



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CASE NO. 1185 OF 2003 (OS)

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF A CONSTITUTIONAL REFERENCE UNDER SECTION 84 OF THE
CONSTITUTION OF KENYA**

GITARI CYRUS

MURAGURI.....PLAINTIFF

VERSUS

THE ATTORNEY

GENERAL.....DEFENDANT

J U D G M E N T

The plaintiff was a businessman up to sometimes in mid December, 1988 when he was arrested by state security officers from his house. The security officers had neither a warrant of arrest nor a search warrant. They conducted a search in the plaintiff's house and took away several textbooks. Thereafter the plaintiff was arrested, blindfolded and forced to lie at the back of a landrover after which he was driven to Nyayo House basement where he was locked up in a dark cell.

After being held in the cells for 14 days, the plaintiff was released without any charges being preferred against him. However, on 2nd February, 1989 the plaintiff was arrested once more by special branch officers at around 6.00 p.m. No reason was given for his arrest. He was again taken to Nyayo House

basement cells where he was interrogated for 5 weeks on allegations that he was a member of an unlawful organization known as “**Mwakenya Movement**”. During the interrogations, the plaintiff was assaulted by police officers. He was stripped naked and kept in a cold waterlogged cell and denied food for four consecutive days.

During the interrogations some persons by the names Salim Ndamwe, Munene and Mworoto, were paraded before the plaintiff and the police wanted the plaintiff to admit that he had recruited them to the said Mwakenya Movement. The plaintiff denied the said allegations but that earned him more beatings and all manner of inhuman treatment.

Subsequently, the plaintiff was charged in the Senior Resident Magistrate’s Court, Nairobi, with the offence of being a member of an unlawful society in **Criminal Case No.1399 of 1989**. He denied the charges and was remanded at Kamiti Maximum Security Prison until 8th August, 1989, when the prosecution entered a *nolle prosequi*, thus terminating the proceedings.

While in remand custody, the plaintiff was beaten and mistreated by prison warders on many occasions. All the aforesaid acts were in breach of various fundamental rights and freedoms as provided for in the Constitution of Kenya. The plaintiff cited in particular **sections 70, 72(3) and (5), 74(1), 76(1), 77, 78, 79, 80 and 82(3)** of the repealed Constitution.

The plaintiff alleged that as a result of the unlawful arrest and incarceration, his life was ruined and his business which used to have an annual turnover of about Kshs.10 million was destroyed. The plaintiff further alleged that he suffered bodily injuries, psychological torture and trauma from which he has not recovered.

In view of the aforesaid unlawful actions, the plaintiff filed a suit by way of an originating summons where he sought the following prayers:

- “1. A declaration that the plaintiff’s fundamental rights and freedoms under sections 70, 72(3&5), 74(1), 76(1), 77, 78(1), 79(1) & 80(3) have been contravened and grossly violated by police officers and other Government servants, agents, employees and institutions in 1988 and 1989 and on diverse dates thereafter.**
- 2. A declaration that the plaintiff 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 on an aggravated scale under S.84(2) of the Constitution of Kenya for the unconstitutional conduct by government servants and agents.**
- 4. Any further orders, writs, directions, as this Honourable Court may consider appropriate.**
- 5. Costs of the suit, with interest at court rates.”**

The originating summons dated 6th October, 2008 was supported by the plaintiff’s affidavit, sworn on the same date. The plaintiff was initially represented by M/s Ng’ang’a Thiong’o & Company Advocates but on 16th April, 2008, he filed a Notice to act in person.

The respondent did not file a replying affidavit but put in grounds of opposition and stated as follows:

“1.That the application discloses no cause of action against the respondent.

2. That the application is misconceived incompetent and bad in law as the prayers sought cannot

be granted by this honourable court.

- 3. That the application lacks merit in entirety.**
- 4. That the application is otherwise an abuse of the court process and ought to be dismissed as a whole.**
- 5. That the orders sought are not tenable against the defendant.**
- 6. That the claim for unlawful imprisonment offends the express provisions of section 3 of the Public Authorities Limitations Act.**
- 7. That the claim for malicious prosecution, unlawful arrest and detention must fail for failing to disclose any particulars of malice as none are pleaded.**
- 8. That the application filed by the applicant is defective in substance and does not come under any provisions of the law.**
- 9. That the court has no jurisdiction to entertain the application in view of its having been filed out of time hence it is time barred.**
- 10. That the applicant has not identified the perpetrators or the names of the said perpetrators involved in the alleged acts complained of.”**

When the matter was listed for directions, it was agreed *inter alia*, that parties do file their respective submissions, list of documents relied upon and a list of authorities and thereafter they be given a limited period of time to highlight their submissions. Both the plaintiff and the respondent filed their respective submissions and list of authorities. The plaintiff also filed a list of documents to which he attached various documents. I will refer to the main grounds of the submissions at a later stage of this judgment.

The hearing commenced before the Hon. Lady Justice Gacheche and the plaintiff as well as **Mr. Menge, Principal Litigation Counsel** for the respondent, made their respective submissions.

When the plaintiff was called upon to reply to the respondent's submissions he requested the said Judge to disqualify herself from hearing the case. He was apparently unhappy because he had been directed to summarize his response within a few minutes. Gacheche J. acceded to the plaintiff's request and thereafter the matter was placed before the Chief Justice for directions. The Chief Justice nominated the undersigned to finalize the hearing.

The main issues for determination in this matter may be summarized as hereunder:

1. Whether the originating summons discloses a cause of action against the respondent. Is it misconceived, incompetent and bad in law?
2. Whether the claim for unlawful imprisonment offends the provisions of section 3 of the Public Authorities Limitations Act.
3. Whether the entire claim is time barred.
4. Whether the claims for malicious prosecution, unlawful arrest and detention are properly pleaded.
5. Whether the plaintiff's fundamental rights as pleaded were violated.
6. Whether the plaintiff is entitled to damages and if so, the quantum thereof.

7. Who should bear the costs of this suit?

I now proceed to determine the aforesaid issues as hereunder:

Legality of plaintiff's claim

The plaintiff's averments in his affidavit were not challenged at all. The respondent failed to file a replying affidavit and therefore the depositions by the plaintiff remain uncontroverted. The court must therefore accept that the plaintiff was arrested and taken to the so called "**Nyayo House Torture Chambers**" where he was held incommunicado for a number of days. I am satisfied that the originating summons discloses a cause of action against the respondent. I do not agree that it is misconceived, incompetent and bad in law as alleged by the respondent.

Does the claim for unlawful imprisonment offend Section 3 of the Public Authorities Limitations Act? Is the plaintiff's claim time barred?

Section 3(1) of the said Act provides as hereunder:

"No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued."

The defendant submitted that the plaintiff's action was instituted nearly fifteen years after the alleged cause of action arose and therefore the claim is time barred. The respondent cited the decision of Nyamu J. (as he then was) in LT. COL. PETER NGARI KAGUME AND OTHERS VS ATTORNEY GENERAL, CONSTITUTIONAL APPLICATION NO.128 OF 2006. In that case, the court held that all the petitioners had prior to commencement of their constitutional application filed HCCC NO.548 OF1995 claiming damages for wrongful dismissal from the Kenya Air Force. Subsequently they withdrew the said case so as to pursue the constitutional reference. The court stated that:

"The appeals as well as a civil suit for unlawful dismissal have time limitation and the petitioners had to comply with the stipulated time. All the petitioners who filed NBI HCCC No.458 of 1995 were time barred since even if they would have sued under the law of contract or tort, the suit was filed in court 13 years after the date of the alleged cause of action. Time limitation in contractual claims is six (6) years while a claim in tort should be filed within three (3) years. Could the petitioners have found out that their claims were time barred and then they craftily jumped the huddle to hide behind the Constitution? It is a possibility that I do not wish to speculate. The petitioners had all the time to file their claim under the ordinary law and the jurisdiction of the court but they never did and are now counting on the Constitution. None of the petitioners have given any explanation as to the delay for 24 years. In my view, the petitioners are guilty of inordinate delay and in the absence of any explanation on the delay, this instant petition is a gross abuse of the court process. I have examined the position in other comparable jurisdictions and found that in most countries, the enforcement of fundamental rights and freedoms has time limitation."

The plaintiff's case was brought under the provisions of section 84 of the repealed Constitution. The

section stated as hereunder:

“(1) Subject to subsection (6), if a person alleges that any of the provisions of sections 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if another person alleges contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction-

(a) to hear and determine an application made by a person in pursuance of subsection (1).

(b) to determine any question arising in the case of a person which is referred to in pursuance of subsection (3), and may make such orders, issue such writs and give 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)”

My reading of section 84(1) of the repealed Constitution does not show that there is any time limit for filing constitutional applications such as the plaintiff’s originating summons herein.

Section 58 of the Interpretation and General Provisions Act states as follows:

“Where no time is prescribed or allowed within which anything shall be done, such thing shall be done without unreasonable delay, and as often as due occasion arises.”

However, the Act only applies in the interpretation of written law but not the Constitution. See section 2 of the Act. In the case of DURITY VS ATTORNEY GENERAL [2002] UKPC 20, the Constitutional court of Trinidad and Tobago held, *inter alia*:

“The inherent jurisdiction of the High Court to prevent abuse of its process applied as much to constitutional proceedings as it did to other proceedings. The grant or refusal of a remedy in constitutional proceedings was a matter in respect of which the court had judicial discretion. The Constitution contained no express limitation period for the commencement of constitutional proceedings. The court should therefore be very slow to hold that by that limitation of constitutional proceedings was subject to a rigid and short bar – the very clearest language was needed before a court could properly so conclude.”

Responding to the respondent’s arguments that he ought to have filed his case much earlier than 2003, the petitioner stated that in view of what he had gone through at the Nyayo House Torture Chambers, he was afraid of filing such a case during the regime of the retired President Daniel Arap Moi. When a new government came into power in the year 2003 he thought it was the opportune time to institute the claim. He added that there is no time limit for filing cases for compensation arising from violation of fundamental rights. He cited the case of RUMBA KINUTHIA & 6 OTHERS VS THE ATTORNEY GENERAL, MISCELLANEOUS APPLICATION NO.1408 OF 2004. In that case Wendo J. held that:

“Section 84 of the Constitution does not give any time limit as to when one can move the court for alleged violations under the bill of rights. It is my view that such claims cannot be time barred.”

My view of this issue is that the makers of the Constitution did not deem it appropriate to fix any time limitation in respect of filing of cases seeking reparations where violation of a fundamental right is alleged. In the circumstances, a Judge is at liberty to exercise his/her discretion guided by the facts obtaining in each case. I find and hold that the plaintiff's suit is not time barred.

In this particular matter, the plaintiff gave a good explanation as to why he did not file his claim before the year 2003. It would be a travesty of justice if the court were to hold that the suit is time barred and dismiss the same summarily. I decline to do so.

Whether the plaintiff's claims for malicious prosecution, unlawful arrest and detention are properly pleaded.

The respondent alleged that the plaintiff did not provide any particulars in support of his claim. He stated that there is no disclosure of the identity of the police officers who allegedly arrested and tortured him.

Ordinarily, a party should plead his case with sufficient particulars as would enable the other side respond appropriately to a claim. However, in this case, I think it is naïve on the part of the respondent to expect the plaintiff to have asked his tormenters for their particulars when he was undergoing such an ordeal. In the circumstances under which the arrest and detention was done I doubt whether the plaintiff would have known the identity of the police officers who manhandled him. In any event, there is no replying affidavit challenging the plaintiff's averments. If indeed the respondent wanted to know the particulars of the police officers who are alleged to have arrested and tortured the plaintiff, such information I believe could have been obtained from police records. In CRIMINAL CASE NO.1399 OF 1999 the charge sheet refers to police file No.111/576 of 1989.

Whether the plaintiff's fundamental rights as pleaded were violated.

In his submissions, the respondent stated that:

“In view of the fact that the plaintiff pleaded guilty before the Senior Resident Magistrate, the acts of the police arresting him cannot be termed as executed in bad faith. The allegations against the police are in respect to the provisions of section 72(3 and (5) which provides for protection of right for personal liberty. The essence of the two subsections is that a person under arrest should be speedily taken to court, twenty four hours for any other offence but fourteen days for an offence that attracts death sentence. We have no doubt that this is a fundamental right that should not be taken away without very good reasons. However, it is our submissions that this right cannot be enjoyed in absolute. It can be taken away by the state if the enjoyment of the same prejudices the right and freedoms of others or public interest. Looking at the facts of this case and the seriousness of the charge, the applicant could not be released to the public because of the seriousness of the charge.”

No doubt the above submissions are irrelevant and totally misplaced. The plaintiff was not taken to court within the prescribed period of time. The plaintiff was arraigned in court on a charge of being a member of an unlawful society and denied the charge. He did not admit the same as alleged by the respondent. He was then remanded in prison custody but subsequently the Attorney General entered a *nolle prosequi*.

The plaintiff cited specific sections of the Constitution that were violated. Those averments were not challenged by the respondent. If I may cite just a few of the sections of the Constitution that were referred to by the petitioner, section 72 deals with the right to personal liberty. The relevant portions of the same are as follows:

“72(1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases:

(a) in execution of the sentence or order of a court whether established for Kenya or some other country, in respect of a criminal offence of which he has been convicted.”

Subsection (3) thereof stipulates the time within which an arrested person ought to be arraigned in court. **Section 74 of the Constitution** outlaws torture or inhuman or degrading punishment. **Section 78(1)** guarantees the right to protection of freedom of conscience. The same states as follows:

“78(1) Except with his own consent no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this section that freedom of thought and of religion, freedom to change his religion or belief and freedom either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.”

Section 79 guarantees the freedom of right of expression while **section 80** provides for protection of freedom of assembly and association.

No doubt the unlawful actions that were committed by the unknown security agents clearly violated the petitioner's fundamental freedoms. It would appear that there was no proper basis for arresting the plaintiff. If such evidence was there, the state would have proceeded with the case that it preferred against him. The treatment that the plaintiff was subjected to as the Nyayo House Torture Chambers, was, to say the least, inhuman and totally unacceptable in law. I therefore find and hold that the plaintiff's fundamental rights were violated.

Damages

The plaintiff prayed for special damages in the sum of **Kshs.107,011/=** on account of medical expenses. He alleged that as a result of his torturous stay at the infamous Nyayo House Torture Chambers for a period of 49 days, his health suffered considerably and had to be hospitalized sometimes after his release. He had developed a blood clot in the left side of the head and underwent two head operations. The first operation was done at Aga Khan Hospital while the second one was at Kenyatta National Hospital. The plaintiff relied on a medical report that was prepared by **Dr. S.M. Kimuhu**, dated 11th September, 2008. He also produced various receipts in respect of the medical expenses that he incurred. That claim is reasonable and I allow the same.

The plaintiff alleged that he paid a sum of **Kshs.500,000/=** to a team of four advocates who were defending him in CRIMINAL CASE NO.1399 OF 1989. His advocates were Mr. Moses Wetangula, Mr. Mohamed Nyaoga, Mr. Z.N. Gathaara and Wachira Kibanya. However, the plaintiff did not produce any documentary evidence in support of that claim.

It is trite law that special damages must be strictly proved. If for any reason the plaintiff had misplaced the receipts which, I believe, ought to have been issued to him by his advocates in acknowledgement of receipt of the said legal fees, the plaintiff could either have obtained copies of the said receipts from the advocates or requested them to swear affidavits in support of his contention. That was not done. In the circumstances, the plaintiff's claim for **Kshs.500,000/=** on account of legal fees is disallowed.

The plaintiff further alleged that after the initial release from police custody, one of the police officers whom he had encountered at the torture chambers went to his place of work and demanded **Kshs.20,000/=**. He said that he had been sent by his colleagues to collect the said sum as an inducement to stop the police from arresting him on allegation that he had been found in possession of a Christian Magazine known as **“Beyond”** which was then considered seditious. He parted with the said sum of money. The plaintiff now wants the court to compensate him for the bribe of **Kshs.20,000/=** which he allegedly gave to an undisclosed person. That claim is unacceptable. A court of law cannot order compensation on account of money that was admittedly paid as a bribe. The plaintiff had the option of refusing to pay the said bribe and face the consequences, if at all, just as he chose to deny the criminal

charges that were preferred against him despite the torture that he was subjected to in a bid to admit the same.

The plaintiff's other claims for damages are as follows:

(i) Pain sufferedKshs.800,000/=

(ii) Loss of earnings at the rate of Kshs.1,500,000/= per year from 1992 to 2009.....27,000,000/=

(Less Government taxes at Kshs.90,698/= x 18 years)
Kshs.1,632,564/=)

(iii) General damages for malicious

prosecution.....Kshs.6,500,000/=

(iv) Exemplary damagesKshs.6,000,000/=

The medical report by **Dr. S.M. Kimuhu** reveals that the plaintiff was well until June, 1992 when it was discovered that he had a blood clot in his head. Burr holes were drilled in the head and evacuation of the same done at Aga Khan Hospital. In September, 1992, he went into coma and a diagnosis of sub-acute subdural haematoma was made. Burr holes and evacuation of the haematoma was done at Kenyatta National Hospital. The doctor stated that the haematoma developed gradually, having been triggered by injury caused by a blunt object. The plaintiff suffers post-traumatic periodical headache and will require intermittent medical attention. The doctor further opined that the plaintiff is likely to suffer epilepsy in future. As at 10th September, 2010 when the plaintiff was examined, he was 68 years old.

The plaintiff alleged that the injury to his head was occasioned at Nyayo House where he was severely assaulted. There is no evidence to challenge that averment. Taking into consideration the contents of the aforesaid medical report, I am of the view that the amount of **Kshs.800,000/=** claimed by the plaintiff on account of pain suffering is reasonable and I award the same.

In respect of the other heads of damages, the plaintiff cited several cases in support thereof. The cases include:

1. DR. ODHIAMBO OLEL VS ATTORNEY GENERAL, HCCC NO.366 OF 1995 AT KISUMU.

The plaintiff hereinabove was arrested and taken to Nyayo House Torture Chambers where he remained for 17 days. He was forced to plead guilty to a charge of being a member of an unlawful organization that was preferred against him as a result of which he was sentenced to imprisonment for a term of 5 years. On appeal, the Court of Appeal quashed the conviction saying the same was unconstitutional. He filed a suit against the Attorney General and was awarded a total of **Kshs.12,477,675/=** made up as hereunder:
Special damages (medical expenses)Kshs.1,547,435/=.

Loss of salary.....Kshs.930,240/=

Loss of pensionKshs.1,500,000/=

General damages for malicious

prosecutionKshs.4,500,000/=

Exemplary damagesKshs.4,000,000/=.

2. RUMBA KINUTHIA & 6 OTHERS VS ATTORNEY GENERAL MISC. APPLICATION NO. 1408 OF 2004

The plaintiff was arrested on 8th October, 1990. He was taken to the Nyayo House Torture Chambers where he remained for 14 days. After undergoing severe torture he was arraigned in court on trumped up charges which he denied. He was detained at Kamiti Maximum Security Prison in solitary confinement. Subsequently, the Attorney General entered a nolle prosequi. Upon his release, the plaintiff filed a case against the Attorney General seeking special and general damages. The court made a global award of Kshs.1.5 million.

There are many other similar cases which have been decided after the **Rumba Kinuthia case**. In HARUN THUNGU WAKABA AND OTHERS VS THE ATTORNEY GENERAL, 21 people who were also arrested and tortured in similar circumstances as the plaintiff herein were awarded general damages ranging from Kshs.1 million to Kshs.3 million. The judgment in the said cases was delivered on 21st July, 2010.

Guided by the aforesaid awards I am of the view that an award of **Kshs.3,500,000/=** is reasonable compensation as **general damages for malicious prosecution**.

The plaintiff prayed for exemplary damages. In OBONGO VS KISUMU MUNICIPAL COUNCIL [1971] EA 91, the Court of Appeal referred to the English case of ROOKES VS BARNARD & OTHERS [1964] AC 1129 where it was held that exemplary damages for tort may be awarded into two classes of cases. These are:

1. Where there is oppressive arbitrary or unconstitutional action by the servants of the government, and
2. Where the defendant's conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff.

In this case, I am satisfied that the conduct of the police officers who arrested and tortured the plaintiff at Nyayo House Torture Chambers before prosecuting him in a case where the state had no evidence at all acted in an oppressive and unconstitutional manner. I therefore award the plaintiff **exemplary damages** in the sum of **Kshs.3 million**.

The plaintiff alleged that he suffered loss of earnings due to the unlawful acts aforesaid because his health suffered considerably and his business was ruined. He now claims a sum of Kshs.1,500,000/= per year over a period of over 18 years.

In support of his claim, the plaintiff produced several documents, among them audited accounts for a company known as **Citizen Equipment and Stationary Ltd** where he was the managing director. The audited accounts revealed that in 1985 the Company's net profit for the year was Kshs.114,315/=. In 1986 the net profit was Kshs.206,467/=. In 1987 the net profit was Kshs.170,407/=. while in 1988 the company suffered an annual loss of Kshs.26,265/=. In 1989 the annual profit was Kshs.182,795/.

While it cannot be denied that the plaintiff may have suffered some loss of income as a result of the state of his health following the torturous acts he went through, I must state that in law a limited liability company is a separate legal entity, different from its directors. The memorandum and articles of association of the said company reveal that there were two other shareholders and directors. The audited accounts show that the remuneration paid to the directors was Kshs.18,000/= per year. In the circumstances, the plaintiff's claim of Kshs.1,500,000/= per year for loss of earning cannot be justified. Doing the best I can in the circumstances, I award the plaintiff a total of **Kshs.500,000/= for loss of earnings.**

Conclusion

In view of the foregoing, the court grants the declarations sought by the plaintiff. That is, his fundamental rights and freedoms under **sections 70, 72 (3) and (5), 74(1), 76(1), 77, 78(1), 79(1), 80(1) and 82(3) of the Constitution** were contravened by police officers and or other government servants and or agents. The plaintiff is therefore entitled to payment of remedies and awards as stated hereinabove. In summary, the awards made are as follows:

- (a) Special damagesKshs.107,011/=

- (b) General damages for malicious
prosecutionKshs.3,500,000/=

- (c) Exemplary damagesKshs.3,000,000/=

- (d) Pain sufferingKshs.800,000/=

- (e) Loss of earningsKshs.500,000/=

- Total.....Kshs.7,907,011/=

The plaintiff will also have costs of this suit as well as interest on the aforesaid sums from the date of this judgment until full settlement.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21st DAY OF JULY, 2011

D. MUSINGA

JUDGE

In the Presence of:

Nazi – Court clerk

Plaintiff in person

Mr. Kakoi for Mr. Menge, Principal Litigation Counsel for the Respondent