



**Mokoit v Defence Council & another (Constitutional Petition
17 of 2013) [2025] KEHC 3545 (KLR) (21 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3545 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CONSTITUTIONAL PETITION 17 OF 2013
AC MRIMA, J
MARCH 21, 2025**

BETWEEN

MOSES MOKOIT PETITIONER

AND

THE DEFENCE COUNCIL 1ST RESPONDENT

THE HON ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

Background:

1. Moses Mokoit, the Petitioner herein, claimed that on 16th March 2008, a squad of about 20 Kenya Army officers illegally stormed his home at Chesiro village, Cheptais Location of Mt. Elgon District and arrested him. He was then frog matched to Kang'anga Army Post.
2. At the army post, the Petitioner posited that he was subjected to acts of torture including being forced to walk on his knees for long distances, being forced to strip and remain naked in the rains, being beaten all over his body with assorted weapons and being exposed to heavy rains and other elements without medical attention.
3. He pleaded that during the torture, the Army officers demanded from him a confession that he was a member of a criminal gang known as Sabaot Land Defence Force (hereinafter referred to as 'the SLDF') or that he names persons who are members of the said SLDF. The Petitioner claimed that after the torture, he was transported naked in public, face lying down with a corpse on the back of an army truck, to Kapkota Military Base. He asserted that at the military base, he was subjected to illegal and unlawful screening to determine whether he was a member of SLDF. When he was not identified as a member of the group, he was left in the rains, badly wounded and unable to move or walk back home.
4. The Petitioner subsequently filed the instant Petition.



The Petition:

5. Through the Petition dated 26th June 2008, the Petitioner sought to vindicate his constitutional rights. It was his case that the arrest, detention and torture curtailed his personal liberty and that he was subjected to inhuman and degrading treatment contrary to Sections 72 and 74 of the retired Constitution of Kenya. He prayed for following reliefs: -
 - a. A declaration that the 1st Respondent has no constitutional right nor statutory power or authority under the Armed Forces Act (chapter 199, Laws of Kenya) to order and or cause the arrest and detention of civilians such as the Petitioner herein.
 - b. A declaration that the arrest and detention of the Petitioner by the army officers under the supervision, command and/or control of the 1st Respondent were illegal, unlawful and unconstitutional in violation of section 72 of *the constitution* of Kenya.
 - c. A declaration that the brutal and indiscriminate beating, forced walking on knees and exposure to heavy rains and elements of nature subjected to the petitioner by army officers under the command, control and/or supervision of the 1st Respondent intended to force the Petitioner to confess to being a member of the SLDF and to falsely name other persons of SLDF amounted to torture, inhuman punishment and/or degrading treatment and is unconstitutional in violation of section 74 of *the constitution* of Kenya and international human rights instruments that Kenya is a party to.
 - d. A declaration that the torture meted out on the Petitioner amounts to criminal offence of unlawful wounding and assault causing actual bodily harm contrary to section 237 and 251 of the *Penal Code* respectively, and the 2nd Respondent is duty bound under the laws of Kenya and the relevant international human rights instruments to which Kenya is a party to investigate to cause investigations to be conducted and to prosecute the army officers responsible for the said criminal offences.
 - e. A declaration that the Petitioner is entitled to special, general, exemplary and punitive damages against the Respondents herein jointly and/or severally.
 - f. Special, general, exemplary and punitive damages as may be assessed by the honourable Court.
 - g. Costs of this Petition.
 - h. Interests in (e) and (f) above.
 - i. Any other order(s) as the honourable court shall deem fit and just.

The Oral Evidence:

6. In his oral evidence, the Petitioner mainly reiterated the contents of the Petition. He narrated his ordeal from the 16th March 2008 when he was arrested until the 17th March 2008 when he was abandoned in the rains while badly wounded. His wife then took him to Cheptais Health Centre where he was admitted for 4 days.
7. It was his testimony he further stated that he went to the Military headquarters but did not record his statement. He claimed that one Jeremiah Mkubwa from a Human Rights group came with the Assistant Chief and asked him to go to Nairobi. He was given Kshs. 8,000/- as fare. He was later given Kshs. 10,000/- and later Kshs. 30,000/-. It was his evidence that he got injuries on the back, hands and



- legs and cannot stand or walk for long. He stated that the injuries on the back healed in September, but he was pursuing compensation.
8. On cross-examination, it was his evidence that he was arrested in his farm. He asserted that there was a military operation where army officers were looking for SLDF, Janjaweed and Moorland adherents. He clarified that the money he received was for sustenance and social protection. He conceded that he did not report the matter to the police and did not make an Affidavit before a Magistrate.
 9. Femnus Chebet Chesang, the Petitioner's wife was PW2. It was her evidence that when the incident happened on 16th March 2008, he was with her husband in the farm. Many people witnessed the Petitioner get assaulted on the claim that he was a member of the SLDF. Despite telling the officers that the Petitioner worked at 'Referral', they did not stop the assault. She stated that she was also beaten and went to Cheptais Hospital.
 10. It was her evidence that after around a month, her mother informed her that the Petitioner was at her home and in bad state. She went there and established that the Petitioner had injuries all over his body. They took him to Cheptais Dispensary. PW2 denied that the Petitioner was assaulted by civilians. She further stated that the Petitioner mentioned some of the officers who assaulted him in his statement, but no action was taken against the said officers. She reiterated it was her, not the Army officers, that took the Petitioner to the dispensary.
 11. On cross-examination, she stated that she did not know who led the fights at Mt. Elgon and did not know when it begun. It was her evidence that she followed the Petitioner when he was arrested by the army officers and whereas she was not arrested she was beaten. She claimed that she saw the Petitioner being forced to walk on knees. She, however, admitted that she did not know Khisa Simiyu, Wamalwa and all the rest of the persons mentioned in her statement. She also stated that she wrote a statement but copied it from what had already been written.
 12. She stated that the Petitioner, after going to Nairobi, went back home with money given to him by IMLAW and that he was treated by the same IMLAW.
 13. Dr. Dickson M. Mchana was PW3. He was a Consultant Pathologist for Western Region based in Kakamega County Referral Hospital, with Bachelor's Degree in Medicine and a Post Graduate Degree in Forensic Medicine Pathologist. In reference to the medical assessment form of Dr. Joan Nyanyiki, it was his evidence that upon assessing the Petitioner on the claim that he had been tortured, she found that the Petitioner was of good appearance, had slow response, healing scars on the top of the skull, healing scars on the back, healing wounds on the front of lower knees and upper feet.
 14. The Doctor further observed that the Petitioner had two loose teeth from upper teeth and loss of sensation between the teeth. It was his evidence that the Dr. Nyanyiki concluded that the injuries were consistent with the torture allegation and recommended management of the wounds and teeth and psychology evaluation.
 15. Upon being cross examined, it was his evidence that the objects used were unknown and that the patient was mentally affected.

The Respondents' case:

16. Lieutenant Colonel David Munoru Murungi, responded to the Petition through his Replying Affidavit deposed to on 7th June 2019. He stated that he was the Officer Commanding Kapkota Camp during Operation Okoa Maisha in Mt. Elgon. He deposed that the operations commenced on 10th March 2008 with the mandate that the Kenya Defence Forces [hereinafter referred to as 'the KDF'] do



neutralize the activities of SLDF and other militia, restore peace and order and to disarm and protect residents.

17. He stated that the atrocities committed by the militia were in the limelight and it led to the emergence of vigilante such as Moorland Defence Forces, and Janjaweed which openly conducted violence against each other. He deposed that the area of operation was divided into two, the upper mountainous areas which was the sole responsibility of KDF and the lower which was inhabited was the responsibility of the Civil Police. He stated that the Kapkota Camp was a temporary open camp which was used only as a logistic support camp to support the operation of the KDF.
18. He explained that the people who were arrested within the mountainous area suspected to be members of SLDF were handed over to the Civil Police for prosecution. He denied that Kapkota Military Base was used as a torture camp. It was his position the base was used to engage militia who were hiding in the upper part of the mountains and it had no contact with the civilians. He also stated that there were reports of many people missing even before they commenced operations in the area. He reiterated that Kapkota camp had no facility to hold civilians since they had only three tents. He deposed that it was through their operations that they brought calm in the area and stopped the torture and disappearance of members in the community.
19. He was of the view that the KDF used proportionate force in combating the SLDF and the other militia. He stated that in the course of their operations, SLDF suffered four fatalities, which was subject to inquest in Sirisia Magistrates Courts. He also pointed out the contradiction on the Petitioner's case where he stated that he was severely beaten up by a mob and not by the KDF. To the contrary, he stated that he was assisted by the KDF just like many other locals who sought refuge at the military camp.
20. He stated that the Petitioner's case is based on falsehood and it ought to be struck out.

The Oral Evidence:

21. Lt. Colonel David Munoru Service No. 199634 testified as DW1. He testified for the Respondents. He stated that he was stationed at Gilgil KDF Forces Training School, Special operations and mainly reiterated the contents of his Replying Affidavit. He affirmed that the KDF was tasked to help the people of Mt. Elgon from the control of militia groups called SLDF, Moorland Defence Forces and Janjaweed that were amputating and cutting ears of the residents.
22. In respect to the Petitioner, he stated that the KDF found the Petitioner already beaten at night by the militia and they tasked one of the nurses to assist him. He was taken to Cheptais Hospital and after getting treated, he claimed that he was not beaten by militia but by army officers. DW1 stated that the Petitioner admitted that he was beaten by the militia and not the army.
23. He testified that the Petitioner was not arrested by the military. He only came towards his car, bleeding and was taken to hospital. He was emphatic that he was beaten by a group of militias who the Petitioner revealed their names and also confirmed that he belonged to SLDF which was one of the militias. DW1 stated that the Petitioner told him that the people who beat him up included Simiyu and others who were his neighbours.
24. On cross-examination, DW1 stated that KDF's main role was to assist the country from external aggressor and to also complement the civil Police. Regarding the case, he stated that they were helping the police by doing arrests and handing them over. He claimed to have kept records of the arrests in the Incidents Book but did not have them in Court.
25. It was his further evidence that the Petitioner saw Brigadier Murgor's vehicle and sought help and it is then that he was taken to hospital by a military vehicle. He admitted that he did not indicate in



his affidavit that the Petitioner was taken to the hospital by a military vehicle. He also stated that the Petitioner was handed over to the police at the camp but admitted that there was no record from the KDF to that end. He also stated that since the Petitioner came for help in the morning, they concluded that he must have been beaten at night because he was suspected of being a member of one of the groups.

26. He testified further that the Petitioner was not investigated by the military and he also had no report of the police who investigated his allegations.
27. No. 61383 WO1, Peter Oscar Kyule was DW2. It was his evidence that he was a member of the KDF at the School of Military Engineering at Archers Post in Isiolo County. He adopted his statement as evidence-in-chief. On cross-examination, he testified that he was one of the KDF officials at Mt. Elgon performing civil military operations that involved construction and education of the locals at Kang'anga and there were no other officers apart from them.
28. He testified that as they were grading the road between Kang'anga and Forest Guard Post, they were called upon to cease and report back to the base. On their way they, found a group of civilians surrounding a person. They claimed that he was a member of the Sabaot Land Defence Force. That person, he claimed was brought by the civilians. He stated that the person was asking for help. His in-charge, one Lieutenant Kuria, now deceased, dispersed the civilians. The person remained with the Commander. It was his evidence that he had clothes on and did not see any injuries on him.
29. He testified that the Commander received the person and was sent to the military base in Kapkota for screening. He claimed that it was a medical Camp and the person was taken there for treatment. He did not follow the matter further. It was his position that the KDF did not beat the person. In re-examination, he stated that the civilians referred to the person as Moses Mokoit.
30. No. 72478 CPL Mwarogo Hinga Pande was DW3. He testified that he was a member of KDF also attached to the School of Military Engineering in Isiolo County. He adopted his statement as evidence in chief. On cross-examination, it was his case that on 16th March 2008, he was constructing roads in Mt. Elgon and did not deal with SLDF in any way. He stated that civilians did not know what their group was doing. He testified that their Base rescued the person who was brought to the camp while already injured and bleeding. They transferred him to other persons dealing with medical.
31. It was his evidence that they were at the camp when the person was brought as they were working on a road just next to the camp. They then heard civilians bringing the person to the camp while shouting and beating him. The person was handed to them. He was injured and was bleeding profusely. The civilians were beating him. They rescued him and sent him for medical aid at Kapkota. A driver, whose name he could not remember took him to hospital. He denied that KDF beat the person up.
32. At the close of the respective cases, the Petitioner and the Respondent filed written submissions dated 9th October 2023 and 10th November 2023 respectively which are incorporated in the analysis part of this judgment.

Analysis:

33. Having understood the Petition and the response and on perusal of the parties' submissions and the decisions referred to therein the two main issues emerge for determination: -
 - i. Whether the Petitioner proved the incidence of torture and inhuman and degrading treatment and if so, whether it was occasioned by the KDF officers.
 - ii. Reliefs, if any.



34. This Court will, hence, deal with the issues sequentially.

Whether the Petitioner proved the incidence of torture and inhuman and degrading treatment and if so, whether it was occasioned by the KDF officers:

35. The Petitioner's case hinges on torture and/or inhuman and degrading treatment. In order to ascertain its incidence, it is first necessary to appreciate what the terms torture and inhuman and degrading treatment are all about. Since this matter was instituted in 2008 during the era of *the Constitution* of Kenya, 1963 (hereinafter referred to as 'the Repealed Constitution'), the first port of call is the said Constitution.

36. The repealed Constitution did not define the terms torture and inhuman and degrading treatment. However, Section 74 thereof, which was the applicable law, was tailored as follows: -

74(1) No person shall be subject to torture or to inhuman or degrading punishment or other treatment.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in Kenya on 11th December, 1963.

37. Kenya is a signatory to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. At Article 1 thereof the term "torture" is defined as follows: -

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

38. The European Court of Human Rights has defined torture and inhuman treatment in Greek Case 1969 Y.B. Eur. Conv. on H.R. 186 (Eur. Comm'n on H.R. in the following terms: -

The notion of inhuman treatment covers at least such treatment as deliberately causes suffering, mental or physical, which, in the particular situation is unjustifiable. The word 'torture' is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be de-grading if it grossly humiliates him before others, or drives him to an act against his will or conscience.

39. In *Suresh vs Canada (Minister of Citizenship and Immigration)* 2002 SCC 1, the Canadian Supreme Court stated had the following to say: -

Torture is defined Article 1 on the United Nations Convention against torture as including the unlawful use of psychological or physical techniques to intentionally inflict severe pain



and suffering on another, when such pain or suffering is inflicted by or with the consent of public officials.

40. The Black's Law Dictionary, 8th Edition defines torture as under:

the infliction of intense pain to the body or mind to punish or to extract a confession or information or to obtain sadistic pleasure.

41. In the said Dictionary, the term inhuman and degrading treatment is defined as follows: -

Physical or mental cruelty so severe that it endangers life or health

42. With the above rendition, it remained the burden on the part of the Petitioner to prove his case. As stated by the Court of Appeal in Michael Maina Kamami & another v Attorney General [2019] eKLR;

While we agree that a court may rely on uncontroverted evidence to find in favour of the petitioners, it is trite that in order for a court to so find, a petitioner must prove the facts alleged to the required standard. As pointed out by the learned judge, section 107 of the Evidence Act is explicit, any person requiring a court to give judgment on the basis of certain facts must prove that those facts exist, and the burden of proof lies on the person alleging them.

43. As is settled, the standard of proof in a Constitutional matter is that of balance of probabilities. This Court will now ascertain whether the Petitioner attained the required proof threshold.

44. An objective consideration of the evidence of the Petitioner and his witnesses as against that of the Respondents reveals several undisputed facts. They include that the Petitioner was arrested and taken away from his home, he was whipped whilst naked, exposed to heavy rains and being forced to walk on knees among other treatments. According to the Respondents, the only time the KDF officers interacted with the Petitioner was when he had already been injured and escorted to their camp. Therefore, the Respondents could not controvert what the Petitioner and his witnesses stated on how the Petitioner sustained the injuries. However, that position was sharply opposed by the Petitioner and his wife.

45. The Petitioner and his wife narrated what befell the Petitioner. PW3 confirmed that indeed the Petitioner received severe injuries all over his body which some were life threatening. That evidence was well corroborated. On the part of the Respondents, whereas the witnesses alluded to the Petitioner having been injured by members of the militia and was later taken to the KDF camp, that was all. There was neither evidence of who escorted the Petitioner to the camp nor any statement recorded to that end. This Court takes judicial notice of the fact that our KDF officers are well-trained professionals and would readily document every life lost or any life-threatening incident especially during an operation. In this case, the KDF officers at the camp would have so documented the incident quite well and tendered that evidence in Court. However, that did not happen. The Respondents witnesses only stated as much. This Court, hence, finds the position taken by the Respondents to be wanting. It is uncorroborated and largely unconvincing. The Court settles for the finding that the Petitioner was arrested by the KDF officers during the operation and confined for the period in issue.

46. Whereas this Court agrees with the Respondents that the KDF was called to restore law and order which had totally broken down around Mt. Elgon and that the officers indeed saved life, restored order and extinguished the militia, nevertheless their actions were to align with the repealed Constitution. Under Section 74(2) of the Repealed Constitution, the only exception where a person would be subjected to any form of torture or inhuman treatment was when administering a lawful sentence.



Therefore, since the Petitioner was not undertaking any form of lawful sentence or punishment, he had to be treated humanely and with dignity.

47. The Petitioner narrated the ordeal he underwent in the hands of the KDF officers. He was forced to walk on his knees for long distances, forced to strip and remain naked in the rains, beaten all over his body with assorted weapons and exposed to heavy rains and other elements without medical attention. He was also transported on the back of a military lorry while his face lying down on a corpse. Medical evidence produced confirmed that the Petitioner had ‘... healing wounds on the back- suggestive of use of a whip, blunt linear object, showing symmetrical distribution, keloid formation, knee wounds healing, loose teeth and loss of sensation....’
48. It is on record that the KDF officers handled the Petitioner as stated above with a view to force him into a confession that he was a member of the SLDF or that he names persons who were members of the said SLDF. Such elements aptly describe and speak to torture and other forms of inhuman and degrading treatment.
49. It is on the basis of the foregoing that this Court has no difficulty in finding and holding that indeed the KDF officers arrested, tortured and wounded the Petitioner for a day and that such acts were against the dictates of Section 74 of the repealed Constitution.

Reliefs:

50. Having established that the Petitioner was tortured and inhumanely treated by the KDF officers, what naturally ensues is whether he can be admitted to compensation in the form of damages. In Constitutional Petition 441 of 2015 Edward Akong’o Oyugi & 2 others -vs- Attorney General [2019] KEHC 10211 (KLR) the Court discussed damages in constitutional petitions in the following terms: -
 110. It is well settled that an award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under *the Constitution*. The quantum of compensation will, however, depend upon the facts and circumstances of each case. In principle, constitutional damages as a relief separate and distinct from remedies available under private law is competent. This is because a violation of a constitutional right must of necessity find a remedy in one form or another, including a remedy in the form of compensation in monetary terms.
 111. Award of damages entails exercise of judicial discretion which should be exercised judicially. The discretion must be exercised upon reason and principle and not upon caprice or personal opinion. The jurisprudence that has emerged in cases of violation of fundamental rights has cleared the doubts about the nature and scope of the this public law remedy evolved by the Court. The following principles clearly emerged from decided cases;[64]
 - i. Monetary compensation for violation of fundamental rights is now an acknowledged remedy in public law for enforcement and protection of fundamental rights;
 - ii. Such claim is distinct from, and in addition to remedy in private law for damages for tort;
 - iii. This remedy would be available when it is the only practicable mode of redress available;
 - iv. Against claim for compensation for violation of a fundamental right under *the constitution*, the defence of Sovereign immunity would be inapplicable.



51. In the above case, the Court observed that when computing the monetary compensation, the Court does not employ exact science. The Court also referred to *Koigi Wamwere -vs- Attorney General* {2015} eKLR where the following was stated: -

... When exercising this constitutional jurisdiction, the court is concerned to uphold, or vindicate, the constitutional right which has been contravened

It is convenient to add that an award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional rights and the gravity of the breach, and deter further breaches. All these elements have a place in helping the court arrive at a reasonable award. The court must consider and have regard to all the circumstances of the case.

52. It is, therefore, inescapable that this Court must vindicate the rights of the Petitioner by an award of damages. There is no doubt the Petitioner suffered quite severe, extensive and lifelong injuries as a result of the torture he went through. There were keloids in his body as spoken to by the medical report. Keloids are raised pinkish scar tissue at the site of an injury occasioned by excessive tissue damage. With such injuries, no amount of money can restore the Petitioner to his original physical and psychological state. Indeed, no amount of compensation can take away the trauma and the physical pain and suffering he went through.

53. The Petition, therefore, succeeds.

Disposition:

54. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 and later elected to the Judicial Service Commission thereby mostly being away from the station. Apologies galore.

55. In the end, the following final orders hereby issue: -

- a. A declaration be and is hereby issued that the Petitioner's rights and fundamental freedoms guaranteed under Section 74 of the Repealed Constitution [including the freedom from torture, inhuman and degrading treatment, the right to security of the person and right to equal protection of the law] were grossly violated by Kenya Army officers during the military operation in Mt. Elgon in March 2008.
- b. The Respondents are hereby held jointly and severally liable for the violation of the Petitioner's inalienable rights and fundamental freedoms.
- c. The Petitioner is hereby awarded the sum of Kshs. 3,000,000/= [Read: Kenya Shillings Three Million Only] as compensation for the said violation.
- d. The above sum shall attract interest at Court rates.
- e. Costs of the Petition be borne by the Respondents.

Orders accordingly.



DELIVERED, DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF MARCH, 2025.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

No appearance for Learned Counsel for the Petitioner.

No appearance for, Learned Counsel for the Respondents.

Chemosop/Duke – Court Assistants.

