



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 729 of 2006

DAVID NJUGUNA

WANYOIKE.....PETITIONER

VERSUS

THE ATTORNEY

GENERAL.....RESPONDENT

JUDGMENT

Introduction

1. This petition relates to alleged violation of the petitioner's rights by state and state agents following his arrest and incarceration by state agents in October 1986.
2. In the petition dated 10th December 2008 which is supported by the petitioner's affidavit sworn on the same date and brought under the provisions of section 84 of the former constitution of Kenya, the petitioner seeks various orders and declarations with regard to alleged violation of his constitutional rights following his arrest and incarceration at Nyayo House for 29 days between the date of his arrest on the 21st of October 1986 and the date he was charged in court on the 19th of November 1986.
3. The respondent entered appearance on the 20th of March 2009 but did not file a reply or take any further part in the proceedings despite service. Consequently, the facts as presented by the petitioner are uncontroverted.

The Petitioner's Case

4. The petitioner states that he was arrested in Nairobi without an arrest warrant early in the morning on 21st October, 1986 by 5 plain- clothes Special Branch policemen. He was taken to Shauri Moyo Police Station where he was held incommunicado and without access to his lawyer and family members and without being informed of the reason for his arrest. He spent the night at the Shauri Moyo Police Station. The following morning, he was blindfolded and about six policemen ordered him into the back of a police car. He was taken from Shauri Moyo Police Station to a dark cell whose walls and roof were painted black. He later came to learn that the cell was in a building known as Nyayo House. He states that the cell was so dark that he could not tell the time of day.
5. The petitioner alleges that he was later on taken by a Special Branch officer to the 24th floor of Nyayo House before a panel of interrogators who blindfolded him and forced him to strip naked. He states that he was beaten with broken chair parts and rubber whips and was kicked several times as his interrogators demanded that he admits to having seen and read certain proscribed publications.

6. The petitioner avers that he was held in custody for twenty nine (29) days during which period he was held incommunicado and was subjected to routine torture which included being denied food, drinking water, a sleeping mat and blankets; that he was threatened that he would be killed and his body would disappear without trace if he failed to cooperate and plead guilty to the charges that would be preferred against him.

7. The petitioner states that he was charged in court on 19th November 1986 before the Chief Magistrate Nairobi, with the offence of failing to prevent a felony. He admitted the charges as he had been asked to do by the Special Branch Police Officers in order to avoid being killed. He produced in evidence a charge sheet in respect of **Nairobi Chief Magistrate Court Criminal Case No. 5478 of 1986, Republic -v- David Njuguna Wanyoike** in which the charges are stated as neglect to prevent a felony contrary to section 392 of the Penal Code as read together with section 36 of the Penal Code Cap 63 Laws of Kenya. He also produced typed proceedings and the judgment of the court.

8. The petitioner claimed that he was held in custody at the Industrial Area Prison and was later on transferred to Kamiti Maximum Prison and again to Naivasha Maximum Prison where he completed his term on 18th September 1987.

9. The petitioner alleges that while serving his sentence, he continued to suffer solitary confinement, was dressed in 'semi-nude' tattered prison uniform and fed on poorly cooked food, thus subjecting him to physical and psychological torture. He alleges that the entire process has left his physical, psychological and economic and political life messed up. He is traumatized by the torture and he cannot get a job in his engineering career and his friends and relatives have shunned him.

10. The petitioner submitted that the respondent violated several of his rights under the former constitution.

Violation of the Right to Personal Liberty

11. The petitioner was arrested on the 21st of October 1986 but was not charged in court until the 19th of November 1986. He was therefore held in custody for a period of 29 days. Under the provisions of Section 72(1) read together with section 72(3) and 72 (5) of the repealed constitution, he ought to have been informed of the reasons for his arrest and produced in court within 24 hours of his arrest unless the state could show reasonable cause for his being held for longer than the 24 hours permitted under the constitution. Section 72 of the repealed constitution provided as follows:

'72. (1) No person shall be deprived of his personal liberty save as may be authorized by law....

(2) A person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.

(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.

12. From the evidence presented before me by the petitioner, and in the absence of evidence to controvert his averments, the failure by the respondent to inform the petitioner of the charges against him

and to charge him in court within the period provided for in the former constitution were a clear violation of his rights under Section 72(1), 72(3) and Section 72(5) of the former constitution.

Protection from Torture and other Cruel and Degrading Treatment

13. The petitioner alleges that his right not to be subjected to torture and other cruel and degrading treatment protected under section 74(1) was violated when he was held for a period of 29 days at the Nyayo House cells and was beaten and subjected to other acts of torture. Section 74 (1) provided that:

‘No person shall be subject to torture or to inhuman or degrading punishment or other treatment.’

14. The issue of what amounts to torture and cruel, degrading treatment has been the subject of judicial adjudication before this court in several cases. The court has held that the beatings, interrogation and confinement in dark cells to which those arrested and held in the now infamous Nyayo House torture chambers were subjected amounted to torture and cruel degrading treatment. I need not repeat the findings of the court in such cases as **Harun Thungu Wakaba & Others –v- The Attorney General Nairobi HC Misc. Appl. 1411 of 2009(OS); Wachira Waheire -v- The Attorney General Nairobi HC Misc. 1184 of 2003(OS), Rumba Kinuthia & Others –v- The Attorney General, Nairobi HC Misc. Appl. No. 1408 of 2004 and Cornelius Akelo Onayngo & Others -v- The Attorney General Nairobi HC Misc. 233 of 2009** (Unreported). In the circumstance, I find and hold that the petitioner was subjected to torture, cruel and degrading treatment contrary to section 74(1) of the former constitution.

Right to a Fair Hearing

15. The petitioner alleges that his right to a fair hearing as provided under section 77(1) of the former constitution was violated. This section required that when a person is charged with a criminal offence, he shall be afforded a fair hearing within a reasonable time by an independent and impartial court. The Court of Appeal has held in the case of **Julius Kamau Mbugua -v-Republic Criminal Appeal No 50 of 2008** (unreported) that section 77 of the former constitution protected rights in the course of the trial. In this case, the petitioner pleaded guilty to the charge, and he was not therefore subjected to a trial. As the petitioner was convicted on his own plea of guilty on the day he was charged in court, and in light of the interpretation given by the Court of Appeal to the provisions of section 77 of the former constitution, I find no violation of the petitioner’s right to a fair hearing under section 77 of the former constitution.

Remedy

16. Having found that the petitioner’s rights under sections 72(1), (2), (3) and (5) and section 74(1) of the former constitution were violated by the respondent, I now turn to consider the remedy that the petitioner is entitled to. As noted above, judicial precedents with regard to the arrests and incarceration in the Nyayo House torture chambers in the 1980s and 1990s are unanimous that they amounted to violations of constitutional rights, and that those whose rights were violated are entitled to damages.

17. In the present case, the petitioner was incarcerated in Nyayo House for 29 days during which time he was subjected to acts of torture. The level of damages awarded in similar circumstances has varied, with awards of Kenya shillings 1,000,000-3,000,000 being made by Okwengu, J to the petitioners in the case of **Harun Thungu Wakaba -v- The Attorney General, Misc Appl. No. 1411 of 2004**; Wendoh, J making an award of Kshs 1,500,000.00 in the case of **Rumba Kinuthia -v- Attorney General (supra)** while Majanja, J awarded damages of Kshs 2,000,000.00 as general damages to the petitioners in **Benedict Munene Kariuki and 14 Others -v- the Attorney General High Court Petition No. 722 of 2009**.

18. In the circumstances of this matter, and bearing in mind the finding of the court in the case of **Dominic Arony Amolo-v- Attorney General – High Court Misc. Appl. No. 494 of 2003** that the violation of the petitioner’s rights in that matter were part of the same transaction and therefore no separate award is merited for each violation of the former constitution, I find that the violations in this matter with regard to sections 72 and 74 of the former constitution were part of the same transaction and

make a global award of Kenya Shillings Two Million (Kshs 2,000,000.00).

19. The petitioner shall also have the costs of the petition together with interest on damages from the date of judgment until payment in full.

Dated, Delivered and Signed at Nairobi this 22nd day of November 2012

**MUMBI NGUGI
JUDGE**

David Njuguna Wanyoike, Petitioner in person

No appearance for the Attorney General

**MUMBI NGUGI
JUDGE**