



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO.131 OF 2011**

**IN THE MATTER OF ARTICLES 23(1) AND (3) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL**

**RIGHTS AND FREEDOMS UNDER ARTICLE 29(c), (d) AND (f) AND**

**ARTICLE 26(1) AND (3) OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**CHARLES MASINDE ROFA.....PETITIONER**

**VERSUS**

**THE COMMISSIONER OF POLICE.....1<sup>ST</sup> RESPONDENT**

**THE MINISTER OF STATE FOR PROVINCIAL**

**ADMINISTRATION AND INTERNAL SECURITY.....2<sup>ND</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**Petitioner's Case**

1. The petitioner through a petition dated 8<sup>th</sup> August 2011 and filed on 10<sup>th</sup> August 2011 brought pursuant to the provisions of Article 29(c) (d) and (f) and 26(1) and (3) of the Constitution of Kenya 2010 seeks the following reliefs:-

- a) A declaration that the torture of the Petitioner by the police amounted to blatant and unlawful violation of his freedom from torture and cruel, inhuman or degrading treatment or punishment as envisaged and guaranteed under Article 25(a) of the Constitution.
- b) A declaration that the torture and unlawful detention of the Petitioner by the police amounted to blatant and unlawful violation of his freedom and security as a person as envisaged and protected under Article 29 of the Constitution.
- c) A declaration that the arrest and detention of the Petitioner by the police amounted to blatant and unlawful violation of his rights as an arrested person as envisaged and protected under Article 49 of the Constitution.
- d) The state be ordered to compensate the Petitioner for the pain and suffering as a consequence of the injuries inflicted on him by the police.
- e) The state be ordered to facilitate the immediate return to the Petitioner of his driving licence and PSV licence.

2. The petitioner's petition is supported by supportive affidavit dated 8<sup>th</sup> August 2011 and filed on 10<sup>th</sup> August 2011 and the bundle of documents produced during the hearing of the suit.

### **Respondent's Case**

3. The Respondents were served with the petition on 10<sup>th</sup> August 2011, acknowledged service, filed notice of appointment for 1<sup>st</sup> Respondent on 29<sup>th</sup> August 2011 and for 2<sup>nd</sup> Respondent on 8<sup>th</sup> September 2011. The Respondents have never appeared in court neither has the Attorney General despite several services of court notices by the petitioner's counsel.

### **Analysis and Determination**

4. In the case of **Kariuki Gathitu vs Attorney General (2013) eKLR**, the Attorney General did not file a response to the Petitioner's petition and despite attending the hearing and cross examining the Petitioner, the Attorney General did not attempt to file any written submissions in the matter. Justice Isaac Lenaola stated that:-

**"It is now trite that although a party alleging a fact has onus of proof of that fact, the opposing party is at the very least expected to file a response to those allegations of fact. Where such a party actually appears in the proceeding but neither in the pleadings nor in oral evidence does, he answers to those facts, then Court can only take it that those facts are uncontested"**

5. Further in **Nairobi Hccc No. 1408/2004 Rumba Kinuthia vs Attorney General** where the Court stated:-

**"Unfortunately, the Respondent did not treat this case with the seriousness that it deserves. Despite the fact that the Applicant made very serious allegations against the Respondent...no affidavit was filed in reply so that all the deposed by the Applicant in his Affidavit are what the Court will take as representing the factual position."**

6. Having noted that the Respondents though duly served, appeared but failed to file any response to the pleadings and further failed to attend hearing; I find that the Respondents have not only lost the opportunity to challenge the petitioner's petition but have decided not to oppose the petition. The petition herein stands unopposed and facts represented by the petitioner represent the factual position in this case.

7. The petitioner appeared before court on 26<sup>th</sup> March 2011 gave evidence in support of his petition and urged that he was relying on petition and supporting affidavit filed on 10/8/2011. He further relied on his medical documents including a P3 form from police; CTC Scan (**Exhibit 1A and 1B**); **Exhibit 2**, and **Exhibit 3**.

8. The brief facts of the petitioners case are summarized as hereunder:-

i) *On the 14<sup>th</sup> day of December, 2009 at about 4.00 pm while driving a matatu registration number KAX 945K near Museum Hill roundabout within Nairobi, he was stopped by a police officer by the name P.C. Kiriinya who informed him that he had a case to answer at Central Police Station. The said officer then took the Petitioner's driving license, PSV license and KES 2,000 in cash and asked that the Petitioner follows him to Central Police Station. The police man went in a Toyota saloon car registration number KAR 615U while the petitioner followed in the matatu;*

ii) *On arriving at the Police station, the Petitioner was unable to trace the said officer and therefore thought it fit to report his missing items as a theft. He reported the incident at the OB desk of Central Police Station and was issued with an OB Number 6014/12/2009. The police man manning desk informed the Petitioner that the person he had encountered was probably not a police officer and hence the importance of reporting the incident;*

iii) *However about two months later on the 12<sup>th</sup> day of February, 2010, at around 9.50 am the Petitioner encountered the police officer P.C. Kiriinya near Central Police Station. He ordered the Petitioner out of the matatu and told him that since he had delayed in giving him KES 3,000/- to clear the petitioner's case he would arrest him. The Petitioner explained to the officer that he did not understand what case he was referring to and that it might have been a case of mistaken identity. The officer started sapping the Petitioner and took him to Central Police Station where he locked him up in the cells and started beating him with his fists and his baton. During the incident the Petitioner lost his tooth;*

iv) *The Petitioner was then detained at the police station despite the fact that he had been injured and was bleeding. He stayed locked up from 10.00 am to 8.00 pm when he was released and warned not to talk about the incident to anyone or he will be rearrested;*

v) *On 15<sup>th</sup> February, 2010 the Petitioner visited Mbagathi District Hospital for treatment but they insisted on him getting a P3 form. His efforts to get the same were thwarted by the then OCS Central Police Station who warned him that pursuing the matter further would lead to dire consequences;*

vi) *The Petitioner was however treated at the Nairobi West Hospital where the doctors took several tests to determine the extent of his injuries. Doctor J.N. Muiru confirmed vide his medical report dated 11<sup>th</sup> June, 2010 that the Petitioner suffered soft tissue injuries on the head and the neck and that he was missing two teeth, 37 and 47, which he alleged that 37 was lost due to the beating by the Police Officer (the medical report and the appointment card were produced in Court as part of the Petitioner's evidence);*

vii) *The Petitioner also informed the Court that his wife Loydah Masinde and his Conductor Peter Kibe were witnesses to the*

whole incident however they were unable to testify in Court as they are both deceased.

9. I have considered the petitioner's petition, supportive affidavit, oral evidence, witness statement and petitioners counsel written submissions, and the issues arising for consideration are as follows:-

a) **Whether the Respondents violated the petitioner's fundamental rights and freedoms as alleged?**

b) **What relief (if any) is the petitioner entitled to?**

**A) Whether the Respondents violated the petitioner's fundamental rights and freedoms as alleged?**

10. The petitioner in his unconverted evidence averred that on 14/12/2009 at about 4.00 pm while driving matatu Registration number KAX 945 K near Museum Hill roundabout within Nairobi, he was stopped by police officer P.C. Kiriinya who informed him he had a case at Central Police Station. The police officer took the petitioner's driving licence, PSV licence and Kshs. 2,000/- in cash and asked the petitioner to follow him to Central Police Station.

11. On arrival at Central police station, the petitioner could not trace P.C. Kiriinya forcing him to report his missing items and was issued with an OB number 6514/12/2009. That about 2 months later on 12<sup>th</sup> February 2010 at around 9.50 am, the petitioner encountered P.C. Kiriinya near Central Police Station, who ordered the petitioner out of a matatu, and demanded Kshs. 3,000/- to clear the petitioner's case. The petitioner explained he did not understand what the police was talking about, to which the P.C. Kiriinya started slapping the petitioner, and took him to Central Police Station and put him in the cells and started beating him with fists, and the beating leading to him losing his tooth. The petitioner inspite of serious injuries sustained remained in cells from 1.00 am to 8.00 pm when he was released and warned not to inform anyone of the incident.

12. On 15<sup>th</sup> February 2010, the petitioner visited Mbagathi District Hospital for treatment, where the doctor in the hospital insisted on a P3 Form and his efforts to get one was threatened by OCS Central Police Station. The petitioner was however treated at Nairobi West Hospital. Dr. J.N. Muiro confirmed in his medical report dated 11<sup>th</sup> June 2010, that the petitioner had suffered soft tissue injuries on the head and neck and had lost 2 teeth 37 and 47 due to beating by police officer (see exhibit 1A, 1B, 2 and 3).

13. I find under **Articles 28 of the Constitution of Kenya 2010**, which deals with Human dignity, **Article 29 of the Constitution of Kenya 2010** dealing with freedom and Security of the person, right not to be detained without trial, right not to be subjected to any form of violence, right not to be subjected to torture, right not to be treated inhuman or degrading manner were violated by the Respondents against the petitioner.

14. The petitioner has demonstrated that his freedom from torture and cruel inhuman and disregarding of treatment or punishment was infringed upon himself by P.C. Kiriinya, who dragged him out of a matatu he was driving, slapped and beat him in a public place and put him into cells from 1.00 am to 8.00 pm thus a period of 10 hours. He was thereafter beaten by the same police officer using his fist and the beating caused excessive bleeding to the petitioner's head, neck and loss of his teeth in the process.

15. In case of **Irene Wambui Muchai & 5 others vs. Attorney General [2017] eKLR** Honourable Justice Isaac Lenaola used the following principles to determine whether there had been torture to the Petitioners. He stated as follows;

**"What is the law on torture in any event? It is now trite that the following elements must be present in proof thereof:**

**i) There must be evidence of severity of pain and suffering – Article 1 of the Convention against Torture is the leading provision on this point.**

**ii) There must be intent in reckless indifference to the possibility of causing pain and suffering – in J. Burgers and H. Danelius, The United Nations Convention Against Torture, (Martinus Nijhoff, 1988) page 118, this point is powerfully made.**

**iii) Acts that do not cause extreme pain and suffering to an ordinary person are normally outside the definition of torture – in Sarah Joseph and Melissa Castain, The International Covenant on Civil and Political Rights, Third Edition, page 218, this element is extensively discussed.**

**iv) The act of torture must involve a public official – in Article 1 of the Convention against Torture expresses this point clearly."**

16. Considering the above elements as enunciated in the above case, I have no doubt to find that the evidence adduced by the petitioner concerning his injuries and how they were executed by P.C Kiriinya, I find that his evidence meets all the elements of what amounts to a torture. In brief the petitioner suffered severe pain and suffering, he lost two teeth, attended MRI conducted to determine the extent of damage to the head and neck. The doctor's report confirms torture. The P.C Kiriinya's intentions were clearly reckless as he dragged the petitioner out of the matatu he was driving, started slapping him immediately before throwing him into a cell and later continued to beat him with fist and baton. Thirdly, the action, of the police officer, caused extreme pain to the petitioner as it would have to any other ordinary person. Lastly, the acts of torture were conducted by a police officer, p.c. Kiriinya, who is a public officer. I find, that these actions infringed or violated or breached the petitioner's fundamental rights and freedoms as envisaged in Article 28 and Article 29 of the Constitution of Kenya 2010. Further as the petitioner was merely dragged and thrown in a cell without being explained his rights as an arrested person under Article 49(1) (a) of the Constitution; I find his rights to be informed promptly, the reason for his arrest, the right to remain silence and the consequences of not remaining silent were violated by police officer one P.C Kiriinya.

**B) What relief (if any) is the petitioners entitled to?**

**17. Under Article 23(3) of the Constitution**, it is provided that in any proceedings brought under Article 22, a Court may grant appropriate relief including:-

- (a) A declaration of rights;**
- (b) An injunction;**
- (c) A conservatory order;**
- (d) A declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;**
- (e) An order for compensation; and**
- (f) An order of judicial review."**

**18.** The petitioner apart from seeking general damages, seeks special damages being amount spent seeking treatment in hospital. According to prescription slip from Nairobi West Hospital (petitioner exhibit 18) the petitioner paid Kshs.22, 000/- to have CT. Scan taken. In claim for special damages, are required to be pleaded and proved. I find that the special damages, have been pleaded and proved and the same are accordingly awarded as pleaded.

**19.** On General damages, I have been referred to the following authorities in support of claim for general damages:-

- a) **Kariuki Gathitu vs Attorney General (2013) eKLR**, the Court awarded the Petitioner KES 1.2 million for violation of this rights taking into account the period of unlawful incarceration and the torture he was subjected to.
- b) In **Akusala A. Borniface vs OCS Lang'ata Police Station & 4 others (2018) eKLR**, the Petitioner was awarded KES 2 million for violation of his rights under the Constitution.
- c) In the case of **Mohamed Feisal & 19 others vs Henry Kandie & 10 others (2018) eKLR**, the 1<sup>st</sup> to 19<sup>th</sup> petitioners were awarded general damages of KES 100,000/- and KES 100,000 as exemplary damages while the 20<sup>th</sup> Petitioner was awarded KES 2,000,000/- as general damages.

**20.** The authorities relied to by the petitioner are not very helpful as the nature of injuries have not been disclosed nor is the period of unlawful incarceration and nor type of the torture the petitioners were subjected to has been discharged. I have however considered the petitioner herein suffered soft tissue injuries, lost two teeth following assault by the police officer, was in unlawful incarceration for 10 hours, I therefore find general damages of Kshs.1,000,000- will suffice. This is based on the fact that the petitioner has developed a recurrent migraines and headaches as a result of beating.

**21.** The upshot is that the petitioner's petition is meritorious and I proceed to make the following orders:-

- a) A declaration be and is HEREBY issued that the torture of the Petitioner by the police amounted to blatant and unlawful violation of his freedom from torture and cruel, inhuman or degrading treatment or punishment as envisaged and guaranteed under Article 25(a) of the Constitution of Kenya 2010;**
- b) A declaration be and is HEREBY issued that the torture and unlawful detention of the Petitioner by the police amounted to blatant and unlawful violation of his freedom and security of the person as envisaged and protected under Article 29 of the Constitution of Kenya 2010;**
- c) A declaration be and is HEREBY issued that the arrest and detention of the Petitioner by the police amounted to blatant and unlawful violation of his rights as an arrested person as envisaged and protected under Article 49 of the Constitution of Kenya 2010;**
- d) The state be and is HEREBY ordered to compensate the Petitioner for the pain and suffering as a consequence of the injuries inflicted on him by the police as follows:-**
  - i) Kshs.1,000,000/-being General damages for pain and suffering;**
  - ii) Kshs. 22,000/- being special damages.**
- e) The state be and is HEREBY ordered to facilitate the immediate return to the Petitioner of his driving licence and PSV licence;**
- f) The Petitioner is awarded costs of the suit;**

**g) The Petitioner's complaint against the P.C. Kiriinya be and is HEREBY referred to DPP for investigation and further action for violation meted against the Petitioner. The Deputy Registrar to forward copy of the judgment to DPP.**

**Dated, signed and delivered at Nairobi this 17<sup>th</sup> day of October, 2019.**

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**J .A. MAKAU**

**JUDGE**