



REPUBLIC OF KENYA



KENYA LAW
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**Gathomi v Attorney General & 4 others (Constitutional Petition
6B of 2019) [2025] KEHC 10876 (KLR) (24 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10876 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CONSTITUTIONAL PETITION 6B OF 2019**

EM MURIITHI, J

JULY 24, 2025

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLES 2, 3, 10, 19, 20, 21, 22,
23, 25, 27, 28, 29, 48, 49, 51, 73, 129 AND 131 OF THE CONSTITUTION**

AND

IN THE MATTER OF PREVENTION OF TORTURE ACT

AND

IN THE MATTER OF SECTION 231 OF THE PENAL CODE

AND

**IN THE MATTER OF ARTICLE 95 OF THE NATIONAL POLICE SERVICE
ACT**

AND

**IN THE MATTER OF THE UNIVERSAL DECLARATION OF HUMAN AND
PEOPLE'S RIGHTS AND THE AFRICAN CHARTER ON HUMAN AND
PEOPLES RIGHTS (ACHPR)**

AND

**IN THE MATTER OF GEORGE GAKONO GATHOMI
AND IN THE MATTER OF THE UNITED NATION CONVENTION AGAINST
TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT
OR PUNISHMENT (UNCAT)**

BETWEEN

GEORGE GAKONO GATHOMI PETITIONER



AND

THE HON ATTORNEY GENERAL 1ST RESPONDENT
INSPECTOR GENERAL OF NATIONAL POLICE SERVICE . 2ND RESPONDENT
ADMINISTRATION POLICE CONSTABLE ANTHONY KUNGU 3RD
RESPONDENT
ADMINISTRATION POLICE CORPORAL JOHN KAARA .. 4TH RESPONDENT
POLICE CONSTABLE ABDI KERYAROW 5TH RESPONDENT

JUDGMENT

1. By a Petition dated 9/10/2019, the Petitioner seeks specific reliefs that;
 - a. A declaration that the petitioner's Constitutional rights as protected under Articles 28, 29 (a), 29 (c), 29 (d), 29 (f), 47 (1) have been violated.
 - b. A declaration that the petitioner's rights as protected under Articles 2, 10, 11, 12, 13, 14 and 16 of the *United Nation Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* have been violated.
 - c. A declaration that the petitioner's rights as protected under Articles 3, 4, 5, 6, 7 and 16 of the *African Charter on Human and People's Rights* have been violated.
 - d. General damages for violation of the petitioner's Constitution rights, rights under the *United Nation Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* and rights under the *African Charter on Human and People's Rights*.
 - e. Costs of the petition.

Petitioner's Case

2. The Petitioner contends that on 17/2/2016, while on his day-to-day activities, he was unlawfully assaulted and tortured by the 3rd and 4th Respondents, at the behest of the Water Irrigation Board, on an allegation that he was a rice farmer with an unpaid water bill. The said officers used excessive force during the said altercation, leading to visible injuries such as bruising and lacerations, as shown in the annexed medical report and photographs, and the force used was disproportionate, as the Petitioner did not own a rice paddy. He reported the incident to the OCS Sagana Police Station, who referred him to the hospital for medical attention, and he was subsequently issued with a P3 form on 19/2/2016. He followed up with the OCS Sagana Police Station for the culprits to be brought to book, in futility, and in a shocking turn of events, he was charged with assault in Wanguru Criminal Case No. 536 of 2016, but he was subsequently acquitted for the reason that there was insufficient evidence to support the charges. The failure of the police to investigate the assault and the torture, coupled with the trumped-up charges and the failure by the Respondents to atone for their cruelty, was a violation of *United Nation Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* under the *African Charter on Human and People's Rights*.
3. Paul Mutwiri Wachira swore a supporting affidavit on 9/9/2019 in support of the Petition.



Respondents' Case

4. The Respondents opposed the Petition vide their Replying Affidavits sworn by APC Anthony Kungu and APC Abdiker Yarow on 14th December 2023. They assert that the 3rd, 4th and 5th Respondents accompanied officials from National Irrigation Board, namely Joseph Kariuki and Charles Muchangi to arrest the Petitioner for failing to pay water levy. After they had informed the Petitioner of the purpose for their visit, they handcuffed him, but he turned violent and bit the 3rd Respondent's forefinger on the left arm. The Petitioner incited members of the public who threatened to stone and destroy the National Irrigation Board vehicle. Engulfed by the members of the public, they retreated and reported the assault at Wangu'ru Police Station. The 3rd Respondent handed over the torn trouser and Jacket as exhibits, and he was issued with a note to seek medical care, and later issued with a P3 form.

Submissions

5. The Petitioner urges that he has proved the particulars of violation of his rights under Articles 28, and 29 of the *Constitution*, and cites *Mumo Matemo v Trusted Society of Human Rights alliance* (2014) eKLR and *Gitobu Imanyara & 2 others v Attorney General* (2016) eKLR. He urges that he is entitled to damages of Ksh. 4,000,000, and cites *Ogero & another v Attorney General & 6 others* (Constitutional Petition E002 of 2021) [2023] KEHC 22662 (KLR) (28 September 2023) (Judgment), *DWK & another v Board of Management AJ Primary School & 2 others* (2021) eKLR and *Preston Kariuki Taiti & 9 others v Chief of the Kenya Defence Forces & another* (2021) eKLR.
6. The Respondents urge that the Petitioner tried to evade arrest and the Respondents acted within the law by using all means necessary to effect the arrest, and the degree of force used was reasonable. They urge that the Petitioner obstructed the police officers in the due execution of their duties, and cite *Agnes Nzali Muthoka v Insurance Company of East Africa* (2001) 1 EA 143, *Erastus Maina Karanja v Machakos County Government* (2021) eKLR, *Fredrick Masagbwe v Director of Public Prosecutions & 3 Others* (2019) eKLR, *Philomena Mbete Mwilu v Director of Public Prosecutions & 3 other; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curie)* [2019] eKLR, and *Ezekiel A. Omollo v Director of Public Prosecution & 2 others* (2021) eKLR.

Analysis and Determination

7. After due consideration of the Petition, the responses and the submissions on record together with the authorities relied on, the issue that arises for determination is whether the Petitioner's rights under Articles 28, 29, and 47 of the *Constitution* were violated by the Respondents.
8. The burden of proof lies on the Petitioner to establish that his rights aforestated were violated by the Respondents.
9. In *Mohammed Abduba Dida v Debate Media Limited and another* [2018] eKLR, the Court of Appeal encapsulated that:

“...ordinarily, the burden of demonstrating that a right was infringed would be upon the person alleging such violation, as, that person would be in the better position to prove it. It is for the petitioner to show that, compared to another person, he or she has been denied a benefit or suffered a disadvantage, which are matters that are within the petitioner's knowledge. Once the case is made out, the burden shifts to the other party. More particularly, in view of the observation that the rights alleged to have been infringed do not



fall within the grounds classified by Article 27 (4), more so the reason for the petitioner have to prove that his or her rights have been infringed in respect of the grounds alleged.”

10. The Petitioner contends that his unlawful assault and torture by the 3rd and 4th Respondents amounted to a violation of his right to dignity and freedom from torture. He has exhibited a medical report and photographs detailing the particulars of his said assault, which occasioned him visible injuries. According to him, the force used was excessive and disproportionate to the situation. The Petitioner sought treatment on 17/2/2016 and the doctor noted in the P3 form that his clothes were blood-stained. The photographs adduced portray the Petitioner being forcefully manhandled by 2 armed police officers. How then can that force be said to have been reasonable, necessary and proportionate? On 31/2/2016, the Petitioner’s Advocate wrote to the O.C.S Sagana Police Station to establish the status and process of the investigations into the Petitioner’s assault. He noted that the Petitioner and his 2 witnesses had since recorded their statements and availed the necessary exhibits in their possession. In his response dated 6/6/2016, the O.C.S Sagana Police Station acknowledged an assault report had indeed been made at the station by the Petitioner. However, a similar assault report had been made by police officers at Wang’uru Police Station, and the matter had been transferred to the latter Police Station for further action. On 24/6/2016, the Petitioner’s Advocate wrote a follow-up letter to the O.C.S Wang’uru Police Station, which elicited no response.

11. In acquitting the Petitioner of the unlawful assault charges, the trial court said that:

“In this particular case, prosecution has not convinced me Accused had committed an offence known under the *Irrigation Act* that would warrant an arrest. If NIB was aggrieved, the ideal situation noting Wang’uru police station is less than 150 metres to their office was to lodge a report which would have been investigated before an arrest, if necessary, was effected. My view is PW1, PW2 and PW4 required a court order or warrants of arrest...My view, based on the above, is PW1, PW2 and PW4 had no legal basis for arresting the Accused when the offense was not disclosed or what was disclosed to them sounded like a civil dispute... With the above finding, I am not convinced PW1 was executing a duty sustainable in law. It appears they and NIB had an arrangement through which water defaulters would be arrested, taken to NIB offices and cajoled to make payments...I find the prosecution has not proven their case beyond reasonable doubt; I find Accused not guilty as charged for the offense of assault contrary to Section 103 (a) of the *National Police Service Act* and I accordingly acquit him of the charges under Section 215 of the *Criminal Procedure Code*.”

12. In *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* [2018] KEHC 7494 (KLR), the Court (John Mativo J, as he then was) emphasized that:

“52. Privacy is a fundamental human right, enshrined in numerous international human rights instruments. [18] It is central to the protection of human dignity and forms the basis of any democratic society. It also supports and reinforces other rights, such as freedom of expression, information, and association. The right to privacy embodies the presumption that individuals should have an area of autonomous development, interaction, and liberty, a “private sphere” with or without interaction with others, free from arbitrary state intervention and from excessive unsolicited intervention by other uninvited individuals. [19] Activities that restrict the right to privacy, such as surveillance and censorship, can only be justified when they are prescribed by law, necessary to achieve a legitimate aim, and proportionate to the aim pursued.[20].”



13. The Petitioner was arrested on 29/9/2016 and charged on 30/9/2016 for an alleged assault that took place on 17/2/2016. The question that lingers is why it took the Respondents that long to charge the Petitioner. The inference that can be drawn from the inordinately delayed prosecution of the Petitioner is that the charges were fabricated in a tactfully orchestrated scheme by the Respondents to escape liability for their deliberate failure to investigate and charge the 3rd and 4th Respondents for assaulting and torturing the Petitioner.
14. Section 103 of the [National Police Service Act](#), 2011 permits police officers to use force, but only to the extent that it is reasonable and necessary in the performance of their duties. The use of force is lawful if it is proportional to the threat posed by the individual and is necessary to achieve the lawful purpose of the arrest.
15. The Petitioner was unarmed, and there is no evidence to suggest that he posed a threat to the officers. The level of force used, which led to visible injuries, was excessive and disproportionate, and thus unlawful under Section 103 of the [National Police Service Act](#).
16. Admittedly, the Petitioner's assault ensued from an alleged default in payment of his water bills. It was expected that he would be arrested and subsequently charged with the said offence under the [Water Act](#). Surprisingly, he was charged with assault under section 103 (a) of the [National Police Service Act](#).
17. It is the finding of this court that the Petitioner's rights under Articles 28 and 29 were violated by the Respondents' arbitrary and capricious actions.
18. Furthermore, the court finds that the failure by the Respondents to investigate the Petitioner's claims of assault and torture was a violation of his rights to fair administrative action as guaranteed under Article 47 of the [Constitution](#).
19. After critically scrutinizing the evidence of all the parties, the relevant provisions of the law, including the international instruments cited by the Petitioner, this court finds that the Petitioner's rights, aforesaid, were violated by the Respondents.
20. On whether the Petitioner is entitled to compensation for the violation of his rights, this court has awarded costs in petitions for violation of rights in [Roshanara Ebrahim v Ashleys Kenya Limited & 3 others](#) [2016] eKLR, awarding damages for violation of her rights to privacy in the sum of Ksh.1,000,000/- (Kenya Shillings One Million) and [Charles Mwenda v Inspector General of Police, National Police Service & 2 others; Law Society of Kenya, Interested Party & 3 others \(Interested Parties\)](#) [2021] KEHC 5792 (KLR), where awarding Ksh.1,500,000/- in a case of violation principally of rights to dignity and protection from torture, the Court lamented that "The 1st Respondent's actions do not reflect a just and democratic society governed by the Rule of Law. In any event the rights to protection from torture, and cruel, inhuman or degrading treatment cannot be limited under our Constitution. The Petitioner has indeed set out a strong case for violation of his Constitutional rights to dignity, and protection from torture, cruel, inhuman and or degrading treatment."
21. This court also respectfully agrees with [MVK & another v Attorney General & 4 others; Independent Medical Lega Unit \(IMLU\) \(Interested Party\); The Redress Trust \(Amicus Curiae\)](#) (Constitutional Petition 347 of 2015) [2017] KEHC 1496 (KLR) (Constitutional and Human Rights) (18 December 2017) (Judgment), where the court (John Mativo J, as he then was) stated that:

"It was well settled that an award of compensation was an appropriate and effective remedy for redress of an established infringement of a fundamental right under the [Constitution](#). The quantum of compensation would, however, depend upon the facts and circumstances of each case. An award of damages entailed an exercise of judicial discretion which would



have been exercised judicially and that meant that it had to be exercised upon reason and principle and not upon caprice or personal opinion. Arriving at the award of damages was not an exact science. No monetary sum could really erase the scarring of the soul and the deprivation of dignity that some of those violations of rights entailed. When exercising that constitutional jurisdiction, the court was concerned to uphold, or vindicate, the constitutional right which had been contravened. A declaration by the court would have articulated the fact of the violation, but in most cases, more would be required than words. If the person wronged had suffered damage, the court could award compensation. An award of compensation would go some distance towards vindicating the infringed constitutional right. How far it went would depend on the circumstances, but in principle it might not suffice. The fact that the right violated was a constitutional right added an extra dimension to the wrong. An additional award, not necessarily of substantial size, would be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and deter further breaches. All those elements had a place in helping the court arrive at a reasonable award. The court had to consider and have regard to all the circumstances of the case.”

22. In the circumstances of this case, this court considers that a global award of Kshs.500,000/= is adequate recompense for the violation of the applicant’s rights.

Orders

23. Accordingly, for the reasons set out above, the Court finds that the Petition dated 9/10/2019 has merit and it is allowed in the following terms:
- a. A declaration is hereby issued that the Petitioner’s Constitutional rights as protected under Articles 28, 29 (a), 29 (c), 29 (d), 29 (f) and 47 (1) have been violated.
 - b. A declaration is hereby issued that the petitioner’s rights as protected under Articles 2, 10, 11, 12, 13, 14 and 16 of the *United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* have been violated.
 - c. A declaration is hereby issued that the petitioner’s rights as protected under Articles 3, 4, 5, 6, 7 and 16 of the *African Charter on Human and People’s Rights* have been violated.
 - d. The Petitioner is awarded general damages of Ksh.500,000/= for the violation of his rights to be paid by the 2nd 3rd and 4th Respondents.
24. The Respondents shall pay the cost of the application to the Applicant.

Order accordingly.

DATED AND DELIVERED THIS 24TH DAY OF JULY 2025.

EDWARD M. MURIITHI

JUDGE

Appearances

Mr. Magee for the Applicant.

Mr. Kiongo for the Respondent.

