



**Mururu (Suing on behalf of the Estate of the Late Eustace Mururu Gatoto)
v Attorney General (Petition 287 of 2018) [2024] KEHC 6833 (KLR)
(Constitutional and Human Rights) (7 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6833 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION 287 OF 2018

EC MWITA, J

JUNE 7, 2024

BETWEEN

**LUCY MURURU (SUING ON BEHALF OF THE ESTATE OF THE LATE
EUSTACE MURURU GATOTO) PETITIONER**

AND

THE ATTORNEY GENERAL RESPONDENT

JUDGMENT

1. Lucy Mburu, (the petitioner), is widow and legal representative of the estate of her deceased husband, Eustace Mururu Gatoto (the deceased). The deceased was an employee of Kenya Air Force; a branch of the Armed Forces of Kenya as it was then known. The deceased was enlisted on 9th August 1967 and served until he was discharged from the service on 15th March 1983, and passed away on 3rd October 2008.
2. On 28th August 2018, the petitioner filed a petition grounded on various articles of *the Constitution*, against the Attorney General, (the respondent), on behalf of the department of defence, for failure to compensate, and pay pension service charge to the deceased. The petitioner challenged the deceased's unlawful arrest, detention and torture as well as termination of the deceased's service. The petition was supported by an affidavit sworn on the same day, written submissions and petitioner's oral testimony.
3. The petitioner averred, deposed in the affidavit and stated in her testimony in court, that the deceased had worked in the Air force since 9th August 1967 when he was enlisted until he was discharged on 15th March 1983, but was not paid any benefits. The petitioner stated that on 2nd August 1982 following the attempted coup, the deceased was taken away from the house by unknown men to an unknown



- place. The deceased returned two years later and left the service after he was given a green book stating that his services were no longer required.
4. The petitioner stated that when the deceased came back, he narrated to them how he had been tortured by secret army agents, special branch officers and prisons warders while he was held at Kamiti and Naivasha Maximum Security Prisons. The petitioner deposed that having somebody taken into custody in the manner the deceased was, left them traumatised.
 5. It was the petitioner's case that due to the deceased's absence, she was unable to educate their children. She stated that she had the right to institute the petition by virtue of articles 22 of *the Constitution* and that the petition disclosed a cause of action being a transitional justice matter. The petitioner further stated that the articles of *the Constitution* relied on in instituting the petition, mirror those in the repealed Constitution.
 6. The petitioner argued that there is no time limitation in claims for violation of constitutional rights; that the deceased was subjected to inhuman treatment when he was arrested, detained and tortured together with his colleagues which ended up with the unlawful termination of his services without explanation. On being released, the petitioner asserted, the deceased was threatened not to be seen with more than three people. He was also not allowed to leave his home without permission from the area chief.
 7. According to the petitioner, the deceased told them that he witnessed his colleagues being killed by shooting without any reasons. He was released from Kamiti Maximum prison without any means of transport and had to walk home which traumatized them. As a result of what they went through, their children were unable to complete school due to lack of fees.
 8. For all the transgressions, the petitioner proposed a compensation of Kshs. 10,000,000 and payment of pension as per the Armed Forces Act Cap 199 (repealed). The petitioner relied on the decisions in *Gitobu Manyara & 2 others v The Hon. Attorney General* [2016] eKLR and *Njuguna Githiru v Attorney General* (Civil Appeal No. 253of 2017 [2020] eKLR.
 9. Based on the above, the petitioner sought general damages for compensation for torture and unlawful imprisonment under inhuman conditions by the government agents;a declaration that the proceedings in the court martial were unlawful, therefore, null and void;that the termination of the deceased's employment by the (82) Air force was unlawful and null and void; costs of the petition and interest and any further and other direction the court may deem fit and just to grant.

Response

10. The respondent opposed the petition through grounds of opposition, and a replying affidavit sworn by Major Damaris Apondi Agnetta and testimony of Major Edwin Kibiru Muta. The respondent also filed written submissions.
11. In the grounds of opposition, the respondent stated that the petitioner had not demonstrated sufficient cause for granting of the relief sought; the petition was time barre; the petition did not disclose a cause of action and the petition contained hearsay allegations on violation of constitutional rights, which had not been demonstrated, rendering the petition meritless.
12. In the replying affidavit, it was deposed that the deceased was properly discharged from the service in 1983 after serving for fifteen years; the deceased's discharge had nothing to do with the 1982 attempted coup, and was within the legal parameters provided for under section 176(g) of the repealed Armed Forces Act. This was because the deceased was only eligible to serve to the maximum number of years allowed for his rank. The respondent denied all particulars of the alleged violations of fundamental



- rights and freedoms. The respondent further asserted that there was no evidence that the deceased was involved in the 1982 attempted coup, was arrested or detained.
13. It is the respondent's case that the deceased never complained of any arrest, detention or torture during his lifetime and the petitioner had not adduced any evidence to that effect. According to the respondent, the petitioner was guilty of undue delay, having filed the petition more than 36 years after the alleged violations.
 14. The respondent took the view, that the petition was an afterthought, and had been filed after unreasonable delay without any plausible explanation for the delay. This, the respondent asserted, was prejudicial to it since crucial witnesses had retired from service, some were dead and documents had either been destroyed or misplaced.
 15. The respondent further asserted that the deceased's death in 2008, had nothing to do with the 1982 attempted coup; that from the time the deceased was discharged to the time of his death was 25 years, yet the deceased never filed a petition challenging violation of his rights and fundamental freedoms, if any, and it had taken the petitioner 10 years after the deceased's death to present this petition.
 16. The respondent maintained that the deceased never complained of any torture while serving in the armed forces and there was no evidence to that effect. The respondent again denied the allegation of failure to pay pension service charge, stating that there was no evidence that he was not paid.
 17. The respondent relied on, among others, decisions in *Peter Ngari Kagume & 7 others v The Attorney General* [2009] eKLR; *David Gitau Njau & 9 others v Attorney General* (Petition No. 340 of 2012); [2013] eKLR; *Nelson versus Raye* (1996) 1WLR 1378 (Ch) 1388; *Wellington Nzioka Kioko v Attorney General* [2018] eKLR; *Gilbert Guantai Mukindia v Attorney General* [2019] eKLR to support his position.
 18. Relying on the decision in *D.T Dobie and Company Ltd v Muchina and Another* [1982] KLR 1, the respondent argued that the petitioner relied solely on hearsay evidence with no documents to support her case, hence no reasonable cause of action had been disclosed. The respondent faulted the petitioner for praying for compensation under the 2010 Constitution instead of the repealed Constitution.
 19. The respondent further took the view, that the petitioner had not adduced evidence to support and prove violation of the deceased's fundamental rights and freedoms. The allegation of detention was also not proved. There was again no evidence that the deceased was arrested and held in custody, for how long and when he was finally released.
 20. The respondent again relied on the decision in *Josephat Nyakeriga Asiago v Guargex Security Services limited* (2018) eKLR for the proposition that the petitioner had not demonstrated that pension was never paid at the time the deceased was discharged.
 21. The respondent further relied on article 162(2) (a) of *the Constitution* and section 12 of the Employment and Labor Relations Court Act to argue that the claim is in the wrong forum.
 22. The respondent urged the court to consider the principles in *Charles Gachathi Mboko v Attorney General* (2014) eKLR in the event that it is inclined to grant the orders sought by the petitioner.

Determination

23. Having carefully considered the pleadings, evidence and arguments by parties, the issues that arise for determination are; whether there was inordinate delay in filing the petition; whether the petitioner has proved violation of the deceased's fundamental rights and freedoms and, depending on the answer to the second issue, whether the petitioner is entitled to damages and what is the quantum.



Delay in filing the petition

24. The respondent raised the issue of delay in bringing the petition. The respondent argued that the petition was filed after an inordinate delay, taking into account that the alleged violations took place in 1982, yet the petition was filed in 2018 more than 35 years later. The petitioner's response was that there is no time limitation in filing constitutional petitions challenging violation of fundamental rights and freedoms. The petition was, thus properly filed and cannot be defeated by *limitation of Actions Act*.
25. This issue has been determined by the Supreme Court in *Wamwere & 5 others v Attorney General* (Petition 26, 34 & 35 of 2019 (Consolidated)) [2023] KESC 3 (KLR) (Constitutional and Human Rights) (27 January 2023) (Judgment). In that consolidated petition, the Supreme Court affirmed the position that there is no limitation of time in matters relating to violation of fundamental rights and freedoms under *the Constitution*. Those matters are evaluated and decided on a case by case basis.
26. The supreme Court, however, emphasized that the court before which the matter is filed, is entitled to consider whether there has been inordinate delay in lodging the claim of violation of rights. The Supreme Court, stated that where there is delay, a petitioner ought to explain the reasons for the delay to the satisfaction of the court. That is, whether a claim for violation of rights has been instituted within a reasonable time is to be determination based on the peculiar circumstances of each case.
27. The Supreme Court also underscored that courts should be conscious of transitional justice when considering violations that occurred during repressive periods and take it into account when dealing with the issue of delay in lodging such cases, and stated:
 - (46) In considering whether the delay... was inordinate; we are of the considered opinion that transitional justice claims are context sensitive. It follows that courts ought to be particularly sensitive to the reasons adduced for the delay. At the same time, courts should balance the reasons for delay with the likely prejudice a respondent may face in defending the claim in line with the right to fair trial. Such an approach emerges from the comparative lesson as can be gleaned from jurisprudence from Kenya's superior courts and other jurisdictions. (emphasis).
28. The decision of the Supreme Court that a court should be satisfied that the delay in filing the petition has been explained, and take it into account in determining whether the delay was justified, is binding on this Court.
29. In the present petition, the petitioner pleaded that the deceased was arrested on 2nd August 1982 and returned two years later. The petitioner did not, however, specify the date or month when the deceased returned. This petition was filed on 22nd August 2018, which the respondent argued, was done after an inordinate delay.
30. I have perusal the petition and supporting affidavit. There is no averment or deposition or even testimony explaining why the petition was filed more than 30 years after the alleged violations. In short, the petitioner did not attempt to explain the delay in filing the petition so long after the alleged infractions. This is not in consonance with the holding by the Supreme Court, that any delay in filing a petition challenging violation of fundamental rights and freedoms, should be satisfactorily explained.
31. In the circumstances, this Court finds, on the first issue, that in line with the holding by the Supreme Court, the petitioner did not explain at all the reasons for the delay in lodging the petition.



Violation of the deceased's rights and fundamental freedoms

32. The next issue is whether the petitioner proved violation of the deceased's fundamental rights and freedoms. The petitioner argued that the deceased was arrested and detained in various prisons. According to the petitioner, the deceased was also tortured during the period of incarceration in violation of his fundamental rights and freedoms. It was asserted that the deceased was also illegally discharged from the Air force without paying his pension service charge.
33. The respondent denied the petitioner's allegations, and argued that the petitioner did not prove allegations of violation of the deceased's fundamental rights and freedoms. In particular, the respondent argued that there was no evidence of arrest, detention and torture. The respondent maintained that the deceased was lawfully discharged from service, and that there was no evidence that the deceased had been discharged for taking part in the failed coup attempt.
34. Whether the deceased was arrested, detained and tortured, is a question of fact. Similarly, whether the deceased's fundamental rights and freedoms were violated, is both a question of fact and law. It is a question of fact because there must be evidence of arrest and detention against one's will. It is then a question of law in that there must be evidence that the deceased was treated in a manner that violated the rights guaranteed under *the Constitution* and the law.
35. From the pleadings and evidence, the following facts are undisputed. First, the deceased was enlisted in the armed forces and on 9th August 1967 and was attached to the Kenya Air force under service No. 101873. Second, the deceased was discharged from the service on 15th March 1983, a fact that is clear from the Certificate of Service annexed to the affidavit in support of the petition. Third, the deceased died on 3rd October 2008 as can be seen from a copy of the Limited Grant of Administration issued on 23rd February 2018 at the High Court, Nairobi.
36. The disputed facts include, whether the deceased was arrested, detained and tortured; whether he was unlawfully discharged from the armed forces, and whether he was paid pension service charge.
37. I have carefully gone through the petition, the supporting affidavit and the response. The petitioner is widow to the deceased. The deceased having been discharged from the service on 15th March 2018, was aware of the circumstances under which he was discharged, but did not challenge his discharge. The petitioner did not adduce evidence to show that the deceased was unlawfully discharged, how and why. The respondent's position is that the deceased served for the period he could serve taking into account his rank and was lawfully discharged,
38. It was upon the petitioner to prove to the court through acceptable evidence that indeed the deceased was unlawfully discharged from the service, a burden she did not discharge. A perusal of the Certificate of Service shows that his service conduct was "Good." The petitioner also had the burden to prove that the deceased was not paid his pension service charge, given that the deceased did not raise the issue during his lifetime.
39. The petitioner further asserted that the deceased was unlawfully arrested, detained and tortured. The respondents position was that the deceased was neither arrested, detained nor tortured. The respondent maintained that the deceased had nothing to do with the attempted coup of 1982. It was again the petitioner's burden to prove that indeed the deceased was arrested and detained. There is no such evidence on record. There is also no evidence that the deceased was tortured.
40. This court is acutely aware of the difficulty a petitioner would have when trying to prove torture in situations relating to past conduct by state agents during repressive regimes. This difficulty was aptly



captured by the Constitutional Court of South Africa in *Azania Peoples Organization (AZAPO) v President of the Republic of South Africa and others* (CCT 17/96) [1996] ZACC 16;1996 (8) BCLR 1015 (CC). The court stated that in such situations, records are usually not easily accessible; witnesses are often unknown, dead, unavailable or unwilling. All that often effectively remains is the truth of wounded memories of loved ones sharing instinctive suspicions, deep and traumatizing to the survivors, but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigours of the law. (See also *John Muruge Mbogo v Chief of the Kenya Defence Forces & another* [2018] eKLR).

41. The position explained in the above decision notwithstanding, the petitioner had a duty to prove her case to the required standard that is on a balance of probabilities. In *Phillips & others v National Director of Public Prosecutions* [2005] ZACC 15; 2006(1) SA 505(CC), the Constitutional Court of South Africa stated that a constitutional challenge should be explicit, with due notice to all affected. This requirement ensures that all interested parties have an opportunity to make representations and that the relevant evidence, if necessary, is led.
42. This position was reinforced by the Supreme Court in *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR (at paragraph 349), that the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.
43. The petitioner bore the burden to prove the alleged violation of fundamental rights and freedoms to the requisite standard of proof, which is on a balance of probabilities, since such claims are by nature civil causes. (*Deynes Muriithi & 4 others v Law Society of Kenya & another*, SC Application No 12 of 2015; [2016] eKLR.)
44. Having considered the evidence on record, it is clear to this Court, that the petitioner did not discharge the legal burden placed on her to prove the case against the respondent. That is, the petitioner did not adduce evidence to prove the fact that the deceased was arrested and detained. There was also no evidence that the deceased was tortured as the petitioner alleged. The petitioner did not demonstrate how the deceased could have been tortured yet the deceased did not complain when he was alive for about 25 years, having retired in March 1983.
45. It is also not plausible that the issue of arrest, detention and torture would only surface in 2018 again about 10 years after the deceased's demise. The petitioner having not discharged the legal burden, the evidentiary burden did not shift to the respondent to explain any of the infractions he was accused of. In the circumstances, I find on this issue, that the petitioner has not proved the claim of arrest, detention and torture to amount to violation of the deceased's fundamental rights and freedoms.
46. The petitioner sought a declaration that the proceedings in the court martial were unlawful, null and void. The court notes however, that there was no evidence that there were such proceedings. The court is unable to address that issue in the circumstances.

Damages and quantum

47. Having found that the petitioner did not prove the case to the required standard, the issue of damages and the quantum thereof does not arise for consideration.



Conclusion

48. Having considered the petition, response and submissions by parties, the conclusion I come to, is first, that the petitioner did not give an explanation, let alone a satisfactory explanation, why the petition was filed more than 30 years after the alleged violations. The deceased was alive between March 1983 when he discharged from the service and 2008 when he passed on, and never raised any issues on his unlawful arrest, detention or torture. The petition was also filed about 10 years after the deceased's death without any explanation for the delay.
49. Second, the petitioner did not prove that the deceased was arrested, detained and tortured in violation of his fundamental rights and freedoms. In other words, there was no evidence that the deceased was arrested, detained and tortured as alleged.

Disposition

The petition is dismissed.

Costs being discretionary, I order that each party do bear own costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JUNE 2024

E C MWITA

JUDGE

