REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

PETITION NO.118 OF 2014

IN THE MATTER OF SECTION 84 (1) OF THE CONSTITUTION OF KENYA (1969)

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTION 72(1), 72(2) 73 (3) 72(5), 74(1) 77(2) AND 79(1) OF THE CONSTITUTION OF KENYA (1969)

AND

IN THE MATTER OF ARTICLES 2,19,20,21,22,23,25,29,31, 32(1), 35, 39, 40, 50(1), 51, 165(3), 262 AND SECTION 7 OF PART 1 OF THE 6TH SCHEDULE OF THE CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF PAST AND CONTINUING INFRINGEMENT OF FUNDAMENTAL RIGHTS AND FREEDOM OF THE PETITIONER

GILBERT GUANTAI MUKINDIA.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

J U D G E M E N T

1. By a petition dated 20th March, 2014 the Petitioner, sought against the Attorney General judgment for various orders including a declaration that his rights had been violated by the Kenya Army and Prison officers for eight (8) months, a declaration that he is entitled to payment of general, exemplary and aggravated damages under Section 84(2) of the retired Constitution as well as an order that he get paid his withheld salary, emoluments terminal benefits and pension. He further sought to be awarded the costs of the petition

2. The short background of the petitioner's claim is that he was recruited into the Kenya Air Force during the month of August 1981, on a date he could not remember, and served till the 2nd August, 1982 when he and other were arrested on accusation of having participated in a plot to overthrow the Government of the Republic of Kenya. Upon arrest, the petitioner contends that he was entitled to due process in accordance with the then constitution as well as the Armed forces Act but was denied the due process but instead incarcerated in various prison facilities till 23rd October, 1982 when he was summarily unlawfully discharged with effect from 1st August, 1982 but was never put to any trial by the court martial. He faults the summary discharge for having been effected by 82 Air Force, an outfit he contends was unlawfully created pursuant no provision of any law, after the Kenya Air Force was unlawfully disbanded.

3. He narrated his incarceration for six (sic) months to have been torturous, being kept in a water logged cells, for which reason he suffered and continue to suffer deteriorating mental and physical health.

4. On his certificate of discharge he faulted the same for having contained several anomalies including the allegation of having been recruited into the Kenya Air force on 1st August, 1982, recruited into 82 Air Force in 2nd August, 1882 and discharge from the 82 Air Force on 9th February, 1983.

5. As a result of the matters aforesaid, the petitioner contends that his physical, psychological, economic and social life was adversely affected and he continues to suffer a deformity of the left lower jaw, stigma and posttraumatic stress disorder. On account of such damage he sought the four (4) substantive prayer as well as costs and interests. His grounds for pursuing the petition were that the Kenya Army and prisons officers had no legal right to hold him for more than 24 hours in inhuman conditions and incommunicado and therefore his incarceration for six months were in flagrant contravention of his right to personal liberty under Section 72(1) (3) and (5) of the then

Constitution. On his salary and benefits the Petitioner contended that the Defence Council had no legal authority to withhold the Petitioners emoluments and salary from 1st August, 1982 to February, 2011 being the anticipated date of retirement from Kenya Air Force.

6. In the petition, the Petitioner pleaded that he would rely upon international law on rights instruments, covenants and conventions as well as pronouncements by notable leaders and the Attorney General of the Republic of Kenya on reparation for victims of torture, Parliamentary motion of 2003 on compensation of torture victim, as well as decided cases on compensation of torture victims on the award of damages due.

7. The petition was opposed by the Respondent by the Replying Affidavit sworn by one Major Damars. A. Agnetta, an officer of the Kenya Defence Forces, deployed as the Staff officer II (S.O.II) Record, at the Defence headquarters, Nairobi. The deponent swore and maintained that from the records of the Defence Forces, there was no record of the Petitioner having been recruited nor served the defence forces at any time and at all. She took the position that the lapse of time taken, a period of some 32 years or thereabout, was clearly inordinate and thus prejudiced to the Respondent as the Respondent was totally unable to procure and access the persons with knowledge of the happenings of the attempted 1982 coup to testify on its behalf. She however admitted that after the attempted coup the members of Kenya Air Force was drastically reduced and that since that incident very many people had sued the Government alleging torture and several of such suits have been by masquerades. She further took the position that under the repealed Armed Forces Act, Section 176, a member of the force would be legally discharged from the service for among other reasons; reduction of the establishment, when services no longer required and for engagement in behavior that portends prejudice for preservation of public security and that with attempted coup the reduction was justified. On the proof of torture, the deponent took the stand that there should have been medical evidence which was never availed.

Evidence at trial

8. When the petition was set down for hearing the Petitioner was the only person who gave evidence just as only Major Damaris A. Agnetta was the sole witness for the Respondent.

9. In his evidence the Petitioner gave evidence that on being enlisted, he was assigned service No. 025252. He then underwent training for six (6) months at Lanet before being posted to the Armed Forces Technical College in Embakasi beginning February, 1982, from where he was released on holiday break on 30th February, 1982. He said that he spent his holiday with an uncle in Shari Moyo Nairobi, till the 1st August, 1982 when he heard over the radio that the armed forces had taken over the government and later an announcement came that all Air force personnel report to the nearest police station which order he obeyed by reporting to Embakasi police station from where he was taken into custody of the armed forces and thereafter ferried and detained at various locations including the Defence headquarters, Kamiti maximum prison, Naivasha maximum prison. At Naivasha Prison, he was subjected to cruel and degrading treatment by being tortured physically and eventually, was placed in water logged solitary cells all calculated to force him to admit that he had taken an active part in the attempted coup. He was however never charged in any court martial. The incarceration lasted 3 months whereafter he was put into a military truck and dropped at Machakos bus-station, given some money to go home while sick and without cloths nor shoes and directed to report to his local chief every Week for a period of 6 months. He said that he lost all his academic certificates and all other property during the incarceration.

10. He then added that he had severally visited the military headquarters pleading to be discharged but could not get any assistance. On late bringing of the Petition, the Petitioner asserted that he could not bring the same as long as President Daniel Arap Moi was the president of the Republic of Kenya. He then produced a medical report prepared by Dr. Fredrick R. Owiti, a consultant psychiatrist, who formed the opinion that the Petitioner had clear evidence of post limnetic tress-disorder symptoms which had remained unresolved and the Petitioner thus needed assistance with treatment. The petitioner then produced a letter before action issued and served upon the Respondent and giving notice of the intended Petition upon expiry of 30 days.

11. On cross examining he said he had no document to evidence recruitment into the service because he lost all his documents and that he was never given any letter of appointment. When referred to paragraph 14 of the Petition in which it was asserted that he had been discharged with anomalies on dates, he denied having been discharged ever. On the delay of some 32 years between the dates of his release from the alleged wrongful and unconstitutional incarceration and degrading treatment to the 2014 when he filed the petition, he admitted having proffered no explanation save that he could not file it while President Moi was still in power and that he waited to get legal advice that it was possible to bring the Petition.

12. He also said he had no discharge from prison because he was not there as a prisoner but under the control of Kenya Defence Forces and that having been taken to Naivasha Maximum Prison on a date he could remember and no documents were issued because, nobody was meant to know his whereabouts even though was not alone but with colleagues.

13. After release, the Petitioner said, he reported to the local Chief whose name he could not remember, every week for a period of six (6) weeks. On his mental status the petitioner confirmed being of sound mind without a history of psychiatric problems.

14. On his claim for withheld salary and emoluments he said he was not aware that the same had statutory time limits.

When re-examined, the witness said that he was never formally released from the Armed Forces but was just released and dropped in Nairobi without any reason advanced.

15. On the medical report the Petitioner said he visited Dr. Owiti to prepare a report as part of his evidence in the matter and lastly that the delay in bringing the petition did not change or right the violations visited upon him.

Evidence by the Respondent:

16. The deponent of the Respondent's Replying Affidavit was the only witness to be called by the Respondent. Her evidence was essentially reinstatement of the averments in the Replying Affidavit to the effect that he petitioner had not been recruited into the defence forces and

never served the said forces as there was no documents to show that he was ever recruited. She said that upon recruitment file is opened for every serviceman and that her search on the records office did not recover any record of the Petitioner having been recruited or served and thus his claim could not be verifiable.

17. On cross-examination, the witness said that the forces keep records of every recruitment and every serviceman is given a service number which is unique to such individual. The witness admitted that Lenaola J had issued an order that the Respondent avails to the Petitioner all documents evidencing engagement but the same was not availed because a concerted search on both soft and hard records did not reveal that the Petitioner had ever been in the service of Armed forces and that the number given by the petitioner had not been assigned to any individuals.

18. On re-examination, the witness said that Judge Lenaola issued his orders on 31st August 2015 and come 29th September 2017 the Petitioner the served a notice to produce but the respondent had not availed the desired documents.

19. When asked questions by the Court, witness said she was unable to say who the serviceman No.625253 was and that everybody who serves the armed forces is issued with a discharge certificate irrespective of how he leaves the service. She however, denied any knowledge on how those implicated in the 1982 attempted coup were dealt with.

Submission by the petitioner.

20. The copy of written submission show that the same were filed on 20th December 2018 but were not placed on the court file by the time the Deputy Registrar transmitted the file for preparation of this judgment, on the 11th February 2019. In those submissions the petitioner contended that he was indeed unlawfully arrested while on holiday from college and that following the arrest he was unlawfully detained and incarcerated at Kamiti and Naivasha maximum prisons from August 2012 for about three months without any lawful charge being preferred against him and that during the incarceration he was put to rigorous questioning and inhuman treatment including torture and denial of food which treatment visited upon the petitioner psychiatric disorder as confirmed by Dr. Owiti in the medical report produced. It was then submitted that upon being released from incarceration the petitioner's employment was unconstitutionally terminated without due discharge. It was then pointed out that the petitioner did serve a notice to produce ever and above the order by Court compelling the Respondent to provide the petitioner with all and any documents evidencing service as serviceman No.025253 between August 1981 and August 1982 but both elicited no action from the Respondent save for a reply to notice to produce dated 13th November 2017 which to the Petitioner was a mere denial and rebuttal. It was then highlighted that even the evidence tendered did not avail anything to show that the documents and the service number did not exist.

21. On the pertinent law, the petitioner cited to Court the provisions of sections 72(1) 92) (3) (5) and 6 as well as Section 74 of the retired Constitution on the need to be informed of the reasons for arrest and to be brought to Court within 24 hours of arrest and be tried within a reasonable time failure to which one is bound to be released adding that all were protected from being subjected to torture, inhuman or degrading punishment or other such treatment. On case law, the Petitioners cited to court the decision by Lenaola J as he then was, in ***Jacob Ntubiri Japheth and Others Vs. A.G (2016) eKLR*** where it was held that delay *per se* is not the only issue to be address but the justification of such delay and further that the holding of the Petitioners for months without being charged was a violation of Section 72 of the retired Constitution.

Submission by the Respondent

22. In the submissions filed on 26th January 2019, the Respondent attacked the petition on four grounds, being; inordinate delay in bringing the Petition which was prejudicial to the respondent; that there had not been proof on a balance of probabilities and lastly that no specific constitution violation had been pleaded hence to allow the Petition would be to trivialize constitutional jurisdiction of the court.

23. On inordinate delay, the respondent cited to court the decisions in ***Joseph Mugere Onoo Vs. A.G (2015) eKLR*** *and* ***Njuguna Githiru Vs. A.G (2016)*** in which the Court in dealing with similar petitions for violation of rights having been brought after undue delay observed that to consider determining such a petition by failing to recognize the general principles of law including periods of limitation expressed in the constitution would lead to anarchy. It was then pointed out that the petitioner when confronted to explain the delay after President Moi exited, he had no explanation to offer but was content to say that he could bring the Petition at any time.

24. For the delay the Respondent contended and bemoaned prejudice upon it when forced to defend a stale Petition when it was unable to gather its own documents and avail the people (witnesses) who were seized of the facts to give evidence.

25. On the burden and standard of proof, the Respondent took the position that the burden was always upon the Petitioner under Section 107 of the Evidence Act and never shifted the gravity of the allegations notwithstanding. It was stressed that there was no evidence produced to prove that the petitioner was ever recruited into the armed forces just like there was no evidence of detention even though the petition said he was detained with other colleagues. The other observation made was that the evidence contradicted the pleading regarding the discharge from the service and the psychiatric conditions of the petitioner. It was then contended that the court risk having its processes abused by claims that seek enrichment rather than vindication of rights.

26. On lack of specific pleading on violation of it constitution in terms of the decision in ***Anarita Karimi Njeru v Republic [1979] eKLR*** it being highlighted that the only specific pleading of a violation as at para 18 of its petition and regards unlawful imprisonment but there was no corresponding prayer sought. In conclusion it was submitted that the prayers for unlawful imprisonment and payment of salary and emoluments were conventional claims governed by the principles of the law of torts and the employment Act and Limitation period prescribed at three years. For those reasons the Respondent prayed that the Petitioner be disallowed with costs.

Issues for determination;

27. Having perused the pleading filed, the evidence and the submissions filed I have formed the opinion that the following issues beg to be determined by the court:-

i) Is the petition bad for having been brought after inordinate and undue delay?

ii) Has the petitioner proved having been a serviceman who was arrested and incarcerated between 2nd August and October 1982?

iii) If the above be answered in the affirmative, is the petitioner entitled to the remedies sought or any of them?

iv) What orders should be made as to costs.

Is the Petition bad for having been brought after undue and unexplained delay?

28. While it is the law that constitutional petitions are not strictly saddled by the statutes of limitation specially where violation of rights are alleged with persisting damage to the individual, it is also good law that even constitutional litigation ought to be presented with some promptitude so that evidence is not lost on account of passage of time. That is critical because expeditious disposal of legal disputes is the other way to underscore the mantra that justice delayed is justice denied. Where, however, there is admitted delay like in this case, where it took the petitioner a period in excess 32 years to bring the petition, it behoves such a petitioner to offer an explanation for the delay. Such explanation must be to the satisfaction of the court as plausible[1]. In ***Peter Ngari Kagume & 6 others v Attorney General [2016] eKLR,*** the Court of Appeal observed:

> ***"…the learned trial judge correctly observed that none of the appellants proffered any explanation for the delay of 24 years in coming to court. Whichever way one looks at it in the circumstances of this appeal, the delay spanning 24 years was inordinate. The appellants slept on their rights. We are unable to find fault in the findings made by the learned judge that in absence of a plausible explanation for delay, the suit amounted to abuse of the court process. On this ground also, the appeal would fail."***

29. In this matter the delay between the date of release, October 1982, to the 20th March 2014, when the Petition was filed, spans some 32 years or thereabouts. The only explanation given by the Petitioner is that while the retired president Moi was in power as the president it was impossible to file the petition. It is not made clear what made it impossible to file such a petition during the Moi presidency. It could have been of help to say the courts would not accept the petition or that the courts then would not accord much regard to such petition or just that the petitioner's life would be in danger. That was purely the onus of the petitioner to disclose his difficulties but he opted to be less than candid on that aspect. While I would accept the reasoning by the courts in ***Harun Thungu Wakaba vs Attorney General Misc Applic No. 1411 of 2004***, ***Okwengu J***, as well as ***Jennifer Muthoini's case (supra)*** that the political atmosphere before 2002 was difficult for litigation for the enforcement of rights and freedoms, I however take notice that there was fundamental and determinant shift in those political conditions after the 2002 elections. Based on that appreciation and while I would accept the delay between1982 to 2002, a better explanation was expected for the delay of another 12 years between 2002 and 2014. For the reason that no explanation was given at all the court is left with no option but to find that the Petitioner slept on his rights. That slumber has justified the complaint by the Respondent that it has been prejudiced in it defence in that it is unable to get any witness and documents which may be of help in its defence. That to me is the rationale for the need for promptitude in litigation which parliament has sought to address by the various periods of limitation in various statutes including Limitation of Actions Act and Public Authorities Limitations Act.

30. On that point I do find that this petition was brought after inordinately undue delay which delay has not been explained and that failure is fatal to the petition. I would dismiss the petition on that score even at this early stage.

Has any violation of rights and fundamental freedom

been violated ?

31. On the merit, the gist and substratum of the Petition is that while serving as a service man with the defunct Kenya Air Force, he was arrested and detained for a period between August 1982 and October of the same year. In his evidence he said he was not alone but with other colleagues.

32. While it is understandable that owing to the difficult moments of the time he may not have got any documents from the Defence Forces, thereafter established, documents are not the only way to prove a fact. Oral evidence serves that same purpose many times. On the evince adduced, I have asked what was so difficult in the Petitioner bringing any person who knew him to have been recruited into the service and that he was so arrested. I have in mind, the uncle he was with in Nairobi when he left to go and report to the police, the chief he said he reported to for six weeks, his parents and spouse, any of his village mates with whom he attended the recruitment drive and even the colleagues with whom he was recruited and or detained. He surely had a big reserve of potential witnesses to call. He chose not to call any yet it was critically important for the court to believe his evidence that he was a serviceman who was arrested and incarcerated on account of the attempted coup of 1982.

33. That failure when coupled with the outright contradiction between the averment in the petition that he was indeed discharged with clear anomalies as opposed to the evidence that he was never discharged, when added to his evidence on psychiatric condition which contradicted the medical report, leaves the court with no option but to find that the Petitioner's case has not been proved to the requisite standards.

Without proof of recruitment, detention and anything on injury suffered, it is difficult to find any merit in the petition.

34. Having found that there has not been proved any unlawful detention nor injury there is no basis for the court to engage in the determination of what remedies, if any, the petitioner is entitled to. It is sufficient to say that the petition lacks merit and the same is hereby

dismissed.

35. On costs, I did observe the petitioner testify in court and I do equally consider this to have been an attempt as enforcement of a right and fundamental freedom hence I make no orders as to costs.

Dated, signed and delivered at Milimani Law Courts this 17th day of July 2019.

P.J.O. OTIENO

JUDGE

---

[1] **Jennifer Muthoni Njoroge Vs. AG (2012) eKLR** quoted in **Jacob Ntubiri and others –vs- AG (2016) eKLR**