



**Muibau v Attorney General (Petition E248 of 2022) [2025] KEHC 817 (KLR)  
(Constitutional and Human Rights) (4 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 817 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION E248 OF 2022  
LN MUGAMBI, J  
FEBRUARY 4, 2025**

**BETWEEN**

**PETER KARIUKI MUIBAU ..... PETITIONER**

**AND**

**ATTORNEY GENERAL ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petition dated 12<sup>th</sup> May, 2022 is supported by the Petitioner’s affidavit in support.
2. This suit revolves around the Petitioner’s claim that the Respondent’s officers, to wit police officers, violated his constitutional rights by unlawfully detaining and torturing him for two months. For this reason, it is asserted that the State is liable for the unlawful actions of its officers.
3. Consequently, the Petitioner seeks the following reliefs against the Respondent:
  - i. A Declaration that the Petitioner’s fundamental rights and freedoms were contravened and grossly violated by the Respondent’s Special Crime Prevention Unit Police Officers who are Kenyan Government Servants, agents and/or employees in its institutions on 16<sup>th</sup> November, 2005 for 60 days at various Police Stations and thereafter at Polo Club next to Jamhuri Show ground.
  - ii. A Declaration that the Petitioner is entitled to the payment of damages and compensation for the violation and contraventions of his fundamental rights and freedoms.



- iii. A Declaration that the Respondent and all police officers are at all times legal custodians of law and has a duty to protect suspects under their custody as provided for under Section 14A (2) (3) of the Police Act.
- iv. Any further orders, writs, directions as this Court may consider appropriate.

### **Petitioner's Case**

4. The Petitioner depones that he was arrested on 16<sup>th</sup> November 2005 for the offence of murder. He was subsequently tried and convicted in 2009. He is currently serving a sentence of 30 years at Thika Main Prison.
5. Prior to this, he alleges that when he was arrested, he was detained at Kilimani Police Station before being transferred to a number of police stations being Jogoo, Buruburu and Kileleshwa before being returned to Kilimani Police Station. He claims that while there, he was detained for two months in solitary confinement. He alleges that the conditions there were deplorable and inhuman.
6. He adds that during his night transfers, he was tortured and subjected to cruel inhuman and degrading treatment. He points out that this was even captured by Hon. Justice Muga Apondi, in his Ruling dated 21<sup>st</sup> May 2008.
7. As a result of his torture, he avers that he has suffered physical and psychological injury. Particularly, he states that he has suffered endless back, chest and joint pain. Additionally he has undergone night terrors, numbness, fear of darkness and insomnia.
8. The Petitioner brings this matter against the Respondent because he asserts that the State under Article 21(1) of *the Constitution* has an obligation to observe, protect, promote and fulfill his rights as guaranteed by the law.
9. In this regard, he urges the Court to find that the Respondent's officers' actions were unlawful and his detention was contrary to Section 72 (3)(b) and 74(1) of the Repealed Constitution. Moreover, Section 14 A (2) of the Police Act.
10. In view of the foregoing, the Petitioner contends that he is entitled to payment of damages and compensation as was provided under Section 84 of the Repealed Constitution and also Article 23(3) of the current Constitution.

### **Respondent's Case**

11. In a rejoinder, the Respondent filed its grounds of opposition dated 28<sup>th</sup> June 2022 stating that:
  - i. The Petition lacks clarity and precision in setting out the alleged violations.
  - ii. The Petition discloses no cause of action against the Respondent.
  - iii. The basis of attributing the alleged action upon the Respondent has not been set out.
  - iv. The orders sought by the Petitioners are not tenable against the Respondent as the Petitioner does not disclose how his rights under *the Constitution* have been contravened and or infringed and how he suffers the loss stated thus he is not entitled to any compensation as stated.
  - v. The Petition is made after inordinate delay of more than ten (10) years.
  - vi. Fundamental rights and freedoms are subject to the rights of others, the society and public interest, and are not absolute.



- vii. The alleged, suffering, imprisonment and present situation of the petitioners is as a result of their wrong doing as they contributed to their condition.

## Parties' Submissions

### Petitioner's Submissions

12. In support of his case, the Petitioner filed submissions dated 19<sup>th</sup> September 2022 and supplementary submissions dated 6<sup>th</sup> April 2023 in response to the Respondent's submissions.
13. The Petitioner sought to discuss: whether this court has the requisite jurisdiction to determine the instant Petition; whether the cause of action survived the transition having subsisted immediately before the effective date of *the Constitution*, 2010; whether in subjecting the Petitioner to torture, inhuman and degrading treatment as captured in the ruling dated 21<sup>st</sup> May, 2008 the Respondent's agents were in contravention of the law and whether the Petitioner's continual suffering as a result of the above violations entitles this Court to enforce his rights by granting him just and fair remedy in the circumstances of this Petition.
14. In the first issue, the Petitioner relying in Article 165 (3) (b) of *the Constitution* submitted that this Court has jurisdiction to entertain this matter. Reliance was placed in Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Limited [1989] KLR where it was noted that:
- "By jurisdiction is meant the authority which a court has to decide matters that are before it or to take cognizance of matters presented in a formal way in its decision... Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."
15. Equal dependence was placed in Boniface Waweru Mbiyu versus Mary Njeri and another Misc. Application No 639 of 2005 and Wamhui M. Versus Geoffrey Njogu Kimani Nairobi HCCC Misc. Application No. 412 of 2003.
16. Turning to the second issue, Counsel submitted that the Petitioner's cause of action survived the transition of *the Constitution* after 2010 under Article 262 of *the Constitution* and Clause 6 of the Sixth Schedule. Accordingly, he stated that the defunct Section 84(1) of the repealed Constitution is equivalent to Article 23 of *the Constitution*.
17. That said, the Petitioner submitted that there is no period of limitation upon which an alleged violation of a Constitution right is to be made. The Petitioner relied in *Njuguna Githiru Versus Attorney General Civil Appeal No. 253 of 2017* where a similar matter was successfully instituted after 25 years.
18. Relying on Article 28 as read with Article 29 of *the Constitution*, the Petitioner submitted that *the Constitution* guarantees a person's dignity and protection from torture and punishment that is cruel, inhuman and degrading. This right is also echoed under international law specifically, Article 5 of the United Declaration on Human Rights (UDHR); Article 1 and 2 of United Nations Convention against Torture and Article 7 International Covenant on Civil and Political Right.
19. Furthermore, the Petitioner submitted that *the Constitution* places an obligation on everyone to respect, enhance and protect fundamental rights and freedoms. The Petitioner asserted that the torture he underwent at the hands of police was continued by the trial Court in its Ruling. He argued thus



that his right against this action was indeed violated by the Respondents. He asserted that as a result of the physical and mental torture, his life has never been the same again.

20. To support his point, he cited the case of Harun Thungu Wakaba v The Hon. Attorney General [2010] eKLR where it was noted that:

“Therefore, the question is whether the various acts to which each of the plaintiff was subjected to, as deponed to in the respective affidavits qualify to be torture or inhuman or degrading treatment within the meaning of the definition provided in Article I of the Convention against Torture, and other Cruel, Inhuman and Degrading Treatment or Punishment. .... The incessant interrogation and the denial of sleep were all mental or psychological infliction of pain.....Further, the infliction of pain was done during the course of interrogation with a view to obtaining information or a confession from the plaintiffs. Thus, all the ingredients of the definition of torture as contained in Article 1 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment were present. The actions described in the affidavits would constitute infringement of the right to protection against inhuman treatment as provided under Section 74(1) of *the Constitution*.”

21. As a consequence, the Petitioner submitted that he is entitled to the relief sought against the Respondent. Reliance was placed in Petition Number 796 of 2008 Bernard Wanjohi Kinga vs. The Attorney General where the Court held that:

“Considering the kind of suffering that was visited upon the Petitioner (s) by Special Branch Police Officers, I have no hesitation in making a declaration that their fundamental rights and freedoms were grossly violated. Each Petitioner is therefore entitled to compensation by way of general damages. ”

22. Comparable dependence was placed in Njuguna Githiru (supra) and Gitobu Imanyara & 2 others vs. Attorney General (2016) eKLR.
23. Owing to the foregoing, the Petitioner argued that he was entitled to an award of damages. He as such urged the Court to be guided by similar decisions and the award that was made therein.
24. Reliance was placed in Wachira Weheire vs. AG, HCCC No. 1184 of 2003 where the Petitioner confined at Nyayo House for 16 days was awarded Kshs.2,500,000; Miguna Miguna vs. AG, H.C Petition No. 16 of 2010, where an award of K.shs.1,500,000 was given for torture, inhuman treatment and violation of right to liberty; Harun Thungu Wakaba & others vs. AG, HCCC No. 1411 of 2004 where Kshs.1,000,000 and Kshs.3,000,000 were awarded to victims of torture at Nyayo House; Jennifer Muthoni Njoroge and Others vs. the Attorney General [2012]eKLR where the Petitioners were each awarded general damages ranging between Kshs.1,500,000 and Kshs.2,000,000 for torture, cruel and degrading treatment and unlawful detention for periods ranging between 7 days and 14 days; and Benedict Munene Kariuki & 13 others vs. the Attorney General High Court Petition No. 722 of 2009, where the plaintiffs were each awarded general damages of Kshs.2,000,000 for constitutional violations of torture, cruel and degrading treatment, and unlawful detention ranging from periods of 7 days to 72 days.
25. The Petitioner submitted in addition that where monetary compensation is not granted or not appropriate, the same can be granted in form of non-monetary compensation such as suspending of his remaining sentence to allow him seek proper medical care for the physical and psychological torture he underwent. In his view, this would be an appropriate and just remedy in the circumstances of his case.



## Respondent's Submissions

26. On 28<sup>th</sup> September 2022, State Counsel E. Makori filed submissions for the Respondent and highlighted the issues for discussion as: whether the issues raised by the Petitioner reflects any violation of the Petitioner's rights and whether the Petitioner is entitled to any orders sought.
27. Counsel submitted on a preliminary note that the Petition is an afterthought having been filed 10 years after the alleged violations. Reliance was placed in *Dominic Arony-v- the Attorney General High Court Civil Application No. 494/2003* where it was held that:
- “With great respect, I wish to depart from their finding concerning limitation. In my view, a party who wishes to enforce his rights in court must do so within a reasonable time and must be prompt. In addition it would be in the interest of good public administration to adjudicate finally in such matters at the earliest time possible.”
28. Counsel further submitted that the Petitioner had not issued any medical reports with reference to the alleged medical conditions that arose as a result of the sufferings he endured while detained.
29. According to Counsel, fundamental rights are not absolute but are subject to the rights of people and public interest. In this case, it was noted that the Petitioner was charged with murder and his right was therefore rightly limited under Article 24 of *the Constitution*. To buttress this point reliance was placed in *Nairobi Hcc Misc No. 343 Of 2000 Ameyna Wafula & Others V Republic* where the Court held that:
- “This case shows the delicate balance between the enjoyment of individual rights vis-à-vis law and order in the wider society. It confirms that the enjoyment of individual rights is not absolute; the state is to a certain extent allowed to regulate enjoyment of rights in order to protect the society's law and order. The case shows acceptable limitations in a democratic society.”
30. Counsel as such asserted that the Petitioner was under the obligation to prove how his constitutional rights were violated but failed to do so. Reliance was placed in *Davis Mokaya Ondimu v Attorney General & 3 others [2021] eKLR* where the Court held that:
- “The Petitioner did not discharge his burden of proof that he was tortured and or subjected to inhuman and degrading treatment. He did not show what he was suffering from when he was taken to hospital so as to shift the burden to the respondents to explain, if at all, how and why he (the petitioner) sustained injuries, if any, while in police custody.”
31. Like dependence was placed in *Constitutional Petition No. 128 of 2006 Lt. Col. Peter Ngari Kagume & Others vs. Attorney General*.
32. On this premise Counsel submitted in the second issue that the Petitioner was not entitled to the reliefs sought and hence the Petition ought to be dismissed.

## Analysis and Determination

33. It is my considered view that the issues that arise for determination are:
- i. Whether there was inordinate delay in filing the Petition;



- ii. Whether the Petitioner's constitutional rights under Section 72 (3)(b) and 74(1) of the Repealed Constitution were violated by the Respondent; and
- iii. Whether the Petitioner is entitled to the relief sought.

**Whether there was inordinate delay in filing the Petition;**

34. This Petition was filed on 12<sup>th</sup> May, 2022 and it relates to an incident that dates back to 16<sup>th</sup> November, 2005. The Respondent opposed the Petition on account of the prolonged delay by the Petitioner to seek redress for the alleged violations.
35. The detrimental effects of delay especially prolonged delays in asserting one's rights is expressed in two equity maxims that 'delay defeats equity' or 'equity aids the vigilant and not the indolent'. The maxims portend that a person who unreasonably delays in seeking a remedy for violation of his/her right is assumed to have acquiesced for failing to exercise reasonable diligence in asserting the rights. Unreasonable delay is thus frowned by the Court as an abuse of the court process. This is not without a good reason. Perils of unreasonable delays in the pursuit of justice are obvious. Witness that may have been well versed with the matter in question may no longer be traceable or available and, if available their recollection may not be reliable hence the quality of the testimony is compromised. At times, it could be the loss or destruction of the relevant documentation pertinent to the question before the Court. This explains why it is always critical for a party to assert its rights at the appropriate time.
36. It is appreciated that sometimes, the cause of delay could be a situation that is beyond the control of the party guilty of delay. That is why the Court must always examine every situation independently in determining the decision to make whenever the issue of delay in bringing an action for enforcement of rights is raised.
37. In principle, Courts have held that there is no limitation of time in matters alleging violation of fundamental rights but this is only if there is sufficient justification to explain the delay. The Court of Court of Appeal in *James Kanyiita Nderitu v Attorney General & Director of Public Prosecution* [2019] KECA 1006 (KLR) succinctly expounded on this position as follows:
  33. In the instant matter, the appellant asserts that the delay of over 26 years was explained. We remind ourselves as was aptly stated in *David Gitau Njau & 10 Others vs. the AG* Petition No. 340 of 2012 that there is no limitation period imposed by *the constitution* in seeking redress for violation of fundamental rights and freedoms. In this matter, we have examined the record of appeal and more particularly the affidavit in support of the petition. We are unable to discern any specific paragraph which explains the delay in filing the petition. All the appellant submitted on this issue is rehashing the background facts from the date of his arrest to the date when the High Court quashed his conviction. In his written submission, it is urged that by the time the appellant was lodging the petition in 2011, it was shortly after the promulgation of the new 2010 Constitution that ushered in a new regime in the protection and enforcement of the Bill of Rights.
  34. Promulgation of the 2010 Constitution is not an act that extends or revives old causes of action. Promulgation neither founds a cause of action nor is it an absolute excuse for each and every delay in instituting proceedings for causes of action which arose and were known to exist. Delay in filing a petition or any cause of action must be explained independently of the promulgation of the 2010 Constitution.
  35. A constitutional petition, or for that matter judicial review proceedings, is not meant to circumvent the law on limitation of actions. Consequently, constitutional petitions filed in



delay alleging violation of the Bill of Rights is to be considered on a case by case basis taking into account the explanation and merits of delay...”

38. I will not belabour point. The Petitioner took 17 years from the date of the incident to file this Petition. I have gone through the entire Petition as well as the affidavit in support. Nowhere does he endeavour to explain the cause of the prolonged delay in bringing this Petition 17 years later.
39. The Court finds the delay unreasonable and unacceptable. The Petition is an afterthought. It is hereby dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT MILIMANI THIS 4<sup>TH</sup> DAY OF FEBRUARY, 2025.**

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**L N MUGAMBI**

**JUDGE**

