs of the torturers, get medical reports to show the injuries inflicted and where is the opportunity to call eye witnesses?**

12. One James Opiyo has been named as the leader of the of the torture squad at Nyayo House at the material times. **Would it be expected that the Petitioners should politely call Opiyo and ask him to call his juniors to testify of their actions?** Obviously not and Okwengu, J. in Harun Thungu Wakaba & Others vs. Attorney General, H.C. Misc. Application No.1411 of 2004 stated as follows;

“I am of the view that the UN Convention against Torture, and other Cruel, Inhuman and Degrading Treatment or Punishment, being a legal international instrument which has been ratified by Kenya, it is appropriate to adopt its definition of ‘torture’ in interpreting Section 74(1) of the Constitution. Such an approach would ensure that Kenya as a country moves in tandem with the international community by invoking the spirit of the international instruments in its domestic laws. Indeed, Section 74(1) of the Constitution is identical to Article 5 of the universal Declaration of Human Rights which has also been ratified by Kenya.

I must add that the offences, for which the Plaintiffs were arrested such as treason and being members of an unlawful society, are serious offences which at the government through its Law enforcement agencies had the responsibility to investigate, carry out arrests and where appropriate, arraign the perpetrators of the offences in Court. Nonetheless, the exercise of these responsibilities, particularly by Law enforcement agencies, had to be carried out within the confines of the Law.

It will be noted be noted that none of the Plaintiffs provided any medical in support of the allegation that they were tortured or injured. While the medical services would have provided appropriate corroboration to the Plaintiffs' allegations, the absence of the medical evidence is not critical, particularly because the Plaintiffs' Affidavits were not controverted. Therefore, the question is whether the various acts to which each of the Plaintiff was subjected to, as deponed to in the meaning of the definition provided in Article 1 of the Convention against Torture and other Cruel, Inhuman or degrading Treatment or Punishment.

A perusal of the affidavits sworn by the Plaintiffs, reveal that there was actual infliction of severe physical pain, caused by the Plaintiffs being physically assaulted, sometimes in intimate and sensitive areas, using various articles. The exposure of the Plaintiff to pressurized water, hot and cold air, as well as the confinement naked in a dark waterlogged cell, were all actions which endangered health. The incessant interrogation and the denial of sleep were all mental or psychological infliction of pain. The infliction of this physical and psychological pain was done at Nyayo House which was a government institution. It was also carried out by government officials. Further, the infliction of the pain was done during the course of interrogation with a view to obtaining information or a confession from the Plaintiffs. Thus, all the ingredients of the definition of torture as contained in Article 1 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment were present. The actions described in the Affidavit would constitute infringement of the right to protection against inhuman treatment as provided under Section 74(1) of the Constitution.”

13. I am in total agreement with the learned Judge and would adopt her reasoning as my own.

14. On the second issue, once I have held that the Petitioners are entitled to the finding that their cases were proved to the required standard, then it follows that they were entitled to their declarations and also to damages in compensation. As was held in Dominic Arony Amolo vs. Attorney General H.C. Misc. Appl. No.494/2003;

“Is the Applicant deserving of an Order in damages? We have held elsewhere and already made declarations that the Applicant suffered certain violations of his Constitutional rights and guarantees. We need not repeat them. Who exactly is to blame for those violations? Clearly in answer to the question, we must find that the Prisons officers at Kamiti Prison at all material times acting in their official capacity should carry the cross for the violations. This should be so because in the Peters Case (supra), it was held that;

“In Pilkington, Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms [1984] 62 Canadian Bar Rev. 517 it is said that the purpose of awarding damages in Constitutional matters should not be limited to simple compensation. Such an award, the Article suggests, ought in proper cases to be made with a view to deterring a repetition of breach or punishing those responsible for it or even securing effective policing of the Constitutionally enshrined rights by rewarding those who expose breach of them with substantial damages.”

Having so said, we must be guided by the decision in the Maharaj Case (supra) where Lord Diplock for the majority said;

“The claim for redress under Section 6(1) (our Section 84 [1]) for what has been done is a claim against the State for what has been done in exercise of a power of the State. This is not vicarious liability, it is liability of the State itself. It is not liability in tort at all; it is a liability in the public law of the State not of the judge himself, which has been newly created by Section 6(1) and (2) of the Constitution.”

We quote these words with approval because whereas in the Maharaj it was the conduct of a judge that was in issue, the principle is the same with regard to any other Public Official (including Prisons Officer) acting in that capacity. To that extent then, the State sued herein through the Attorney General shall be held liable for the conduct of its officials in violation of the Constitution”.

15. I will take the same position as the bench in the Arony case.

16. As a corollary to the above, the next question to address is the quantum of damages awardable to each Petitioner. Each was incarcerated unlawfully for a different period of time; all suffered the same kind of torture; some were released without trial; others were convicted on their pleas of guilty which are now contested; others were detained without trial. It follows that the quantum of damages would differ and as was stated in the Arony case, the Courts can only use their legal expertise to determine what compensation is fair and reasonable from case to case but in doing so, they must “*promote a degree of consistency from one case or type of case to the next, and to avoid pitfalls*”. – see also Rees vs. Darlington Memorial Hospital NHS Trust (2003) UKHL 52 per Lord Nicholls of Birkenhead.

17. The cases before me are only some in the series that I shall generally name, the “*Nyayo House Chamber Cases*”. Others have been decided before, including;

- Harun Thungu Wakaba, (Supra)
- Wachira Weheire vs. Attorney General, H.C. Misc. Appl. No.1184/2003,
- Rumba Kinuthia vs. Attorney General, H.C. Misc. Application No.1408 of 2004, and
- Cornellius Akello Onyango & 8 Others vs. Attorney General, Petitions Nos.233 – 243/2009 amongst others.

18. In the above cases, the High Court consistently held that where fundamental rights and freedoms particularly those enshrined in **Section 84** of that **Constitution** were violated, the remedy must include an award in damages against the State. The reasoning for the proposition that it is the State that must be held liable also found favour in the case of Cholmondely vs. Republic [2008] eKLR where the Court of Appeal stated as follows;

“We know who is capable of locking individual Kenyans in the Nyayo House Dungeons ... It is the State that who (sic) has the capacity to deprive individual Kenyans of their rights guaranteed by Sections 70 to 82 inclusive of the Constitution.”

19. In the same case, the Court of Appeal admitted the failings of the Courts in the past and argued that Courts “***must now vigorously enforce and enforce against the State the fundamental rights and freedoms of the individual guaranteed by the Constitution.***”

I emphasize this point because it is quite obvious to me that as a lesson for the future, the State must today pay the price for its failings in the past.

20. In awarding damages therefore, I shall use the following criteria;

- (i) The torture inflicted on each Petitioner.
- (ii) The length of time the Petitioners were held in unlawful custody
- (iii) The decided cases on the subject or matter.
- (iv) what is fair and reasonable in the circumstances of each case, and I have chosen to give a lumpsum in each case.

21. In the event, I shall order as follows;

In Petition No.340/2009, the Petitioner shall have the declarations sought and an award of damages in Kshs.1,500,000/-.

In Petition No.341/2009, the Petitioner shall have the declarations sought and an award of damages in Kshs.2,500,000/-.

In Petition No.342/2009, the Petitioner shall have the declarations sought and an award of damages in Kshs.2,000,000/-.

In Petition No.343/2009, the Petitioner shall have the declarations sought and an award of damages in Kshs. 2,000,000/-.

In Petition No.344/2009, the Petitioner shall have the declarations sought and an award of damages in Kshs.6,000,000/-.

In Petition No.345/2009, the Petitioner shall have the declarations sought and an award of damages in Kshs.2,000,000/-.

In Petition No.346/2009, the Petitioner shall have the declarations sought and an award of damages in Kshs.5,500,000/-.

In Petition No.347/2009, the Petitioner shall have the declarations sought and an award of damages in Kshs.1,750,000/-.

In Petition No.348/2009, the Petitioner shall have the declarations sought and an award of damages in Kshs.2,650,000/-.

In Petition No.349/2009, the Petitioner shall have the declarations sought and an award of damages in Kshs.1,500,000/-.

In Petition No.350/2009, the Petitioner shall have the declarations sought and an award of damages in Kshs.3,000,000/-.

22. Conclusion

Having held as above, I can only conclude by stating that each Petitioner has shown that they suffered in the past for the mere fact that they may have held political and other opinions that were not popular with the government of the day. As the new Constitutional dawn continues to unravel its mysteries, one lesson is clear; the Kenyan Courts may have failed the people in the past but today it can be said with Mwendwa CJ in Okunda vs. Republic [1970] E.A 454 that like Dicey said of England, the supremacy of the Constitution rather than any organ of government is what guides the Courts and especially the High Court in executing its mandate under **Article 165 of the Constitution, 2010**. The Judiciary must therefore never slumber and should not fall into the obvious ignoring of the past.

23. In the end, the final Orders to be made are the following;

(i) In all Petitions, the following declarations are granted;

(a) A declaration that the Petitioners' fundamental rights and freedoms were contravened and grossly violated by the Respondent's Special Branch Police Officers who were Kenyan Government servants, agents, employees and in their institutions on diverse dates and diverse days at Nyayo House Torture Chambers.

(b) A declaration that the Petitioners' are entitled to the payment of damages and compensation for the

violations and contraventions of their fundamental rights and freedoms under the aforementioned provisions of the Constitution.”

(ii) In Petition No.340/2009 of 2009, a lumpsum award in damages in the sum of Kshs.1,500,000/-.

In Petition No.341/2009 of 2009, a lumpsum award in damages in the sum of Kshs.2,500,000/-.

In Petition No.342/2009 of 2009, a lumpsum award in damages in the sum of Kshs.2,000,000/-.

In Petition No.343/2009 of 2009, a lumpsum award in damages in the sum of Kshs.2,000,000/-.

In Petition No.344/2009 of 2009, a lumpsum award in damages in the sum of Kshs.6,000,000/-.

In Petition No.345/2009 of 2009, a lumpsum award in damages in the sum of Kshs.2,000,000/-.

In Petition No.346/2009 of 2009, a lumpsum award in damages in the sum of Kshs.5,500,000/-.

In Petition No.347/2009 of 2009, a lumpsum award in damages in the sum of Kshs.1,750,000/-.

In Petition No.348/2009 of 2009, a lumpsum award in damages in the sum of Kshs.2,650,000/-.

In Petition No.349/2009 of 2009, a lumpsum award in damages in the sum of Kshs.1,500,000/-.

In Petition No.350/2009 of 2009, a lumpsum award in damages in the sum of Kshs.3,000,000/-.

(iii) Each Petitioner shall also have the costs of his/her Petition.

24. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 2nd DAY OF AUGUST, 2012

**ISAAC LENAOLA
JUDGE**

In the presence of:

Irene – court clerk

Mr. Gitau for Petitioner

Mr. Ojwang for Respondents

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE

By Consent

A stay is granted for 30 days.

Copies of the judgment to be supplied.

**ISAAC LENAOLA
JUDGE**

2/8/2012