



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 225 OF 2016**

**IN THE MATTER OF ARTICLE 22 & 23 (1) & (3) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMTNAL RIGHTS AND FREEDOMS UNDER ARTICLES 21,  
28, 29, 31, 32, 33, 36, 39, 43, 49 AND 50**

**OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND  
FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES, 2006**

**BETWEEN**

**PATRICK LUMUMBA KOWADE.....PETITIONER**

**VERSUS**

**THE HONOURABLE ATTORNEY GENERAL .....RESPONDENT**

**JUDGMENT**

**PETITIONERS CAS**

1. The Petitioner through a Petition filed on 3<sup>rd</sup> June 2016 prays for the following reliefs:-

a. That this honourable Court issue a declaration that the Petitioner's fundamental rights and freedoms under Articles 28, 29 (a-f), 31, 32, 33, 39, 43, 48, 49(1) (a, b, c, d & f) and 50 of the Constitution of Kenya have been and were contravened and grossly violated by the military police and armed forces and other Kenyan Government servants, agents, employees and institutions on dates specified above and/or in the Petitioner's Supporting Affidavit herein attached and on diverse dates thereafter.

b. That this Honourable Court declare 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 Constitutional provisions stated in (a) above.

c. For an award of general damages and exemplary damages on an aggravated scale, under Article 23(3) of the constitution for the aforementioned violations.

d. That the costs of this humble petition be provided for.

e. For such other order(s) writs and/or directions as this Honourable Court shall deem fit and just.

2. The Petitioner's case is that on 2<sup>nd</sup> August 1982 he heard an announcement on the radio requiring all members of Kenya Air Force to report to their command posts and being a man of Kenya Air Force, he duly went to the Eastleigh Airbase. He was with no warrant or explanation bundled into a truck by military police and army officers and taken to Kamiti Prison, where he was stripped naked and detained illegally for 8 days. On 10<sup>th</sup> august 1982 he was transferred to Naivasha maximum prison by the military police and army officers.

3. The Petitioner aver that from the time of his arrest and transfer to Naivasha Maximum Prison his family were not aware of his whereabouts and he was not allowed any visitation thus creating an impression that he was a very dangerous person and any one associating with him would be courting danger. The Petitioner contend the cell in which he was held was inhospitable, inhuman and degrading. He was made to sleep on a cold floor and sometimes the cell would have stagnant water logged inside. He was subject to further humiliation and torture which included severe beating, poor feeding and being paraded naked. He was occasionally interrogated and during the questioning compelled to sign what can only be deemed as a forced confessions to implicate him on baseless accusations of taking part in the coup against the government.

4. On 27<sup>th</sup> April 1983 the Petitioner was discharged from the Airforce and presented within a certificate of service before being served with a detention order. He was dressed in civilian clothes and given a Bible. He was returned to cells within the same Naivasha G.K. Prison and compelled to sign a back dated detention order and told that whether he signed or not, he would remain detained and there was not much he could do. The order was signed by the minister for Internal Security on behalf of the government, one Ole Tipis.

5. The Petitioner was subsequently presented in front of a tribunal which was commenced once every six months, which tribunal only dealt with welfare matters and not concerned with his release. On 1<sup>st</sup> June 1986 after 4 years of detention, the Petitioner was taken to dress in civilian clothing and given his personal belongings among which included the detention order and a Bible, bundled into a car with others and driven to Sondu from where he was told that he had been released and asked if he could find his way home. He opted to disembark and slowly make his way home.

6. The Petitioner gave evidence before this court and adopted his witness statement dated 25<sup>th</sup> October 2019 (exhibit 1 (a) and supplementary affidavit sworn on 18<sup>th</sup> January 2017 (exhibit 1(b) and annexures thereto) as his evidence in Chief. He averred that when he was released he was not in good health and his sickness lasted until 1998.

#### **RESPONDENT'S CASE**

7. The Respondent is opposed to the Petitioner's Petition and in doing so filed grounds of opposition dated 30<sup>th</sup> November 2016 and Replying Affidavit by Major Daniel Muu Kiama sworn on 24<sup>th</sup> February 2017.

8. The Respondent denies all the allegations averred in the Petitioner's Petition. The Respondents Replying Affidavit do not admit any of the allegations set out in the Petitioner's Petition.

9. The Respondent called R.W1 Major Daniel Kiama, Commissioned Officer of Kenya Defence Forces as a witness who adopted the Replying Affidavit sworn on 24<sup>th</sup> February 2017 and statement dated 12<sup>th</sup> November 2017 (exhibit R 1(a) and R 1(b) respectively as his evidence in Chief.

#### **ANALYSIS AND DETERMINATION**

10. I have very carefully considered the parties rival pleadings; oral evidence and counsel rival written submission and from the above the issues arising for consideration are as follows:-

*a) Whether there is limitation in law within which a claim based on violation of fundamental rights and freedoms may be instituted?*

*b) Whether the Petitioner fundamental rights and freedoms under Articles 28, 29, 31, 32, 33, 39, 43, 48, 49 (1) (a) (b) (c) (d) and (f) and 50 of the constitution of Kenya have been contravened by the military police, armed forces and other Kenyan government servants, agents, employees and institutions?*

*c) What reliefs is the Petitioner entitled to (if any)?*

#### **A. WHETHER THERE IS LIMITATION IN LAW WITHIN WHICH A CLAIM BASED ON VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS MAY BE INSTITUTED?**

11. The Respondent avers that the Petitioner's claim is barred by the doctrine of laches having been instituted thirty four years after the alleged contravening of the Petitioner's constitutional rights. It should nevertheless be noted that the constitution does not set a time limit within which a claim based on violation of fundamental rights and freedoms may be instituted. This position is based on the fact that a claim under constitution is neither a claim in fort nor contract so as to require the application of the Limitation of Actions Act (Cap 22) Laws of Kenya. In the case of *Dominic Arony Amolo v. Attorney General Nairobi High Court Misc. Civil Case No.1184 of 2003 (OS) [2010]* the Court stated that:-

***“I therefore, think and I so hold that Section 3 of the constitution excludes the operation of Cap 22 with regards to claims under fundamental Rights and further that Fundamental Rights provisions cannot be interpreted to be subject to the legal heads of legal wrongs or causes of action enunciated under the Limitation Act Cap 22.”***

12. In the case of *Wellington Nzioka Kioko v. Attorney General [2018] eKLR* the Court of Appeal found no plausible reason for delay had been rendered by a Petitioner who had lodged a claim thirty-three years after the event. In the Court's word it was stated :-

***“The reason given for not filing the Petition with promptitude were that he was poor, he did not have parents, and that his***

family depended on him. Those in our view are not plausible reasons. The appellant could have gone to court and applied to file the claim as a pauper. There is no evidence that he tired pursue that route. Could it be that the appellant had not suffered and only decided to lodge the claim because others had done so and they had been compensated? We cite with approval the following finding by Majanja J in *James Kanyita Nderitu vs. A.G and Another*, Petition No. 180 of 2011.

*“Although there is no limitation period for filing proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under section 84 of the constitution, its entitled to consider whether there has been inordinate delay in lodging the claim. The Court is obliged to consider whether justice will be served by permitting a respondent, whether an individual or the State in any of it manifestations, should be vexed by an otherwise stale claim. Just as a Petitioner is entitled to enforce its fundamental rights and freedoms, a respondent must have a reasonable expectation that such claims are prosecuted within a reasonable time.”*

13. In the instant Petition, the petitioner gave evidence and was cross-examined. He gave the reasons why he could not file a Petition during Moi’s regime or Kibaki’s regime as that he feared he could not get justice. That the threat ceased from 2013 – 2016. The Petitioner gave evidence that he was ostracized, denied access to many social amenities and employment. That he feared for his life and this stopped him from seeking counsel services until change of the regime. The Petitioner also averred that it was impossible for him to institute legal proceedings upon his release from detention since he lacked financial capability due to loss of employment and subsequent detention. He stated further he was sickly upon release owing to the inhuman conditions that he was subjected to while in detention. It’s a reality of life that intense mental and psychological torture can take long time for one to heal. The Petitioner herein having been subjected to such inhuman treatment could not have been expected to have healed suddenly. That through the constitution does not impose a time limit for filing of cases seeking enforcement of constitutional rights, it does not allow litigants the carte blanche to sit on their laurels for years on end only to institute claims long after the occurrence of the events complained about. However in the instant Petition the petitioner has given a plausible justification for the delay. I find the interest of justice shall be served by disregarding the technicalities.

**B. WHETHER THE PETITIONER FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 28, 29, 31, 32, 33, 39, 43, 48, 49 (1) (A) (B) (C) (D) AND (F) AND 50 OF THE CONSTITUTION OF KENYA HAVE BEEN CONTROVERTED BY THE MILITARY POLICE, ARMED FORCES AND OTHER KENYAN GOVERNMENT SERVANTS, AGENTS, EMPLOYEES AND INSTITUTIONS?**

14. The Petitioner in his petition avers a number of the Constitutional rights and freedoms were violated by the Respondent. The Respondent contend that the repealed constitution, which was applicable when the alleged infringements are said to have occurred, did not provide for the rights to a clean and healthy environment, economic and social rights, the right to access justice and itemized rights of an arrested person in any way as those rights are defined by the constitution today under Articles 42, 43, 47 and 49 of the Constitution of Kenya 2010. It is therefore Respondents position that the Petitioner’s Petition should not succeed as there was no constitutional infringement.

15. The Respondent referred to the case of *Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 Others*, [2012] eKLR in which the Court pronounced that:

*“At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of the Constitution. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the Court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately occurred before the commencement of the Constitution.”*

16. *Article 25 of the Constitution* provides:

*“25. Fundamental Rights and freedoms that may not be limited Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited-*

- a) freedom from torture and cruel, inhuman or degrading treatment or punishment;*
- b) freedom from slavery or servitude*
- c) the right to a fair trial; and*
- d) the right to an order of habeas corpus.”*

*From the above it is clear the rights under Article 25 of the Constitution must not be limited no matter the circumstances.*

17. In the instant Petition the Petitioner produced a letter he wrote while in detention, he was in detention till 1986 when he was released. His right not to be subjected to torture, cruel, inhuman and other degrading treatment as envisaged under Article 29(d) (c) (i) (f) of the constitution was violated during the detention period. He called evidence which the Respondent did not controvert. **Article 29 of the Constitution** provides:

*“29. Freedom and security of the person*

*Every person has the right to freedom and security of the person, which includes the right not to be—*

*d) subjected to torture in any manner, whether physical or psychological;*

*f) treated or punished in a cruel, inhuman or degrading manner.”*

18. The Petitioner in his witness statement and during examination in chief, stated that he was bundled into a truck at Eastleigh Airbase by Military Police and army officers, with no warrant or explanation and taken to Kamiti Prison where he was paraded naked and detained illegally for 8 days; later transferred to Naivasha G. K. Maximum Prison where he was held in cells that were inhospitable, inhuman and degrading. He was made to sleep on a cold floor and sometimes the cell would have stagnant water logged inside which he had to drink and answer nature's calls, which was never changed. He would be severely beaten, poorly fed and be paraded naked in an attempt to extract a confession from him over his alleged involvement in the coup.

19. I find from the Petitioner's unchallenged evidence that the Petitioner's right to respect for his dignity and freedom from inhuman and degrading treatment as guaranteed by **Article 28 and 29 of the Constitution and Article 10(1) of the ICCPR** which states that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of human person deprived of their liberty. The rights similarly protected by Article 3 of the Geneva Covenant were violated by the Respondent.

20. Black's Law Dictionary, 10<sup>th</sup> Edition describes torture as follows:

*“The infliction of intense pain to the body or mind to punish, to extract a confession or information or to obtain sadistic pleasure.”*

21. The European Convention on Human Rights has defined torture and inhuman treatment in Greek Case 1969 Y.B. Eur. Conv. On H R 186 [Eur. Comm'n on H2 in the following:-

*“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 degrading if it grossly humiliates him before others, or dries him to an act against his will or conscience.”*

22. The Petitioner further evidence is that he was unlawfully detained in Kamiti prison for 8 days before being transferred to Naivasha Maximum Prison where he spent 4 years in detention. After his arrest the Respondent made no attempt to take him before any Court. **Article 49 (1) (f) (i) (ii) of the Constitution** provides:

*“49. Rights of arrested persons*

*1) An arrested person has the right—*

*a) to be informed promptly, in language that the person understands, of—*

*i) the reason for the arrest;*

*ii) the right to remain silent; and*

*iii) the consequences of not remaining silent;*

*f) to be brought before a court as soon as reasonably possible, but not later than—*

*i) twenty-four hours after being arrested; or*

*ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day”*

23. In the case of **Ann Njogu & 5 others v R [2007] eKLR** Hon. Justice Mutungi, (as he then was) declared the detention of the 6 applicants thereto to be illegal and a violation of their constitutional rights.

24. The Respondent contend the Petitioner was subjected to a fair trial; that he was properly arrested due to his involvement in the 1982 attempted coup by member of disciplined forces. That he was properly charged under the Armed Forces Act (now repealed). That the Petitioner was subjected to summary trial and duly convicted in accordance with **Part VII of the Armed Forces Act** and he was properly dismissed from the Armed Forces. The Respondent witness RW1 Major Daniel Kiama in his evidence confirmed the Petitioner was not tried and urged the cases were dropped summarily. RW1 had no Court records to support that the Petitioner had a fair trial as the documents were not available.

25. I find from the evidence on record that the Petitioner has demonstrated that he was under detention for four years without any charge

being preferred against him or without being brought before a Court martial or any other Court, and that in my view constitutes a breach of his constitutional right to personal liberty. I further find that any detention of a suspect beyond the period prescribed in the constitution is illegal and unlawful. I find the Petitioner being a citizen of Kenya and a service man in Kenya Air force then he was entitled to protection of the law like any other citizen. In ***Petition No. 49 of 2012 Estate of Captain Kariuki Kingaru Murebu (Ded) & 8 others v Attorney General [2014] eKLR*** the Court held that men in uniform were not only citizens to whom the constitution applied but were also covered by the Armed Forces Act by virtue of their employment.

26. In the instant Petition there is no dispute that at the time of the arrest of the Petitioner the military police or army officers did not produce any warrant of arrest or explained to the petitioner as to why he was being arrested. He was bundled in a truck at Eastleigh Airbase and taken to Kamiti Prison, where he was detained for 8 days before being transferred to Naivasha Maximum prison. This was a violation of the petitioner's rights as provided under ***Article 49(1) (f) of the Constitution***. The Petitioner in his evidence and even during cross-examination stated that he was never subjected to any court martial or any proceedings under the disciplinary law of the force. He was discharged from the Air force on 27<sup>th</sup> April 1983 and presented with a certificate of service without any dues. The Respondent called RW 1 Major Daniel Kiama, who did not produce any documentary evidence of disciplinary proceedings or summary dismissal as required by law. In view of this I find that was a violation of the Petitioner's fundamental rights or human dignity, protection of law, personal liberty and freedom from torture, cruel, inhuman and degrading treatment and the right to a fair trial and expeditious trial.

27. The Petitioner in his evidence produced a certificate of discharge as exhibit in which the Petitioner is shown to have been discharged from the Airforce on 1/8/1982 yet he was arrested on 2<sup>nd</sup> August 1982. This demonstrates lack of integrity on part of the Respondent or foul play as it could not have been possible for Petitioner discharged to have been before the alleged act of coup had taken place. The proper procedural way should be vice versa. It is of great concern to note the Petitioner upon his arrest he was treated like a common criminal even before he was put on trial, (which trial never happened). He testified during detention he was only allowed communication with the outside world every six months by a way of a letter; Whose contents were restricted as he was not allowed to disclose where he was and the letter had to be screened by security officers in the prison which was a clear contravention of ***Articles 31 and 36 of the Constitution of Kenya, 2010***. He avers during the period of detention his family did not know where he was and that he was not allowed any visitation, creating an impression that he was a very dangerous person as anyone associating with him would be courting danger. It is therefore clear that due process guaranteed to an accused person, thus the right to presumption of innocence under ***Article 50 (2) (a) of the Constitution*** and further ***Article 7(1) (b) of the African Charter on Human and peoples Rights; Article 14(2) of the ICCPR, and Article 6(2) of the European Convention on Human Rights***, which provides "***everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law***", a right also guaranteed in ***Article 11(1) of UDHR*** was violated as against the Petitioner.

28. From the uncontroverted evidence by the Petitioner, I find that he was subjected to physical assault during the arrest, arbitrary detention in deplorable conditions at Kamiti Maximum Prison and Naivasha Prison which caused the Petitioner physical pain. This was a clear violation of the Petitioner's fundamental rights, and freedoms that are not limited in freedom from torture and which include cruel, inhuman or degrading treatment as guaranteed by Article 25, 28, 29, 43, 49 and 50 of the Constitution of Kenya, 2010.

### **C. WHAT RELIEFS IS THE PETITIONER ENTITLED TO (IF ANY)?**

29. I have come to the conclusion herein above that the Petitioner's fundamental rights were infringed by the Respondents due to the illegal detention, and the petitioner's discharge from employment without terminal dues making his survival and that of his family difficult and miserable due to lack of finance.

30. It is also not disputed that while the Petitioner was in Detention he contracted skin complications and did not have a clean bill of health due to deplorable and inhuman conditions in the cell. He underwent intense mental and physical torture which took him quite along time to heal. The Constitution of Kenya is clear and specific and direct that compensation is a necessary consequence of breach of the right to personal liberty and that the court has jurisdiction under ***Article 23(3) of the Constitution*** to grant appropriate relief including an order of compensation for breach of fundamental rights. One such remedy, no doubt include general damages which court has discretion to grant.

31. The evaluation of damages is however a matter of discretion taking into account the violation, manner of violation, intensity and length of violation as well as inter alia past decreed cases on the same subject matter.

32. To the extent of my findings I find that the Petitioner's petition is meritorious and I proceed to make the following orders in favour of the Petitioner.

***a) A Declaration BE AND IS HEREBY issued that the Petitioner's fundamental rights and freedoms under Articles 28, 29 (a-f), 31, 32, 33, 39, 43, 48, 49(1) (a), (b), (c), (d) & (f) and 50 of the Constitution of Kenya have been and were contravened and grossly violated by the military police and armed forces and other Kenyan Government servants, agents, employees and institutions on dates specified and noted in the Petition and/or in the Petitioner's Supporting Affidavit herein and on diverse dates therein.***

***b) A Declaration BE AND IS HEREBY issued 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 Constitutional provisions stated in prayer (a) above.***

***c) The Petitioner is awarded general damages of Kshs.8 million and Kshs.1.5 million as exemplary damages on an aggravated scale under Article 23(3) of the Constitution for aforementioned violations.***

***d) Costs of the Petition is awarded to the Petitioner.***

**Dated, Signed and Delivered at Nairobi on this 4<sup>th</sup> day of June, 2020**

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**J. A. MAKAU**

**JUDGE**