



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ngeno v Attorney General (Petition 8 of 2018) [2023] KEHC 20179 (KLR)  
(Constitutional and Human Rights) (14 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20179 (KLR)

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

**PETITION 8 OF 2018**

**LN MUGAMBI, J**

**JULY 14, 2023**

**BETWEEN**

**MICHAEL KIPSIGEI NGENO - SVC NO 21148-LT ..... PETITIONER**

**AND**

**THE HON ATTORNEY GENERAL ..... RESPONDENT**

**JUDGMENT**

1. The petitioner is former military personnel enlisted in the Kenya Air Force on 5<sup>th</sup> September, 1969 where he worked until his services were terminated on or about 1<sup>st</sup> August, 1982.
2. Pursuant to constitutional petition dated 11<sup>th</sup> January 2018 and supported by verifying affidavit sworn on even date, he prayed for the following reliefs: -
  - a) General damages for compensation for torture and unlawful confinement under inhuman conditions by the government Agents.
  - b) That the termination of the petitioners from their employment was therefore illegal and void.
  - c) That the orders and directives by the aid Eight Two Air Force (82 Air force) was illegal and unconstitutional and therefore null and void.
  - d) Any further orders, directions this Honourable Court may deem fit and just to grant.
  - e) Costs of this petition with interest at court rates.



### **Petitioner's Case**

3. The petitioner pleaded that he was employed by the Kenya Air Force and assigned Air Force Officer Number 21148. Nevertheless, his termination was done through an entity known as 82 Air Force on or about August 1, 1982 after he was framed that he had participated in 1982 attempted coup.
4. He averred that Department of Defence and the said 82 Air Force did not accord him the right to be heard or defend himself; Instead for a whole year he was incarcerated and moved into different prison facilities where he was subjected to torture in violation of his fundamental human rights under Articles 25, 29, 48, 50 and 51 of *the Constitution* at the hands of Government agents, its servants, employees and institutions. He was also was kept in solitary confinement under inhumane conditions.
5. He particularized the acts of torture he was subjected at King'ong'o Prison, Kamiti Maximum Prison, Manyani, Shimo La Tewa and Naivasha as follows: -
  - a) Slept in cold water.
  - b) Was stripped naked
  - c) Beaten and blind folded
  - d) Had his private parts squeezed and pulled
6. The petition was supported by the verifying affidavit sworn by the Petitioner on 11<sup>th</sup> January, 2018. It basically re-affirmed the contents of the petition in a more detailed manner.
7. In his affidavit he reiterated the following facts: -He was enlisted in the Kenya Airforce on 5<sup>th</sup> September, 1969 and worked until 1<sup>st</sup> August, 1982 when he was arrested while on duty at Nanyuki by Kenya Army officers. They disarmed him and together with fellow servicemen, they were bundled into lorries and taken to King'ong'o Prison. At King'ong'o Prison, they were stripped naked and beaten by special branch officers who threatened to kill him with a gun and in fact witnessed some fellow officers being killed as he watched. At King'ong'o prison he was forced to sleep on the verandah under the watch of Kenya Army Officers. He was then taken to Kamiti Prison and kept in solitary confinement, put in a waterlogged cell with water that reached knee length, was denied food and beaten as he underwent a five-day interrogation. He was taken to Naivasha Maximum Prison where the beating by army officers, wardens and secret agents intensified. Here, he was locked in a solitary room without light or ventilation for two weeks. He would defecate, urinate and sleep in that cell. His family did not know of his whereabouts or if he was alive or dead for the whole year he was in custody. He was released on 22<sup>nd</sup> March, 1983 and informed that his services were no longer needed. This was done through an unlawful entity called 82-Airforce. He was required to report weekly to the local chief and to seek clearance from him whenever he wanted to leave his village. He attached his copy of national Identity card and certificate of service to the affidavit.

### **Response to the Petition**

8. The respondent filed its replying affidavit sworn on 10<sup>th</sup> May, 2019 by Major Emmanuel M Wandera.
9. The respondent denied the allegations of violations of fundamental rights particularized in the petition.
10. The Respondent alleged that the petitioner had admitted participating in the failed 1982 coup by obeying orders, drawing arms from the armoury and undertaking unlawful patrols in furtherance of the coup.



11. It denied the allegation that the petitioner was threatened with death and instead asserted that nobody was killed during grilling. It also averred that if any force was used; it was only necessary to the extent facilitating the arrest those who had participated in the coup including the petitioner because they were armed.
12. It denied that the petitioner was tortured by being stripped naked, placed in solitary confinement, physically beaten, placed in waterlogged cell or denied toilet facility as particularized in the petition.
13. It averred that the termination of employment of the petitioner was procedurally done as per the law by Kenya Airforce and not 82 Airforce for the reason that the petitioner had participated in the coup.
14. The allegations that the petitioner was detained at Kamiti Maximum Prison, Naivasha Maximum Security Prison or his rights were violated in the said prison facilities were denied and thus disputed the petitioner's claim for compensation.
15. The Respondent averred that *the Constitution* of Kenya, 1969 limited the rights and freedoms of members of the armed forces in Section 86(4) of the said Constitution where it provided that nothing contained in or done under authority of disciplinary law in relation to members of the disciplined force would be held to be inconsistent with or in contravention of any of provisions of Sections 71, 73 and 74 of the that Constitution.
16. The respondent asserted that the arrest of the petitioner by the Kenya Army officers, was legal, statutory and lawful as it was done to pursuant to Section 70 of the *Armed Forces Act* Cap 199 due to breakdown of law and order as a result of attempted coup by the Kenya Air Force.
17. The respondent denied that the petitioner was required to report to the area chief every two weeks or that the petitioner was denied access to an advocate, relatives and friends prior to being terminated.
18. The respondent denied that the petitioner's certificates were deferred by an illegal entity known as 82 Airforce and asserted that the petitioner was granted exemplary service recommendations from the Kenya Armed Forces and not 82 Airforce.
19. The respondent stated that the petition is an abuse of court process having been filed 30 years post-alleged violation without an explanation for the said delay. He stated that the delay is prejudicial to the respondent as the relevant documents are no longer available and key witnesses have either died or have left service.
20. The respondent averred that the reliefs sought are unjustified and baseless, hence the petition should be dismissed as it lacks merit.

### **Trial Directions**

21. In the earlier directions issued in this Petition, the respondent had indicated its desire to call oral evidence. On his part, the Petitioner had offered to present himself physically before the court for purposes of being cross-examined. Several hearing dates were subsequently fixed but for one reason or the other, no oral hearing took place. The said hearing dates were 24<sup>th</sup> September, 2019, 4<sup>th</sup> December, 2019, 27<sup>th</sup> April, 2020 and 21<sup>st</sup> July, 2021.
22. No action was taken in the matter for a long time. At one point, the Court even issued a notice of dismissal but the Advocate for Petitioner successfully appeared on the scheduled mention date and rescued the petition from being dismissed. Eventually, the hearing proceeded by way of affidavit evidence and written submissions.



### **Petitioner's Submissions**

23. The petitioner reaffirmed his factual account contained in the affidavit concerning the torture he underwent after his arrest on 1<sup>st</sup> August, 1982.
24. On the issue of damages, the petitioner contended that he suffered for a whole year under deplorable conditions for a crime he did not commit hence proposed a generous award of Ksh.10,000,000/- as fees and reasonable compensation for all that he went through in the hands of Government Agents.
25. He relied on case of *David Gitau Njau versus the Hon. Attorney General* [2013] eKLR where under similar circumstances, the court awarded Ksh.8,000,000/- arguing that the proposed award of Ksh.10,000,000/- is justified due to inflation. He also cited the case of *Rumba Kinuthia v Attorney General*, Petition No. 141 of 2011 and Petition No. 427 of 2008 – *Peter Tony Wambua & 17 Others v Attorney General* to demonstrate that exemplary damages are recoverable where oppressive, arbitrary and unconstitutional acts are carried out by servants of government. In the two cases, an award of Kshs.3,000,000/- was made under that head.

### **Respondent's Submissions**

26. The Respondent formulated four issues, namely:
  - i. If the Petitioner's claim is invalid by reason of inordinate delay
  - ii. Whether the claim of torture, brutal, inhuman and degrading treatment was proved
  - iii. Whether the Petitioner had proved the alleged illegal detention
  - iv. Whether the claim for general and special damages was proved by the Petitioner
27. Concerning the first issue, the Respondent submitted that a delay of 35 years between the time the alleged violation took place and the time this Petition was filed is inordinate. The Respondent argued that explanation for that kind of delay ought to have been provided by the Petitioner and cited a number of judicial decisions in which delay in filing constitutional petitions alleging violation of fundamental freedoms without satisfactory explanation was found unacceptable and petitions dismissed. He relied on the cases of *Wellington Nzioka Kioko v Attorney General* [2018] eKLR; *Hezron Nderera Ochuri v Attorney General* [2020] eKLR; *Joseph Migere Onoo v Attorney General* [2015] eKLR; *Alphonse Kipkemoi Somongi v Attorney General* [2019] eKLR; *Abraham Kaisha Kanzika alias Moses Savala Keva T/A Kapco Machinery Services and Milano Investments Limited Vs. Governor Central Bank of Kenya and 2 Others*, Misc. App No. 1759 of 2004.
28. Concerning allegations of torture; the Respondent pointed out that no medical evidence had been provided to substantiate the allegation. The Respondent submitted that there no evidentially proof of torture that was tendered.
29. The Respondent took the Court through the Black's Law Dictionary definition of torture and the definition in the *United Nations Convention Against Torture*, and Other Cruel, Inhuman and Degrading Treatment or Punishment as well as judicial precedents namely; the Court of Appeal decision of *Monicah Wangu Wamwere v Republic* [2019] eKLR and the High Court decision of *Koigi Wamwere v Attorney General* [2012] eKLR and urged the Court to find that the legal threshold of what amounts to torture could not be established through the evidence that the petitioner presented before the court.



30. Concerning the alleged detention, the respondent insisted in its submissions that this too had not been established considering not even a committal warrant to demonstrate the fact of detention was produced in court. The respondent castigated the evidence by the Petitioner as scanty recollection of various prisons without providing real proof of actual custody. The Petitioner relied on the case of *Fredrick Gitau Kimani Vs. Attorney General* (2012) eKLR where the court held that if a person makes a claim but fails to show in a satisfactory manner the facts upon which he basis his claim, the respondent is under no obligation to prove his defence or exception. The Respondent contended that it was the Petitioner who had the onus to prove that he was unlawfully detained but he did not.
31. In regard to the claim for damages, the Respondent contended that the proposal for payment of Kshs. 10,000,000 is not founded on any basis at all.

### **Analysis and Determination**

32. The issues in this Petition as can be discerned from the pleadings and submissions are simple. The main issues are:
  - a. Has there been unreasonable delay in filing this petition to the extent that it may prejudice the respondent in getting a fair trial?
  - b. Was the Petitioner subjected to torture, inhuman and degrading treatment and punishment? If so, by who?
  - c. Was the Petitioner illegally confined and kept incommunicado for a period of one year?
  - d. Is the Petitioner entitled to damages? If so, to what extent?
33. Delving into the 1<sup>st</sup> issue, whether there has been unreasonable delay in instituting this Petition, the Petitioner stated that the genesis of his tribulations began on 1/8/1982 when he was arrested in Nanyuki by Kenya Army Officers and bundled into a lorry together with other air force service men. He was subjected to intense torture in various forms including sleeping in a room with water, being stripped naked, having his private parts pulled, kept in dark solitary confinement and this went on until 22/3/1983 when he was released from custody and relieved off his duties.
34. The Respondent contends that the cause of action arose 35 years ago. The Respondent argued that the Petitioner has not explained the excessive delay he has taken before filing this petition. The Respondent contended that this long delay has exposed it to serious prejudice as the witnesses it would have been called on its behalf to confront the Petitioner's allegations have either died or left service. That it is quite difficult to find the necessary records to counter these allegations hence the delay is highly prejudicial. It cited various decisions which I have already adverted to in the foregoing.
35. A critical characteristic of the law is that it frowns upon sluggishness by a person wronged in seeking a remedy or asserting their rights especially when no reasonable explanation for the delay is provided. The law expects that a person that has suffered a wrong will be swift in asserting their rights by seeking remedy hence the time honoured maxim that equity aids the vigilant not the indolent.
36. I have read a number of judicial authorities some of which touch directly on the same subject matter as the petitioner is litigating in this petition and indeed, there is consensus that for a long period in this country, instituting this kind of action would have been risky for the petitioner. However, this repressive environment ended in 2003 when the Government which was the target of the attempted coup was swept out of power through coalition parties in a multi-party democratic elections.



37. This new dawn was solidified in 2010 when the current progressive constitution was birthed.
38. The question therefore is; as Kenya went through these transformative epochs starting with the year 2003 and then 2010 which heralded the new dawn; where was the Petitioner? What prevented him from seeking justice for the events of 1982 to 1983? Does he have any good reason for not seizing the earliest opportunity to raise these grievances?
39. In principle, there is no limitation of time for filing claims for redress of constitutional violations but this is not a blank cheque that is totally unchecked. Everybody is entitled to equal protection of the law including those that are required to defend themselves against such allegations brought against them. A prolonged delay may disadvantage someone from defending a case even when they would have proffered a good defence on merit. It happens that sometimes it is difficult to obtain documents to confront the case many years after the incident took place. An example is where the records are gazetted and destroyed after a number of years. Delay therefore may be extremely ruinous to the opposite party that would have relied on such documents as they may never have anticipated that a dispute would arise after so many years. In any case, crucial witnesses may be no more, and if they are, their recollection may also not be sound.
40. Consequently, I agree with the judicial precedents that hold that a long delay such as this one of over 30 years must be satisfactorily explained failing which the claim must collapse. The Court of Appeal in *Wellington Nzioka Kioko v Attorney General* [2018] eKLR was on point in asserting this position when it held follows:
- “...Whereas there is no time limitation in respect of constitutional petitions, the delay must not be inordinate and there must be a plausible explanation for the delay...”
41. It follows therefore that if there is undue delay which is not sufficiently explained to the court; that claim must not be allowed to see the light of the day. In the present case, no attempt at all was made by the petitioner to explain why it took him over 30 years to bring this petition. This point alone suffices to dispose off the present petition without the need of covering any other ground.
42. The Petition is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED AT MILIMANI THIS 14TH DAY OF JULY, 2023.**

**L.N MUGAMBI**

**JUDGE**

