



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 237 of 2010

BENSON THIRU KARANJA PETITIONER

AND

THE ATTORNEY GENERAL RESPONDENT

JUDGMENT

1. Through a petition dated 28th June, 2010 supported by an affidavit, the petitioner moved this court seeking the following reliefs:

(i) *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 November 1987 and for 22 days at Nyayo House Torture Chambers*

(ii) *General damages, exemplary damages and moral damages on an aggrieved scale under Section 84(2) of the Constitution of Kenya of 2010 for the unconstitutional conduct by the Kenyan government servants and agents be awarded.*

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

2. The petitioner's case is that on 15th November 1987, the petitioner was arrested at a hotel at Nakuru town by two Special Branch Police officers. The petitioner was told by the officers that he was under arrest for being a *Mwakenya* agent, an outlawed organization, and then he was locked up in a solitary cell at Nakuru Central Police Station and thereafter taken to Menengai Police Station where he was locked for 4 days.

3. On the fifth day, he was blindfolded and the vehicle taken around Dundori area in Nakuru District before he was taken to Muthaiga Police station. At about 8.30pm, he was again, hurled in a land rover and taken to Nyayo House basement whereupon the blind fold was removed.

4. The petitioner claims that the Special Branch Police Officers ordered the petitioner to strip naked and they beat him with slaps, rubber whips, broken chair pieces, kicks and blows until he was full of blood all over his body. The torture episodes continued for the twenty two days that he was held at Nyayo House. That after each session of torture, he would be returned to a dark cell flooded with cold water where pressurized water would be sprayed on him while naked.

5. The petitioner was locked in the dark cell for the twenty-two days and kept without food for some days, a sleeping mat, blankets or drinking water for the period. He was threatened that he would be

killed if he did not plead guilty to whatever charges the Special Branch Police Officers would prefer against him. The officers did not charge him in a court of law and he was released with a warning that he would re-arrested to face fresh torture.

6. It is the petitioner's contention that during the period of his incarceration, neither his family members nor his friends knew where he was as he was denied communication with them.

Respondent's Case

7. The respondent, represented by Mr. Opondo, did not file a replying affidavit to the petition but filed written submissions dated 18th October, 2012.

8. The respondent termed the claim as baseless and opportunist. The respondent relies on **sections 107 and 109** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* for the assertion that the onus of proof of existence of facts lay on the petitioner and that the petitioner had not discharged this burden. He urged the court to decline the prayers sought as there was no proof of the allegations.

Determination and Disposition

9. The respondent's averments and arguments are well disposed of in previous cases grounded on the same facts including that of *Oduor Ongwen and Others v Attorney General Nairobi Constitutional Petition No. 777 of 2008 (Unreported)*, *Harun Thungu Wakaba, Rumba Kinuthia & Others v Attorney General, Nairobi HC Misc. Appl. No. 1408 of 2004 (Unreported)* and *Cornelius Akelo Onyango & Others v Attorney General Nairobi HC Misc. 233 of 2009 (Unreported)*. The statements set out in the affidavit constitute evidence on oath and the same has not been disputed.

10. According to the uncontroverted facts which I have set out above, it is not in doubt that the actions by the government agents subjected the petitioner to mental and physical torture, inhuman and degrading treatment contrary to **section 74(1)** of the former Constitution that guaranteed freedom from torture or inhuman and degrading treatment. I also find that and declare that the **section 72** of the Constitution was violated to the extent that the petitioner was held in detention for twenty two days which was a period longer than that prescribed by the former Constitution.

Damages

11. The petitioner in this case asked court to grant the sum of Kshs 8,000,000 being the total sum of awards in both general and exemplary damages.

12. The court's jurisdiction to award damages for breach of constitutionally protected rights under **section 84** of the former Constitution is now well settled. As I stated in the case of *Benedict Munene Kariuki and 14 Other Attorney General, Petition No. 722 of 2009 (Unreported)*, I am not inclined to award exemplary damages. (See also *Lt. Col. Peter Ngari Kagume & Others v Attorney General, Nairobi Constitutional Appl. No. 128 of 2006 (Unreported)*).

13. In assessing general damages due for the breaches of the constitution, I addressed my mind the cases cited by the parties and awards in similar cases and to the facts of this particular case. I also did not have the benefit of oral evidence, medical or other expert evidence to enable me assess the nature and extent of injury psychological or otherwise to the petitioners. I consider that the sum of Kshs. 1,000,000.00 as general damages would be appropriate to vindicate the infringement of the petitioner's rights.

14. I now enter judgment for each petitioner and issue orders as follows;

(a) I hereby declare that the fundamental rights and freedoms of the petitioner guaranteed under sections 72 and 74(1) of the former Constitution were infringed by the respondent.

- (b) **The petitioner is awarded a sum of Kshs. 1,000,000/00 as general damages.**
- (c) **Interest on (b) above shall accrue at court rates from the date of this judgment.**
- (d) **The respondent shall bear the costs of the suit.**

DATED and DELIVERED at NAIROBI this 26th day of September, 2012.

D.S. MAJANJA

JUDGE

Mr Gitau instructed by Gitau J.H. Mwaru Co. Advocates for the petitioner.

Mr Opondo, Litigation Counsel instructed by the State Law Office for the respondent.