



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A. C. Mrima, J.)

CONSTITUTIONAL PETITION NO. 95 OF 2018

AGGREY STAUSS INDUSWE.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

Introduction:

1. *Aggrey Stauss Induswe*, the Petitioner herein, instituted the Petition subject of this judgment sometimes in May, 2018. He seeks declarations of violation of his rights and fundamental freedoms and compensation arising from alleged detention and torture he underwent as a member of the Kenya Air Force who was suspected to have taken part in the attempted *coup de tat* in 1982.

2. The Petition is opposed.

The Petition:

3. The Petition is dated 8th February, 2018. It is supported by two Affidavits sworn by the Petitioner on 8th February, 2018 and 1st November, 2019 respectively. They are a Supporting Affidavit and a Supplementary Affidavit. In further support to the Petition, the Petitioner filed a Statement dated 31st August, 2020 and written submissions dated 5th March, 2021.

4. The Petition was heard by way of *viva-voce* evidence. The Petitioner testified on 10th December, 2020. The Petitioner then closed his case without calling any witness.

5. In the main, the Petitioner prayed for the following orders: -

1. A declaration that the Petitioner's Fundamental Rights and Freedom were contravened and grossly violated by the Respondent's Kenya Army Military Police Officers who were Kenyan Government servants, agents, employees and institution on 1st August, 1982 to 1st June, 1986 and for 3½ years in Kenyan Prisons.

2. A declaration that the Petitioner is entitled to the payment of damages and compensation for the violations and contraventions of his fundamental rights and freedoms under the aforementioned

provisions of the Constitution.

3. General and exemplary damages and moral damages on an aggravated scale under Section 85(2) of the Constitution of Kenya 1969 Articles 23 and 29 Constitution of Kenya 2010 for the unconstitutional conduct by the Kenyan government Servants and agents awarded.

4. Any further orders, writes, directions as this Honourable Court may consider appropriate.

5. Costs of the suit and interest.

The Response:

6. The Petition is opposed by the Respondent.

7. The Respondent filed two Affidavits as well. They are both sworn by one *Major Emmanuel Makokha Wandera (21314)* (hereinafter referred to as '**Major Wandera**'), a Commissioned Officer employed and deployed as Staff Officer II at the Kenya Defence Headquarters. He is in-charge of all personnel records. The Affidavits are a Replying Affidavit sworn on 1st August, 2018 and a Further Affidavit sworn on 6th January, 2020.

8. The Respondent through Major Wandera also filed a Statement dated 6th January, 2020 and written submissions dated 30th December, 2020.

9. The Respondent called Major Wandera as the sole witness.

10. In the end, the Respondent prayed for the dismissal of the Petition with costs.

Issues for Determination:

11. I have carefully considered the Petition, the responses thereto, the parties' submissions and the decisions referred to. I find the following issues are for determination: -

i. Whether the Petition ought to fail on account of inordinate and unexplained delay;

ii. Whether the Petitioner was a member of the Kenya Armed Forces at any time;

iii. Whether the Petitioner's claim is proved;

iv. Whether the Petitioner is entitled to the remedies sought.

12. I will deal with the issues in *seriatim*.

Analysis and Determinations:

(i) Whether the Petition ought to fail on account of inordinate and unexplained delay:

13. The Respondent fronted a scathing attack on the 35 years' time-lapse between the alleged infringement of the rights and fundamental freedoms and the filing of the Petition.

14. The Petitioner pleaded and testified that he was enlisted as an Officer in the Kenya Air Force within the then Kenya Armed Forces sometimes on 2nd July, 1974 shortly upon attaining the age of majority. He served for a period of around 8 years until his dismissal from service on 31st July, 1982. He was issued with a Certificate of Service dated 27th March, 1987.

15. The Petitioner alleges that he was variously and continually subjected to immense and inhuman

treatment from 1st August, 1982 when he was arrested and detained to 1st June, 1986 when he was released from Naivasha Maximum Prison. He avers that he had been arrested on suspicion of having taken part in the failed *coup de tat* which was majorly undertaken by members of the Kenya Air Force.

16. In explaining the laches between June, 1986 when he was released from prison and the filing of the Petition in 2018, the Petitioner fronted two reasons. They are as follows: -

i. That the Government which had detained the Petitioner was in power; and,

ii. That when there was a change of Government, the same officers were still in service.

17. The Petitioner further stated that upon release from detention, he was forced to live a life of penury in his rural home in Vihiga County. He further stated that he was not allowed to leave his home and never was he to step into any town.

18. According to the Petitioner, it was not until when there was a change in Government when he was advised by a human rights organization of his rights and urged to pursue reparations. He then presented his claim before the Truth and Justice Commission whose report is yet to be made public. As a last resort, he filed the instant Petition.

19. The Petitioner urged the Court to find that despite the passage of time, his claim could still be sustained in law. He submitted that claims on infringement of human rights and fundamental freedoms cannot be limited by time and that he had plausible reasons in explaining the delay.

20. The decisions in *Lewis Wilkinson Kimani Waiyaki v. Hon. Attorney General (2016) eKLR* and *Florence Wakiuru Muchiri & Another v. Attorney General (2017) eKLR* were relied on in support of the submission.

21. The Respondent vehemently opposed the Petitioner's proposed justification of the laches of time. The Respondent posits that the time lapse will cause hardship to itself and deny it its right to a fair trial under Article 50 of the Constitution since its crucial witnesses have so far died, the available witnesses suffer loss of memory and that crucial documents were either destroyed or lost.

22. It is further posited that although the Government is a going concern, still it is run by human beings and is not immune to the contingencies that come with human nature.

23. In support of the position, the Respondent relied on several decisions including *James Kanyita Nderitu vs. AG, Durity v. AG (2002) UKPC 20*, *Joyce Nakaewa v. AG & Others, Constitutional Claim No. 2 of 2001 (2020) UGCCI, Nairobi Court of Appeal Civil Appeal No. 268 of 2016* and *Lt. Col. Peter Ngari Karume & Others v. AG (2009) eKLR*.

24. The Respondent also submits that the Court ought to interpret the Constitution as a whole and find that in all fairness the time lapse will cause hardships to the Respondent in defending the claim. The decision in *Centre for Rights Education and Awareness & Another v. John Harun Mwau & 6 Others (2012) eKLR* is referred to in support.

25. Referring to Regulation 73 of the Defence Forces Standing Orders, the Respondent posits that the documents in support of its defence were accordingly disposed of.

26. The decisions referred to above by the parties are clear on the guidelines in determining whether a claim ought to fail on unexplained and inexcusable time lapses. I will add that generally the law provides for statutory timelines within which claims ought to be instituted. However, and as stated in various decisions, the position does not apply to Petitions seeking enforcement of human rights and fundamental freedoms.

27. This Court recently dealt with this issue in Nairobi High Court Constitutional Petition No. 33 of

2020 *Peter Odoyo & Stanley Kinyanjui (Suing on behalf of the Outdoor Advertising Association of Kenya) v. Kenya National Highways Authority & 2 Others* (unreported) where after extensive consideration of several decisions, the Court at paragraph 159 held as follows: -

(i) That human rights and fundamental freedoms can never be waived or acquiesced to by a person unless there is such enormous and unexplained delay in enforcement.

(ii) Statutory limitations do not apply to Petitions claiming infringement or threat to infringement of human rights and fundamental freedoms. A party, however, must account for the time between the alleged infringement or threat of infringement of the human rights and fundamental freedoms and the filing of the claim.

28. I will now determine whether the Petitioner's reasons in explaining the delay of 35 years are reasonably holding.

29. What the Petitioner alleges took place in 1982. By then the Government of the Republic of Kenya was headed by H.E. Daniel arap Moi. The President was in power until 2002 when, upon elections, the Government was headed by one of the opposition candidates H.E. Mwai Kibaki. As such, the Petitioner's explanation that he could not institute proceedings before the Government which was attempted be toppled left power is plausible.

30. The Petitioner posits that after the change of Government, he still could not institute the proceedings as the officers in the Armed Forces were still in office. He further states that he was later assisted by a human rights organization to tender his complaint before the Truth and Justice Commission (hereinafter referred to as '***the Commission***'), which Commission was formed in 2008. As the report is yet to be released years after the Commission's tenure, the Petitioner instituted the instant proceedings.

31. The Petition was filed in March, 2018. That is a period of 16 years from the change of Government in 2002. It is also a period of 10 years from the making of the complaint before the Commission. It is as well a period of 8 years after the promulgation of the Constitution in 2010.

32. A successful *coup de tat* is no mean business. An attempt is worse. This Court, in taking judicial notice of matters of general or local notoriety under Section 60 of the Evidence Act, Cap. 80 of the Laws of Kenya, is alive to the atrocities which follow the proponents of a failed *coup de tat*. The Petitioner alleges that he was a member of the Kenya Air Force which wing of the then Armed Forces was alleged to be the main proponents of the failed *coup de tat*. In the event it is proved that the Petitioner was then a member of the Kenya Air Force, coupled with what the Petitioner alleges to have followed thereafter, then the fear of instituting proceedings while the officers in the Armed Forces were still in office was not far-fetched.

33. The Respondent has decried infringement of Article 50 of the Constitution if the claim is allowed to proceed. That constitutional provision is on the right to a fair trial. Under *Article 25* of the Constitution, the right to a fair trial is one of the rights which cannot be limited in any manner whatsoever.

34. The Respondent has advanced three reasons why it believes its right to a fair trial stands infringed by these proceedings. On the issue of the death of witnesses, the Respondent has not disclosed the names of those witnesses and when they died. As to witnesses having lost memory of the events in issue, again the Respondent has not disclosed the names of those witnesses and has further failed to tender their current health status.

35. This Court, therefore, finds that the contention on witnesses is unsupported and unproved. It is hereby dismissed.

36. There is also the claim that crucial documents were destroyed in line with Regulation 73 of the Defence Forces Standing Orders. I have carefully perused the said Orders. It is true Regulation 73 provides for the disposal of certain documents. The provision sanctions the disposal of secret documents,

upon review and declassification, after 30 years. Confidential documents can be reviewed and on declassification, be disposed after 10 years. All other documents are to be reviewed and destroyed after 7 years *except* those documents required for future use.

37. The Respondent has not disclosed the documents it intended to rely on in its defence. It is also not disclosed whether and when the said documents were disposed of. Further, having failed to disclose the documents, the Court is denied the opportunity to decide whether the documents could have fallen within the category of those documents which cannot be disposed of as they may be required for future use.

38. As I have earlier on stated, a *coup de tat* is one of those occurrences which shakes the strength and loyalty of a country's Defence Forces to the core. It also tests the sovereignty of a country since, in some instances, the incoming government may suffer lack of recognition by other states and international institutions. Such a status may also lead to placing of sanctions by international players against the incoming government.

39. Given the nature and magnitude of a *coup de tat*, a government cannot in any circumstances whatsoever handle an attempted coup lightly. The records of those who took part in the mutiny and the manner in which the attempt was resisted must, no doubt, form part of the records that can never be disposed of. Such information remains crucial not only to the current government, but even to the subsequent ones.

40. It is, hence, the finding of this Court that the Respondent's contention on the documents cannot hold.

41. In sum, the Respondent's contention that its right under Article 50 of the Constitution will be infringed by sustaining the instant proceedings is not proved.

42. Having said so, and by taking the totality of the circumstances in this matter, including the Petitioner's attempt to seek justice before the Commission, this Court is persuaded that the lapse of time from 1986 to the filing of the Petition herein is well explained and is excusable. I, hence, find that no prejudice has been occasioned to the Respondent by the filing of the present claim.

43. The issue is now answered in the negative.

(ii) Whether the Petitioner was a member of the Kenya Armed Forces at any time:

44. This issue is hotly contested by both parties.

45. The Petitioner pleaded, testified and submitted that he was enlisted as a member of the Kenya Air Force on 2nd July, 1974. That, his service number was 021756.

46. At the hearing, the Petitioner produced several documents in support of the claim. The documents were *inter alia* Certificates of Training in Kenya and the United States of America, a photograph and a Certificate of Service.

47. The Petitioner testified on how he worked and was promoted. He also led evidence of where and how he was arrested on 1st August, 1982 and what happened thereafter until the filing of the instant suit.

48. The Respondent led evidence to the contrary. It took the Petitioner to task on almost all the exhibits he produced. The Respondent maintained that the Petitioner was never a member of the Armed Forces and that the documents were not genuine. The Respondent made extensive submissions on the issue as well.

49. Having carefully considered the parties' positions, my attention is drawn to the Respondent's Replying Affidavit in response to the Petition.

50. Major Wandera deponed, in paragraphs 11, 12, 13 and 16 of the Replying Affidavit, as follows: -

11. *THAT any interrogation against the Claimant and subsequent dismissal from the military service was due to his involvement in the 1982 aborted coup and the action taken against him was within the law hence his discharge on services no longer required*

12. *THAT the Petitioner participated in an illegal coup passively or actively by obeying illegal orders and/or by issuing illegal orders to his subordinates and by arming himself up against a government authority constitutional and legitimate*

13. *THAT the under the Armed Forces Act Cap 199 (repealed), military trial can be either in a Court Martial or through Summary Disciplinary Proceedings It is therefore not unlawful for a member of the Defence Forces to be tried summarily by military commanders.*

16. *THAT the dismissals from the service of the Petitioner was very much in order and within the law as dismissal was/is a lawful sentence or punishment under the Kenya Armed Forces Act (Cap 199) now repealed*

51. From the above disposition, the Respondent while responding to the Petition admitted that the Petitioner was a member of Kenya Air Force as at 1st August, 1982 and contended that his dismissal from service was on account of the Petitioner's involvement in the *coup de tat*.

52. The position taken by the Respondent later at the trial and in its submissions is, hence, contrary to the disposition.

53. The contents of the Replying Affidavit were not denounced by the deponent. As such, the contents formed the Respondent's response to the Petition.

54. The Respondent, therefore, seems to have taken a different position from the one in its pleadings. The contention that the Petitioner was not a member of the Kenya Air Force did not form part of the Respondent's defence. The issue was raised at the trial and submitted at length in the submissions.

55. The position in law that in an adversarial system of litigation any evidence which does not support the pleadings is for rejection is well settled. The position was reiterated by the Court of Appeal in ***Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR*** which decision cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002* where Sylvester Umaru Onu, JSC stated that: -

It is settled law that parties are bound by their pleadings.....the court below was in error when it raised the issue contrary to the pleadings of the parties.

56. *Adereji, JSC* in the same case expressed himself thus on the importance and place of pleadings: -

.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.

57. The Supreme Court of Kenya as well agreed with the above legal position in a ruling in ***Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR***.

58. It now follows that the contention by the Respondent that the Petitioner was not a member of the Kenya Air Force as at 1st August, 1982 is not legally sustainable. At its best, the allegation is an

afterthought and has been raised in fragrant disregard to settled law and rules of procedure. The contention is hereby rejected.

59. This Court hereby finds that the Petitioner was a member of the Kenya Air Force as from 2nd July, 1974 to 31st July, 1982.

60. The issue is answered in the affirmative.

Whether the Petitioner's claim is proved:

61. The Respondent once again fronted a scathing attack on proof of the Petition. On the basis of Sections 107, 108 and 110 of the Evidence Act, the Respondent contends that the allegation by the Petitioner that he was arrested and tortured were not proved.

62. Citing the decisions in *Susan Mumbi v. Kefala Grebedhin*, *Monicah Wangu Wamwere v. Attorney General (2016) eKLR*, *Robert Njeru v. Attorney General (2014) eKLR*, *John Cheruiyot Rono v. Attorney General*, *Wellington Nzioka Kioko v. Attorney General* and *Gilbert Guantai Mikindia v. Attorney General*, the Respondent argued that the evidence tendered by the Petitioner did not attain the required threshold in proving the allegations in the Petition.

63. To the contrary, the Petitioner posits that he tendered evidence in support of the Petition and attained the threshold of proof required in law. He urged the Court to go through the pleadings and the evidence and ascertain that the Petition is proved beyond any peradventure. He narrated in detail what he allegedly went through when he was arrested and tortured in various security institutions in Kenya. The Petitioner stated that he suffered both physical and psychological torture and abuse.

64. The Petitioner relied on *Herman Marine Nderi v. The Attorney General (2012) eKLR* and various provisions of the 1969 Constitution and argued that those provisions were retained in the 2010 Constitution.

65. The matter before Court is a constitutional Petition. Like other disputes, the conduct of constitutional Petitions is generally governed by the Constitution and the law.

66. *Article 159(2)(d)* of the Constitution call upon Courts and Tribunals to administer justice without undue regard to procedural technicalities.

67. *Speaking of the essence of Article 159(2)(d) of the Constitution*, the Supreme Court of Kenya in ***Law Society of Kenya v. The Centre for Human Rights & Democracy & 12 Others***, Petition No. 14 of 2013 held that: -

Article 159(2) (d) of the Constitution is not a panacea for all procedural shortfalls.

68. And, in ***Patricia Cherotich Sawe v Independent Electoral & Boundaries Commission (IEBC) & 4 others [2015] eKLR*** the Supreme Court further held that: -

Not all procedural deficiencies can be remedied by Article 159...

69. The practice and procedure in constitutional Petitions is further provided for under *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (hereinafter referred to as '**the Mutunga Rules**').

70. *Rule 20(1)* of the Mutunga Rules is on the manner in which constitutional Petitions ought to be heard. Such Petitions may be heard by way of *affidavits* or *written submissions* or *oral evidence*. *Rule 20(3)* of the Mutunga Rules provide that a Court may upon application or on its own motion direct that the Petition or part thereof be heard by oral evidence. *Rule 20(4)* and *(5)* of the *Mutunga Rules* provide for the summoning and examination of witnesses.

71. The conduct of constitutional Petitions is also guided by various laws. For instance, the Evidence Act applies to matters generally relating to evidence. The Evidence Act is clear on its application to constitutional Petitions and affidavits in *Section 2* thereof. The provision provides as follows: -

1. This Act shall apply to all judicial proceedings in or before any Court other than a Kadhi's Court, but not to proceedings before an arbitrator.

2. Subject to the provisions of any other Act or of any rules of Court, this Act shall apply to affidavits presented to any Court.

72. Sections 107(1), (2) and 109 of the Evidence Act are on the burden of proof. They state as follows:

107(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

and

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

73. The burden of proof on a Petitioner in a constitutional Petition was addressed by the Supreme Court in ***Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR*** as follows: -

Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru vs. Republic, (1979) KLR 154: 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. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

74. Turning back to this matter, the Petition was heard by way of oral evidence. The Petitioner was the sole witness. He testified on his arrest and torture.

75. The evidence of the Petitioner was partly corroborated. The exhibits on record supported the Petitioner's assertion that he was a member of the Kenya Air Force and that he rose through the ranks in his service.

76. On the issue of arrest and torture, the Petitioner mainly relied on a copy of the complaint he filed with the Commission and a letter he allegedly wrote to his father while he was held in Naivasha Maximum Prison.

77. The complaint mainly reiterates the contents of the Petition. The same does not lend any credit to proving the contents.

78. A copy of the letter was annexed as one of the exhibits in the Petitioner's Supplementary Affidavit. At the hearing, the Petitioner produced the original of the letter in issue. On being cross-examined on the letter, the Petitioner stated as follows: -

.... *The address is Nairobi and it is addressed to Josephat Esilaba. **The original of that letter is produced as an exhibit in Court...***

79. The Petitioner also testified that his father, to whom the letter had been addressed to, passed on in 2017. However, the Petitioner did not explain how he managed to get back the original letter which he had sent to his father. There is totally no evidence to connect the *dispatch* of the letter by the Petitioner to his father and the *return* of the said letter to the Petitioner. As such, it is reasonable for one to conclude that the letter is an afterthought. It is highly probable that the Petitioner did not author any letter to his late father. It is still probable that the letter was authored much later with an intention to mislead the Court.

80. With such a finding, the Petitioner's contention that he was arrested and tortured solely rests on his oral evidence. The position is opposed and the Petitioner was put into strict proof by the Respondent right from the Respondent's responses.

81. The Petitioner had ample opportunity to adduce evidence to prove that indeed he was arrested and tortured. From his testimony in Court, and apart from availing documentary evidence, the Petitioner could have availed at least one witness. For instance, he could have called any of his six siblings or any of his colleagues whom the Petitioner alleges to have been arrested with, tortured and subsequently released together.

82. The effect of the foregoing is that the allegation that the Petitioner was arrested and tortured is not ascertained. By placing the evidence of the Petitioner and that of the Respondent side by side on the issue, the scales of justice weigh in favour of the position that the allegation is not proved. A party should not only plead, but also prove a fact which a Court is to believe. That is a cardinal, and indeed basic, principle in law.

83. In sum, there is a lot of premium in the Respondent's contention that there is no evidence that the Petitioner was arrested and tortured. To the contrary, there is evidence contained in the Certificate of Service that the Petitioner was a member of the Keya Air Force from 2nd July, 1974 to 31st July, 1982. In arriving at the position on the issue, I must say that there is a possibility that the Petitioner was actually arrested and detained, but it is all about evidence.

84. In the end, the Petition is not proved. Had it been proved, and in consideration of comparable decisions and the period the Petitioner was allegedly incarcerated, this Court would have awarded the sum of Kenya Shillings Ten Million Only (Kshs. 10,000,000/=) as compensation.

85. The above discussion is sufficient to bring this matter to an end. The Petition is hereby dismissed on account of failure to prove that the Petitioner was arrested and tortured from 1st August, 1982 to 1st June, 1986.

86. There shall be no orders as to costs.

87. Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF JULY 2021.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Wandaka, Learned Counsel for the Petitioner.

Mr. V. G. Thabi, Learned Special Counsel appearing on behalf of the Honourable Attorney General for the Respondent.

Elizabeth Wambui – Court Assistant.