



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**Civil Case 1411 of 2004**

**HARUN THUNGU WAKABA .....PLAINTIFF/APPLICANT**

**VERSUS**

**THE HON. THE ATTORNEY GENERAL.....DEFENDANT/RESPONDENT**

**AND**

**CIVIL CASE (CONSTITUTIONAL REFERENCE NO. 1187 OF 2003 (OS)**

**SAMUEL KABERERE NJENGA.....PLAINTIFF/APPLICANT**

**VERSUS**

**THE HON. THE ATTORNEY GENERAL.....DEFENDANT/RESPONDENT**

**AND**

**MISC. APPL. NO. 35 OF 2005**

**ALI CHEPTEGEI SALKWA .....PLAINTIFF/APPLICANT**

**VERSUS**

**THE HON. THE ATTORNEY GENERAL.....DEFENDANT/RESPONDENT**

**AND**

**MISC.APPL.NO .36 OF 2005**

**JAMES MWANGI KARIUKI .....PLAINTIFF/APPLICANT**

**VERSUS**

**THE HON. THE ATTORNEY GENERAL.....DEFENDANT/RESPONDENT**

**AND**

**MISC. APPL. NO. 37 OF 2005**

**PAUL AMINA.....PLAINTIFF/APPLICANT**

**VERSUS**

**THE HON. THE ATTORNEY GENERAL.....DEFENDANT/RESPONDENT**

**AND**

**MISC. APPL. NO. 1131 OF 2004**

**SILVANUS OKECH ODUOR .....PLAINTIFF/APPLICANT**

**VERSUS**

**THE HON. THE ATTORNEY GENERAL.....DEFENDANT/RESPONDENT**

**AND**

**MISC. APPL.NO. 1309 OF 2004**

**EDWARD AKONGO OYUGI .....PLAINTIFF/APPLICANT**

**VERSUS**

**THE HON. THE ATTORNEY GENERAL.....DEFENDANT/RESPONDENT**

**AND**

**MISC. APPL. NO. 1310 OF 2004**

**JOE NJOROGE.....PLAINTIFF/APPLICANT**

**VERSUS**

**THE HON. THE ATTORNEY GENERAL.....DEFENDANT/RESPONDENT**

**AND**

**MISC. APPL. NO. 1312 OF 2004**

**KIONGO MAINA .....PLAINTIFF/APPLICANT**

**VERSUS**

**THE HON. THE ATTORNEY GENERAL.....DEFENDANT/RESPONDENT**

**AND**

**MISC. APPL. NO. 1313 OF 2004**

**FLORENCE NYAGUTHIE MURAGE .....PLAINTIFF/APPLICANT**

**VERSUS**

**THE HON. THE ATTORNEY GENERAL.....DEFENDANT/RESPONDENT**

**AND**

**MISC. APPL. NO. 34 OF 2005**

**KAMONYE MANJE.....PLAINTIFF/APPLICANT**

**VERSUS**

**THE HON. THE ATTORNEY GENERAL.....DEFENDANT/RESPONDENT**

**AND**

**MISC. APPL. NO. 1743 OF 2004**

**MUNENE KAMAU.....PLAINTIFF/APPLICANT**

**VERSUS**

**THE HON. THE ATTORNEY GENERAL.....DEFENDANT/RESPONDENT**

**AND**

**MISC. APPL. NO. 1741 OF 2004**

**FREDERICK MURAGE GATHUKU.....PLAINTIFF/APPLICANT**

**VERSUS**

**THE HON. THE ATTORNEY GENERAL.....DEFENDANT/RESPONDENT**

**AND**

**MISC. APPL. NO. 1744 OF 2004**

**STEPHEN MULILI KITUU.....PLAINTIFF/APPLICANT**

**VERSUS**

**THE HON. THE ATTORNEY GENERAL.....DEFENDANT/RESPONDENT**

**AND**

**MISC. APPL. NO. 1742 OF 2004**

**WILSON NDUATI NJOROGE .....PLAINTIFF/APPLICANT**

**VERSUS**

**THE HON. THE ATTORNEY GENERAL.....DEFENDANT/RESPONDENT**

**AND**

**MISC. APPL. NO. 1745 OF 2004**

**FRANCIS NDUTHU KARANJA .....PLAINTIFF/APPLICANT**

**VERSUS**

**THE HON. THE ATTORNEY GENERAL.....DEFENDANT/RESPONDENT**

**AND**

**MISC. APPL. NO. 56 OF 2005**

**JAMES H. GITAU MWARA.....PLAINTIFF/APPLICANT**

**VERSUS**

**THE HON. THE ATTORNEY GENERAL.....DEFENDANT/RESPONDENT**

**(ALL CONSOLIDATED)**

**R U L I N G**

1. What is before me are 20 suits brought by way of Originating Summons under section 84(1) and (2) of the Constitution of Kenya, Rule 9 of the Constitution of Kenya (Protection of Fundamental Rights & Freedoms of Individuals) Practice and Procedure Rules, 2001, and order XXXVI of the Civil Procedure Rules, and section 3A of the Civil Procedure Act. The suits were consolidated for hearing pursuant to orders made by The Hon. The Chief Justice.
2. An issue has arisen in this matter regarding the procedure to be adopted in the hearing of the plaintiff's suit. This was following an application which was made by the plaintiff for the Court to visit the Nyayo House Torture Chambers for each of the plaintiff to identify the cells where they were kept. Mr. Gitau, counsel for the plaintiffs submitted that directions were given on 22<sup>nd</sup> June, 2007 for the hearing to proceed by way of affidavit evidence and submissions. This was disputed by Mr. Menge who appears for the Attorney-General. I therefore invited the parties' counsel to address me on the issue of the procedure to be adopted.
3. Mr. Gitau submitted that the practice has been that matters in the Constitutional and Judicial Review division are disposed of by way of affidavits and not oral evidence. In support of that procedure, Mr. Gitau referred the Court to Rule No.9 & 11(a) of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individuals) Practice and Procedure Rules, 2001; and Rule 18(1) of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individuals), High Court Practice and Procedure Rules, 2006.
4. Mr. Gitau submitted that under those rules, the Court ordered on 22<sup>nd</sup> June, 2007 that written submissions be filed. The plaintiffs have filed their submissions and what remained was for the counsel to highlight those submissions and thereafter a date for judgment fixed. He maintained that no oral evidence was necessary. He further added that the plaintiffs had elected to proceed by way of affidavits and submissions.
5. Mr. Menge submitted that it was paramount that oral evidence be adduced. He noted that some of the plaintiffs had since died and that their cause of action being personal, the action died with the deceased plaintiffs. Mr. Menge further submitted that there were other different plaintiffs who claimed to have been tortured at different periods and it was necessary that they give oral evidence. Mr. Menge argued that it was for the presiding Judge to determine the procedure to be followed depending on the circumstances of each case. He urged the Court to order that the plaintiffs give *viva voce* evidence so that the respondent could have the opportunity to cross examine them individually.
6. I have considered the submissions which have been made. I have also perused the Constitution and the relevant rules which were referred to. I do note that the applicants have brought their applications under Rule 9 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individuals) Practice and Procedure Rules, 2001. Rule 11(a) of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individuals) Practice and Procedure Rules, 2001, provides the procedure to be applied in such a situation as the Originating Summons as laid down under Order XXXVI of the Civil Procedure Rules.
7. Order XXXVI Rules 9 & 10 empowers the Court at the hearing of the originating summons, to order that the summons be supported by such other evidence as may be necessary; or where the Court is of the view that the proceedings should for any reason be continued as if filed in a plaint, it may order the proceedings to continue as if the proceedings had been commenced by way of plaint, and order that any affidavit shall stand as pleadings, with liberty to any of the parties to add to or apply for particulars of those affidavits. It follows that where the Court directs that the proceedings should proceed as if commenced by way of a plaint, *viva voce* evidence would be necessary.
8. The plaintiffs filed their suits when the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individuals) Practice and Procedure Rules, 2001, was in place. That Legal Notice has since been revoked and replaced by Legal Notice No. 6 of 2006 which is The Constitution of Kenya

(Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of Individuals) High Court Practice and Procedure Rules, 2006. Rule 36 (1) of the Legal Notice No.6 of 2006, provides a transitional provision for any matters commenced under the previous rules, to continue under the new rules.

9. Rules 11 to 18 of The Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of Individuals) High Court Practice and Procedure Rules, 2006, provide the procedure to be adopted under the new rules. This procedure includes commencement by way of petition, supported by an affidavit to which any document intended to be relied upon is annexed. The Attorney-General has also the right to file a replying affidavit within 14 days of the date of service of the petition. Thereafter parties are to appear before a Judge for directions and the Judge may in giving directions, require the parties to file and serve written submissions. In my view, although these procedures envisage the disposal of the suits by way of affidavits and submissions, it does not outlaw the calling of viva voce evidence. The matter is entirely within the discretion of the trial Judge to direct where necessary, for the calling of viva voce evidence.

10. In this case in accordance with Rule 18, the suits were placed before a Judge and directions given for the respondents to file their documents within 14 days; and thereafter parties to file their skeletal arguments. No reply was however filed by The Hon. The Attorney-General in respect of any suit. Consequently the suits were listed for hearing on the 16<sup>th</sup> July, 2008. At that stage, the suits were not consolidated. Hearing in Misc. Civil Case No.1411 (OS) of 2004 proceeded by way of affidavits and submissions. Unfortunately the Judge disqualified herself. It was thereafter that The Hon. The Chief Justice directed that the suits be consolidated and the matter proceed before me.

11. Thus it is for this Court at this stage to give directions as to how these matters which are now consolidated may proceed to hearing. Counsel for the plaintiffs has urged the Court to dispose of the suits through affidavits and submissions. Counsel for the respondent on the other hand maintained that oral evidence is necessary as there are different plaintiffs circumstances of each plaintiff's case being different. Mr. Menge also argues that the respondents need to have an opportunity to cross examine the plaintiffs individually.

12. I do note that the respondent has not filed any papers in response to the Originating Summons and affidavits which were filed by the plaintiffs. To that extent the allegations of the plaintiffs contained in the affidavits are unchallenged. The respondent cannot argue that it needs to have an opportunity to cross examine the plaintiffs individually, when it has not filed any response to the plaintiffs' application. I find that in this case, the plaintiff is at liberty to have the hearing of the suit conducted by way of affidavits evidence. The plaintiffs having indicated a wish to proceed by way of affidavit evidence, and this Court having granted that wish, the plaintiffs' application to have the Court move to Nyayo House Torture Chambers would be inconsistent with the direction that the matter be disposed of by way of affidavit and submissions, as proceeding to the scene would entail taking evidence at the scene.

13. For the above reasons, I give the following directions.

(i) That the hearing of the consolidated suits shall proceed by way of affidavit evidence and submissions.

(ii) That the plaintiff's application for the Court to visit Nyayo House Torture Chambers is rejected.

(iii) That a new date be fixed for the hearing of this matter.

(iv) I further refer these files to The Hon. The Chief Justice for further directions, in view of **Msic.1184**

*of 2003, Wachira Waheire vs. The Hon. Attorney-General* which is a similar suit as these suits, and which is being heard by a two Judge Bench.

**Dated and delivered this 13<sup>th</sup> day of November, 2009**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Gitau for the plaintiff

Menge for respondent

Eric, court clerk