



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION NO. 1374 OF 2003 (OS)

BETWEEN

ISRAEL OTIENO AGINA
PETITIONER
AND
THE ATTORNEY GENERAL
RESPONDENT

Constitutional law, fundamental rights and freedoms, torture and inhuman treatment, breach of sections 72(3) and 74(1) of the Constitution - effect of failure to file replying affidavit – sufficiency of pleadings – prescription and the Public Authorities Limitation Act (Cap 39) – section 84 of the Constitution - damages.

JUDGMENT

The Petitioner’s Case

1. On or about 2nd September, 1986, the petitioner was arrested by plain clothes policemen at Agip House where he was then working and taken to Buruburu where they searched his house.
2. The policemen took away his personal items including books and letters before taking him to Parklands Police Station where he was kept until 9. O’clock. He was later blindfolded and taken to the Nyayo House basement where he was locked in a dark cell.
3. During this period in detention, he was kept incommunicado, without access to his lawyer, doctor, friend or relatives. He was routinely tortured and treated in a cruel and inhuman manner by being assaulted with whips and broken furniture. He was kept in a water logged area for prolonged periods, routinely sprayed with cold water, and denied food, drink and sleep. On the few occasions he was given food he had to eat it in darkness and in water logged cells.
4. He was interrogated by police officers on his personal history, political beliefs and associations while stark naked. He was routinely beaten until he became unconscious.
5. As a result of his detention, psychological torture and beating he suffered, he developed serious kidney problems, skin disorders, grave insomnia which has necessitated long and expensive medical attention.

6. The petitioner states that he spent a total of 96 days in police custody before being detained without trial between 6th December 1986 and 5th February 1988 after which he was taken to Nairobi State House along with other detainees and was then released by the President, Daniel arap Moi.

7. The petitioner avers that his career, economic and political life were destroyed as a result of his detention. His young wife Elizabeth Akinyi died at the age of 29 and he was not allowed to see the body or attend the funeral.

8. These facts as stated are set out in the petitioner's affidavit sworn on 14th October, 2003 in support of the Originating Summons dated 30th October, 2003 and filed on 7th November 2003. In the summons, the petitioner prays for the following reliefs:

1) *A declaration that the plaintiff's fundamental rights and freedoms under sections 70, 72(3) and (5), 74(1), 76, 77, 78(1), 79(1), 80(1) and 82(3) have been and were contravened and grossly violated by police officers and other Government servants, agents employees and institutions in 1990 and on diverse dated 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 section 84(2) of the Constitution of Kenya for the unconstitutional conduct by government servants and agents.*

4) *Any further orders, writs, direction, as this Honorable Court may consider appropriate.*

5) *Costs of the suit with interest at court rates.*

Respondent's case

9. The respondent did not file any replying affidavit but filed grounds of opposition dated 14th February 2011 where the petition was opposed on the following grounds:-

(a) The application lacks clarity and precision in setting out the alleged violations.

(b) The causes of action are stale and should not be entertained by the court.

(c) The actions alleged by the petitioner have no proof.

(d) The basis for attributing the alleged action upon the government has not been set out.

(e) The application is premature, anticipatory and lacks legal basis.

10. These grounds were supported by written submissions filed on behalf of the respondent in support of the grounds, reliance was placed on ***Paul Mungai Mimani & 21 others v Attorney General & 2 Others Nairobi Misc. App. No. 1366 of 2006 (Unreported)*** where the court held that a petitioner seeking redress from the high court must set out with reasonable precision that which he complains of. Secondly, it was not clear whether the persons who were accused of wrongdoing were agents of the state. He relied on the case of ***Alphonse Mwangeni Munga & 16 Others v Africa Safari Club Limited Nairobi Nairobi Petition No. 564 of 2004 (Unreported)***. The respondent also submits that the court has wide discretion and in this case there has been no material before the court to enable it make a determination. The case of ***Adel Mohamed Abdulkadir al Daihas v Attorney General & Others Nairobi Misc. Civil Appl. No. 1546 of 2004 (Unreported)*** was cited.

Effect of failure to file Replying Affidavit on Evidence

11. The facts of this case are set out in the petition and affidavit in support of the petition. These facts are not controverted by the respondent. The effect of this is that I must take the facts set out as true and correct so that the only task before me is to consider whether they constitute a violation of the petitioner's rights and if so what relief I should grant.

Sufficiency of the Pleadings

12. The respondent has raised the issue of sufficiency or lack of clarity of the pleadings. I agree that it is an established principle that a party who invokes the provisions of section 84(1) of the Constitution is obliged to state his complaint, the provision of the Constitution he considers violated in relation to him and the manner he believes it was infringed. (See ***Matiba v The Attorney General Nairobi HC Misc. 666 of 1990 (Unreported)***)

13. I am satisfied that the petition before me is of sufficient particularity to enable me determine the matter. Other than making a complaint in a general manner, the respondent has not sought any further particulars or pointed to any specific part of the pleading that would be embarrassing.

14. I find it interesting that such a submission can be made. The petitioner has given specific dates, named names of specific officers and given registration numbers of vehicles. These are details which would have assisted the state with its enormous resources to verify the petitioner's evidence. Similarly the nature of violations had been disclosed to enable the respondent answer to them.

Prescription

15. The respondent has argued that these proceedings have been brought 17 years after the petitioner's release from prison. I am urged to interpose this action by application of section 3 of the ***Public Authorities Limitation Act*** which provides that no proceedings for an action in tort can be commenced after 12 months from the date of the cause of action.

16. This argument must fail as an action for the enforcement of fundamental right and freedoms under section 84 is a separate right not inhibited by the rules of limitations of action under any statute. In the case of ***Wachira Weihere v The Attorney General Nairobi HC Misc. 1184 of 2003 (OS) (Unreported)***, the Court stated, "*We find that although there is a need to bring proceedings to court as early as possible in order that reliable evidence can be brought to court for proper adjudication seeking redress there is no limitation period for seeking redress for violation of the fundamental rights and freedoms for the individual under the Constitution*"

17. The Court may, where the circumstances permit, bar an action if prejudice may result as a result of delay in bringing the case but this must be done on the basis of evidence. In this case, the respondent has not provided or shown any evidence of prejudice from which the court can conclude that this claim is stale.

Whether the respondent violated any of the petitioner's rights under the Constitution

18. According to the uncontested evidence of the petitioner he was arrested and kept in custody without trial from 6th December, 1986 to 5th February 1988, a period of 96 days. During this time he neither charged nor detained under the ***Preservation of Public Security Act (Chapter 57 of the Laws of Kenya)***. This is a clear breach of Section 72(3) of the Constitution and I so find.

19. The evidence of harsh treatment by agents of the respondent in custody outlined at paragraphs 3 and 4 above is uncontested. This treatment is unjustified and amounts to torture and inhuman treatment. Section 74(1) of the Constitution has also been breached by the respondent.

20. I am unable to discern from the pleadings and affidavits how the provisions of sections 76, 77, 78(1), 79(1), 80(1) and 82(3) of the Constitution are violated.

Reliefs

21. I have found the petitioner's rights have been infringed. The only issue that remains for consideration is that of the relief I should award.

22. Apart from declarations, counsel for the petitioner has urged me to consider each breach as distinct and award a sum of Ksh.10 million. In the case of ***Rumba Kinuthia Case (Supra)***, the petitioners were awarded Ksh1.5 million as general damages on facts almost similar. I did not have the advantage of medical reports to assess the nature and extent of torture or evidence of actual loss by way of special damages. Taking all this into account I would award **Kshs.2,000,000.00** million as general damages.

Conclusion

23. In conclusion, I give judgment to the petitioner as follows:-

- (i) I declare that the petitioner's fundamental rights and freedoms under sections 72(3) and 74(1) were contravened and violated by the respondent.
- (ii) I award the petitioner the sum of Kshs. 2,000,000.00 as general damages for the violation of the fundamental rights.
- (iii) I award costs of this suit to the petitioner.
- (iv) The petitioner is awarded interest on damages from the date of judgment at court rates.

DATED and **DELIVERED** at **NAIROBI** this 25th day of November, 2011.

D.S. MAJANJA
JUDGE

Mr Ojwang Agina instructed by Agina & Company for the petitioner.
Mr Onyiso instructed by the State Law Office for the respondent.