



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 46 of 2010

SIMON NJAAGA MBOTE.....PETITIONER

AND

THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

1. Before me is a petition dated 31st August, 2010 in which the petitioner seeks 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 2nd February 1989 and for 17 days at Nyayo House Torture Chambers*

(ii) *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 Constitution*

(iii) *General damages and moral damages on an aggrieved scale under Section 23(3) of the Constitution of Kenya of 2010 for the unconstitutional conduct by the Kenyan government servants and agents be awarded.*

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

2. The facts according to material before court are that on the 2nd February 1989, he was arrested from Kabete campus of the University of Nairobi by Special Branch Police Officers who were accompanied by a Mr Muchiri, a security officer at the main university library, on allegations that he wrote a document on a clandestine movement known as *Mwakenya*.

3. The petitioner was then locked up in a solitary cell at Central Police Station and the following morning he was driven while blindfolded all the way to Nyayo House where he was kept in isolation. That before day break, he was taken to the 24th floor of Nyayo House whereupon he was presented to a panel of about ten people who asked him to tell them what he knew about *Mwakenya* Organisation.

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 seventeen days that he was held at Nyayo House. After each torture episode, he would be returned to a dark cell flooded with cold water where pressurized water would be sprayed on him while naked. During the torture sessions, he was questioned on his personal history, political views and opinions and was asked to confess to being members of *Mwakenya*

or confess that he was involved in anti-government activities.

5. The petitioner continued to stay in the cold cells until he became unconscious such that he could neither drink nor talk because he has stayed for days without food and so his throat was too painful to swallow anything. He was locked in the dark cell for the seventeen days and kept without food for days, a sleeping mat, blankets or drinking water for the period. The petitioner avers that he was forced to rotate using his finger pointed on the ground and also to do press-ups by special branch police officers continued to whip him.

6. It is the petitioner's contention that between the dates of arrest on the 2nd February 1989 and 19th February 1989, he was denied access to a lawyer, doctor, friends and relatives and he suffered bodily injuries.

Respondent's Case

7. The respondent, represented by Mr. Moimbo, did not file any replying affidavit but filed written submissions on the 6th September, 2012 in which he submitted that the petitioner had failed to substantiate his allegations of the violations of his fundamental rights and freedoms.

8. The respondent relied 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. Counsel also relied on the holding of court in *Col. Peter Ngari Kagume & Others v Attorney General, Nairobi Constitutional Application No. 128 of 2006 (Unreported)* in support of the proposition that where a party alleges and the other disputes, the party alleging assumes the burden to prove the allegation. It is the respondent's contention that therefore, in absence of any exhibit to support the petitioner's claim, the same ought to be dismissed.

Determination and Disposition

9. The respondent terms as unsubstantiated the petitioner's claim although no replying affidavit was filed to challenge the averments. On this, I adopt the finding of court in *Oduor Ongwen & 20 others v Attorney General, Nairobi Constitutional Petition No. 777 of 2008 (Unreported)* where Hon. Justice Musunga stated in regard to similar contentions, ***"...If the Attorney General wanted to verify the correctness of the petitioner's averments nothing would have prevented him from obtaining the desired information. The State has the power, machinery and ability to obtain information from each and every police station or court and in the absence of an appropriate affidavit supported by such documentary evidence as would be sufficient to counter the petitioners' averments, the respondent cannot simply argue that the petitioners' claims have no proof...The basis of each of the petitioners' claim is well documented and if the respondent intended to challenge the claims he ought to have filed an appropriate affidavit in response thereto. That was not done. All in all, each of the petitioners have properly demonstrated that their constitutional rights and freedoms were violated and what now remains is for this court to assess the quantum of damages payable..."***

10. I will thus proceed on the premises that the uncontroverted facts represent true factual situation. (See also *Harun Thungu Wakaba & others v Attorney General Nairobi HC Misc. Appl. 1411 of 2009(OS) (Unreported)*, *Wachira Weheire v Attorney General Nairobi HC Misc. 1184 of 2003(OS) (Unreported)*, *Rumba Kinuthia & Others v Attorney General, Nairobi HC Misc. Appl. No. 1408 of 2004 (Unreported)*, *Cornelius Akelo Onayngo & others v Attorney General Nairobi HC Misc. 233 of 2009 (Unreported)*.)

11. 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 17 days which was a period longer than that prescribed by the former Constitution.

Damages

12. In assessing general damages due for the breaches of the constitution I addressed my mind to the cases cited by the parties and awards in similar case and to the facts of this particular case. I consider that the petitioner deserves to be compensated for the wrongs that were meted on him. I award the petitioner a sum of Kshs. 1,000,000.00 as general damages.

13. 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 October, 2012.

D.S. MAJANJA

JUDGE

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

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