



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

**PETITION NO 602 OF 2017**

**STEPHEN NJOROGE MBURU.....PETITIONER**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE PRINCIPAL SECRETARY MINISTRY OF INTERIOR AND.....**

**COORDINATION OF NATIONAL GOVERNMENT.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. **Stephen Njoroge Mburu**, the Petitioner, filed this petition against the **Hon. Attorney General**, the principal legal advisor to the national government and the Principal Secretary in the Ministry of Interior and Coordination of National Government, the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively for violation of his rights and fundamental freedoms by state agents.

2. The petitioner averred that on 10<sup>th</sup> May 1991 while carrying on his duties as Assistant Manager in charge of operation, at the National Bank of Kenya, he was arrested by two plain clothes police officers. This, he stated, happened in the presence of his boss, the Branch manager. He averred that he was taken to Nairobi Traffic Headquarters under tight security but was not told the reasons for his arrest.

3. The petitioner further averred that he was later escorted to Kilimani Police Station still under tight security where he was detained for 4 hours and still without being told why he was arrested or was being held. He stated that he was put in the boot of a car, taken to an isolated place in Upper Hill Nairobi, was blind folded and later taken to Nyayo House where he was locked in a cold cell for 13 days in solitary confinement and incommunicado.

4. It is the petitioner's case that during the 13 days of incarceration in Nyayo House, he would be taken in a lift in blind folded into the interrogation room where more than 20 men would be waiting and who would ask him to reveal reason for his arrest. He stated that without revealing reasons for his arrest to him, they would return him to the cell where he would be stripped naked and would remain naked in the cold cell in total humiliation and torturous circumstances. He stated that during interrogation sessions, he would be insulted and threatened with murder for failing to disclose reasons for his arrest and detention.

5. He averred that he was eventually released after 13 days without being taken to court or charged. He therefore contended that these actions violated his rights and fundamental freedom guaranteed in sections 72(3)(b) 74(1) and 77(1)(7) of the appealed constitution and sought the following reliefs.

***a. A declaration that the petitioner's fundamental rights and freedoms were contravened and grossly violated by the Respondent's plain cloth Police Officers who are Kenya Government Servants, agents and/or employees in its institutions on 10<sup>th</sup> of May 1991 for 13 days at various Police Stations and thereafter at Nyayo House torture chambers.***

***b. 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.***

***c. General damages, exemplary damages and Punitive damages on an aggravated scale under Section 84(2) of the Constitution of Kenya 1969 for the Unconstitutional conduct by the Kenyan Government Police, servants and/or agents be awarded and assessed by the Honourable Court.***

***d. Any further orders, writs, directions, as this Honourable Court may consider appropriate.***

## **Response**

6. The respondents filed grounds of opposition dated 13<sup>th</sup> February 2018 and filed in court on 14<sup>th</sup> February 2018. They contended that the Kenya Police is a professional Service and as the custodian of the rule of law, they respect and uphold individual's equality and freedom before the law as enshrined in the constitution; that there is no report or record at Kilimani Police Station showing that the petitioner was ever confined at the station and that there is no evidence that while at the station the petitioner was tortured.

7. The respondents further contended that there was unreasonable delay in filing this petition, contending violation of rights and fundamental freedoms without offering any explanation or evidence for it. They also contended that the petitioner is abusing the constitutional protection of rights in bringing claims before the court with the sole aim of enrichment rather than vindication of rights given the delay of more than 20 years in bringing this action.

8. The respondents further contended that there is insufficient material disclosure to demonstrate that the petitioner was arrested, detained and tortured at Nyayo House as alleged.

## **Evidence**

9. The petitioner who testified as **PW1** told the court that in May 1991 he was at the Bank's Harambee Avenue Branch where he worked as the Assistant Manager operations, including oversight of departments such as current, savings and cash accounts.

10. He told the court that on 8<sup>th</sup> May 1991 he was in the office when a stranger tried to get in touch with him at his Ngumo House and his wife called to inform him about the incident. When he went home, the stranger again called and when the petitioner answered the call, the caller told him he knew the petitioner and identified himself as **Kennedy Vietnam**. The caller informed the petitioner that he wanted to discuss some issues the petitioner was aware about and asked the petitioner to meet him the following evening at **Eureka Restaurant** but the petitioner declined. The caller however agreed to go to the petitioner's office.

11. According to the petitioner, on 10<sup>th</sup> May 1991, two men went to his office and introduced themselves as Police Officers without disclosing their names. They informed him that he was under arrest without disclosing the reason for his arrest.

12. The Petitioner testified that he called the Branch Manager, **Evans Muriithi** who went to the petitioner's office and left with one of the officers in his office. He testified that after sometime, **Mr. Muriithi** returned with the person and informed the petitioner that the authorities were aware that he would be arrested.

13. The petitioner told the court that he left with the officer to Nairobi Area Police Headquarters where he was made to sit on chair along the corridor from 10am to 12 noon; that he was later taken to Kilimani Police station where he was again made to sit on the floor under watch; that he was later taken to Nyayo House where he was interrogated. He was then taken around the city and later returned to Nyayo House where he was taken to a small dark room and locked in and that he was only served with tea. He testified that he was then taken for interrogation where he met about 20 men who did the interrogation. He told the court that he was stripped naked and tortured in the process.

14. The petitioner testified that he was in the cell for 13 days sleeping on the floor without a mattress and that he was kept in the cell for 5 days without meals. The petitioner told the court that two days before he was released, he was given a few clothes and there after he was put in the boot of a car and taken to CID Headquarters where he was given his items before he was taken back to Nyayo House. He was eventually released on 15<sup>th</sup> December 1991 without any charge being preferred against him or given the reason why he had been arrested.

15. In Cross Examination, the petitioner told the court that he was an employee of National Bank although he had no documents to prove that. He stated that the persons who arrested him were strangers to him but had introduced themselves to him and the Branch Manager as Police Officers. He maintained that he was blindfolded and taken to Nyayo House. He told the court that although he was tortured and had seen a Doctor after his release, he had no medical evidence in court,

16. **PW2, Joice Wangui Mburu**, the Petitioner's wife, told the court that on 8<sup>th</sup> May 1991 a house help informed her that there had been several calls during the day; that someone called **Kmendi Vietnam** had called asking to speak to the petitioner and that her husband (the petitioner) had been investigating fraud in the bank. She told the court that she called the petitioner and informed him about the calls. Later the petitioner was arrested on 10<sup>th</sup> may 1991 and detained for several days. She told the court that when her husband was eventually released, he looked confused and she did not know why he was not charged in court.

17. In Cross examination, the witness told the court she did not witness the petitioner's arrest. She however told the court that he was tortured although she also did not witness this. She also told the court that she did not know who had arrested the petitioner. At the close of the Petitioner's case, the respondents opted not to call evidence and closed their case.

## **Petitioner's Submissions**

18. The petitioner filed written submission dated 28<sup>th</sup> March 2018 and filed on 29<sup>th</sup> March 2018. It was submitted that the petitioner was subjected to inhuman treatment and torture when he was arrested in 1991; that his right to fair hearing; dignified treatment while in Police custody were violated.

19. Responding to the respondents' contention that the petition was time barred, it was submitted that equitable doctrine of laches does not apply to nullify human rights litigation based on violation of constitutional rights and relied on the decision in **Harun Thiongo Wakaba v the Hon Attorney General**[2010]eKLR for this submission.

20. Referring to the petitioner's evidence, it was submitted that the petitioner was subjected to unjustified arrest; confinement at Nyayo House; tortured and treated in an inhuman manner. It was contended that the petitioner had sufficiently proved his case and demonstrated that his constitutional rights and freedoms were violated contrary to the provisions of the repealed constitution including sections 72, 74 and 77. It was submitted that violation of the right to protection to personal liberty; detention without justifiable cause and torture for 15 days where he was stripped naked, kept in a cold water logged dark cell without food and without a charge or being produced in a court of law violated rights and fundamental freedoms. On the level of damages, it was submitted that Kshs.20 million would be a fair compensation and Kshs.6,591,520 for medical treatment.

### ***Respondents' Submissions***

21. The respondents filed written submissions dated 15<sup>th</sup> October, 2018 and filed on 17<sup>th</sup> October 2018. It was contended on behalf of the respondents that the petitioner had failed to prove his petition; that there was no evidence to support the petition that the petitioner was arrested, tortured or that the people who arrested him were police officers and that he was detained at any Police Station or Nyayo House.

22. It was further contended that the petitioner had not proved that he was ill-treated or that he fell ill due to the treatment he was subjected to while in police custody since no medical evidence was produced. The respondents relied on sections 107 and 109 of the Evidence Act for the submission that the burden of proof is on the petitioner. Reliance was also placed on the case of *China Wuyi and Co. Ltd v Samson K Melta [2014]eKLR* (CA No 81 of 2009) for the submission that the cardinal principle of law requires that he who alleges must prove.

23. Regarding the allegations of violation of fundamental rights, it was submitted that it was incumbent upon the petitioner to prove that his contention of violations of rights and freedoms are true. Reliance was placed on the case of *Peter Ngari Kagume & Others v Attorney General* (Petition No 128 of 2016)

24. It was also contended that there was no explanation why the petition was brought after 21 years and the respondents relied on the case of *Ochieng Kemeto K'gollo v Kenyatta University & 2 Others* (Petition No 306 of 2012) on the delay in filing the petition. They urged the court to dismiss the petition.

### ***Determination***

25. I have considered this petition the response thereto, evidence adduced and submissions by counsel for the parties. I have also considered the authorities relied on by both sides. The issue raised in this petition is primarily whether the petitioner's rights and fundamental freedoms were violated and what level of compensation could be granted, if at all.

26. The petitioner has contended that on 10<sup>th</sup> May 1991, he was arrested from his office by persons who identified themselves as police officers but that he was not told why he had been arrested. According to the petitioner, two days earlier, a person who identified himself as "Kennedy Vietnam" had tried to reach him through his home telephone number and when he eventually managed to talk to him, the caller tried to set up a meeting at a Nairobi restaurant known as *Eureka* but the petitioner declined. This was on 8<sup>th</sup> May 1991.

27. After the petitioner declined the meeting, two men who identified themselves as police officers went to his office on 10<sup>th</sup> May 1991 and arrested him. His branch Manager talked to these people and informed the petitioner that authorities were aware that he was being arrested.

28. The petitioner testified that he was taken to various police stations and ended up at Nyayo House where he was tortured and subjected to inhuman and degrading treatment. He stated that he was kept in a dark, cold water logged cell while naked, without food and was interrogated during which time he was threatened with death. He was eventually released after 15 days without being charged with any offence and was not produced before a court of law.

29. The petitioner called one witness, *Joyce Wangui Mburu*, his wife, who relied on her witness statement narrating how her husband had been arrested and the efforts she made in trying to establish why he was arrested without success. She and relatives visited various police stations to ascertain whether the petitioner was there without to no avail. Her husband was released after 2 weeks.

30. The respondent filed grounds of opposition in opposing the petition contending that the petitioner had not shown that he was arrested as there were no records at the police stations mentioned or Nyayo House; that there was delay in filing the petition and that the petitioner had not explained the cause of the delay. In their view, the petitioner was abusing constitutional protection of rights to bring this petition that late.

### ***Whether Petitioner's Rights were violated***

31. This is a constitutional petition challenging violation of rights and fundamental freedoms. The acts complained of took place in 1991 during the repealed constitution. That constitution protected rights and fundamental freedoms of individuals. Section 72 in particular had limited instances, when a person's liberty could be interrupted. The section provided with respect to arrested persons that 72(2) "*a person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.*" Section 72(3)(b) provides that a person who is arrested and detained;

***"upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with."***

32. A person's right to liberty could therefore be interrupted when suspected of committing or about to commit a criminal offence. The person, if arrested, had to be produced in court within 24 hours if he had committed or was suspected of committing a misdemeanor or 14 days if he had been arrested on suspicion of committing a capital offence. That was a constitutional limit that had to be implied with. Where it was not, the onus was on the police or those responsible for the arrest to show that they had complied with that constitutional demand and if not why they did not do so.

33. In that respect, the Court of Appeal held in Albanus Mwasia Mutua v Republic [2006] eKLR that it was a violation of one's fundamental rights to fail to produce him/her in court within the stipulated period. The court went on to state that ***"it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place"***.

34. The constitution further prohibited in absolute terms torture or any treatment that resembled torture including in human and degrading treatment. Section 74 (1) provided that ***"No person shall be subject to torture or to inhuman or degrading punishment or other treatment."*** Although the constitution did not define torture, Article 1 of the UN Convention Against Torture defines "torture" to mean

***"Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."***

35. Courts have also weighed in and tried to define torture. In the case of John Muruge Mbogo v Chief of the Kenya Defence Forces & another [2018] eKLR the court stated that

***"[51] Section 74(1) of the repealed Constitution provided that "no person shall be subjected to torture or to inhuman or degrading punishment or other treatment" In my respectful view, the section used a disjunctive word "or" followed by "Other treatment" which meant torture, inhuman or degrading punishment or other treatment were prohibited. The words "or other treatment" used in section 74(1) being a constitutional provision conferring fundamental rights, should be given a broad, liberal and flexible interpretation to include any such treatment that is unusual to human beings and is intended to humiliate a person for sadistic pleasure. Stripping the petitioner naked in public, forcing him to walk on his knees on concrete floors and keeping him in waterlogged cells, was such "other treatment" that was outlawed by section 74(1) of the repealed Constitution"***.

36. The provision of section 74(1) of the repealed constitution was a replica of Article 3 of the EU Convention on Human Rights. And with regard to that Article (Article 3 of the EU Convention), the EU Court of Human Rights stated in Selmouni v France (2000) 29 EHRR 403 that;

***"[99] The acts complained of where such as to arouse in the applicant feelings of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical and moral resistance. The Court therefore finds elements which are sufficiently serious to render such treatment inhuman and degrading...In any event, the Court reiterates that, in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3"***

37. The petitioner no doubt explained what he went through while in the hands of his captors. Miss Robi, learned counsel for the respondent, contended that the petitioner did not prove that he had been arrested by the police; that he was tortured and that as a result, his rights and fundamental freedoms were violated. There is no doubt that the experience the petitioner went through would amount to torture because torture does not have to be physical alone. Mental and psychological disturbance too would amount to torture. In Moses Tengeya Omweno v Commissioner of Police & another [2018] eKLR the Court of Appeal observed that torture does not have to be physical alone and that both mental and psychological infringement would amount to torture. There cannot also be doubt that the period of 15 days the petitioner was held incommunicado was outside that constitutionally permitted period and the respondent never offered any explanation why the petitioner was not produced in court.

38. The question that the respondent have raised to with regard to proof is that he was indeed arrested and tortured as he contends. The respondents have relied in sections 107 to 109 of the Evidence Act to submit and urge the court to find that the petitioner has not discharged the burden of proof with regard to arrest and torture.

39. I have agonized over this submission. The petitioner testified on oath and called a witness both of whom narrated how the petitioner was arrested and what he was subjected to. The respondents only filed grounds of opposition without an affidavit to controvert the petitioner's averments and what he and his witness stated on oath. This leaves evidence in oath visa vis a general statement in the form of grounds of opposition thus leaving the court with no option but to accept the petitioner's evidence.

40. With regard to the contention that there were no record that the petitioner was held at the named police stations or even at Nyayo House, this court is prepared to take judicial notice that during the height of the crackdown on dissent in the 1980s and 1990s the police would arrest and keep one in any police station and release him without record. It was therefore not uncommon to find people arrested at whims with no record of their whereabouts. If the evidence by the petitioner's wife (PW2) is anything to go by, there is evidence that the petitioner went missing for some time and his wife made every effort to trace him in various Police stations without success. The contention that there was no record at the police stations or at Nyayo House would not itself be proof that the petitioner was not arrested or held there given the history of the country then.

41. Finally there is the question of delay in filing this petition. The respondents have argued that the petitioner did not explain why he filed this claim late. The petitioner responded through submissions contending that laches cannot nullify constitutional provisions protecting liberty and freedoms of the person hence the claim was properly filed.

42. This is a novel issue that has been litigated in our courts for some time now. Courts have had different views on this issue some holding that a claim of this nature could not succeed after sometime while others hold the view that there is no limitation period in claims to redress violation of constitutional rights and fundamental freedoms. (See Harun Thungu Wakaba v Attorney General [2010] eKLR, David Gitau Njau & 9 others v Attorney General [2013] eKLR, Domnic Arony Amolo v Attorney General [2003]eKLR and John Muruge Mbogo v Chief of the Kenya Defence Forces & another [2018] eKLR).

43. The court of Appeal itself has, however held in Wellington Nzioka Kioko v Attorney General [2018] eKLR(CA No 268 of 2016), which is binding on his court, that one has to explain the delay in bringing such a claim. I have perused the petition and the supporting affidavit. They do not explain why the petition was filed in 2017 when the infringements took place in 1991, about 26 years later. Had the petitioner explained the delay, the decision would perhaps have been different. For that reason this petition fails and is dismissed with no order as to costs.

**Dated, Signed and Delivered at Nairobi this 18<sup>th</sup> Day of January 2019**

**E C MWITA**

**JUDGE**