



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL PETITION NO 555 OF 2013

DAVID NYANJOM OWAK.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

1. *David Nyanjom The Owak*, the Petitioner, filed this petition against *The Hon Attorney General*, the respondent, claiming compensation for violation of his rights and fundamental freedoms by state agents. He stated that on or about 1<sup>st</sup> December 1989, at 930a.m, he was arrested from his office at old Mutual Building, Kimathi street Nairobi, by police officers lead by *Inspector Kiarie*; that he was taken to Central Police station and later to his residence at Buruburu where a search was conducted. He averred that police officers took away some items including his passport, a brief case and some books.

2. The Petitioner further averred that he was detained at Jogoo Road Police station from 11a.m on that day up to about 930p.m when he was blind folded and bundled into the back of a Land Rover and taken to an unknown place which he later learnt was *Nyayo House*. His Identification card, Jacket and shoes were taken away.

3. It is the petitioner's case that on the following day, he was taken for interrogation where he was tortured and subjected to inhuman and degrading treatment. He averred that he was accused of being in association with Mwakenya and Jaramongi Oginga Odinga's family.

4. The petitioner stated that he was held in Nyayo House for 14 days in solitary confinement, naked and in a dark cold and waterlogged cell. He also stated that he was on average interrogated three times a day and was always threatened with death in order to force him to confess to false allegations. He averred that during this period he once fell seriously ill and had to be taken to Kenyatta National Hospital but that did not deter the torture he was being subjected to.

5. He stated that on the 14<sup>th</sup> day, 15<sup>th</sup> December 1989 at about 8.30pm he was again blind folded by police officers under the command of *IP Kiarie* and taken to CID Headquarters on threats that he was being taken to detention. He was later on the same day dropped at the National Archives and left on his own. He stated that during this period, his rights were grossly violated and he suffered loss and damage. He sought the following reliefs:-

*a. A declaration that the petitioner's fundamental rights and freedoms were contravened and grossly violated by the police and Special Branch Officers who were Kenya Government Servants employees and/or agents acting as such at various police stations and at Nyayo house torture chambers between the 1<sup>st</sup> and 15<sup>th</sup> December 1989.*

*b. A declaration that the petitioner is therefore entitled to payment of damages and compensation for the violations and contraventions of his fundamental rights and freedoms as enshrined in and protected by the Constitution of Kenya.*

*c. Assessment and qualification of general damages, exemplary damages and moral damages on an aggravated scale payable to the petitioner for the unconstitutional conduct of the Kenya Government Officers, servant and/or employees acting in conduct of their employment.*

*d. Costs and interest.*

**Response**

6. The respondent filed a replying affidavit by *Philip Ndolo*, Assistant Commissioner of Police, sworn on 10<sup>th</sup> July 2014 and filed in court on 14<sup>th</sup> July 2014. He deposed that the petitioner's allegations were frivolous, baseless and unfounded; that the petitioner did not utilize available statutory mechanism for addressing the alleged violation of his fundamental rights namely section 6(a) of the Independent Police Oversight Authority and that the petitioner has deliberately avoided the procedure and remedy provided for under the said Act.

7. He deposed that the petition and supporting affidavit do not support he alleged acts of torture; that the petitioner has not shown that he was arrested on 1<sup>st</sup> December 1989 or at all and that he has not shown that his house was searched. It is the respondent's case that it is sufficient to identify only one of the alleged arresting officers by one name and fail to identify others yet every police officer has a unique service number.

8. It was contended that Special Branch is not under the National Police Service hence the National Police Service is not in a position to address the petitioner's claims. He denied that the petitioner was taken to Jogoo Road Police Station, Nairobi Area Police Station and Nyayo House since he stated that he had been blind folded. He also stated that there are no records in their possession to confirm that the petitioner was arrested and booked at Jogoo Road Police station at the material time.

9. **ACP Ndolo** further stated that there are no records showing the petitioner's alleged confiscated items; that rights under section 72 of the repealed constitution were limited by the same constitution and that the constitution allowed the police to hold a suspect in custody beyond the statutory period if they had reasonable and justifiable cause.

10. He contended that the petition had been brought after an inordinate delay and no reasons had been given for it; and further that the respondents will be greatly prejudiced as the would be witnesses have retired; others left service or passed on. He also contended that there is no nexus between the petitioner's alleged torture by Special Branch and the petitioner's association within Mwakenya and Jaramongi Oginga Odinga's family.

11. The deponent further contended that constitutional or statutory provisions do not apply retrospectively and for that reason, the petitioner cannot rely on the provisions of the 2010 constitution.

### **Evidence**

12. At the hearing, the petitioner who testified as **PW1**, told the court that he is a business man; that on 11<sup>th</sup> December 1989, he reported to his office and found his late father had just arrived from his home village but before he could take him to the house, three men entered the office and informed him that they were arresting him after introducing themselves as police officers. They walked out with him and boarded a white vehicle; sandwiched him between officers and drove off. He told the court that he was first taken to Central Police Station and identified the leader of the team as **Inspector Kariuki**.

13. The petitioner testified that at the police station he was asked where he lived. They proceeded to his house at Buruburu where a search was conducted. police officers took a few items and proceeded with him to Jogoo Road Police Station where he was locked in. He testified that at about 9p.m, he was taken in a Land Rover in blindfolds and finally found himself at Nyayo House where he was placed in a cell but was not told why he had been arrested. He was placed in a dark room and would have to ring a bell if he wanted to go for a call of nature.

14. The petitioner testified that the following morning, he was taken to a room for interrogation and was persistently asked why he was associated with Mwakenya and the Odinga family. He told the court that he was interrogated daily; physically assaulted and was injured and at one time he had to be taken to hospital.

15. According to the petitioner he was held for 14 days, naked and in a cold cell; that he was later taken to CID offices for photographs after which he was released. In Cross Examination the petitioner stated that the torture happened in 1989 but that he had filed the petition in 2013. He contended that he filed the petition late because he was not aware of any time limit.

16. He stated that he was tortured until he collapsed and he was taken to hospital although he did not have documentary evidence to that effect. He attributed this to the fact that he was under police escort. According to the petitioner he was held alone in the cell but was not told why he was being detained. He maintained he was tortured but admitted that he had no medical evidence to prove his claims of torture.

17. After the closure of the petitioner's case, the respondent elected not to call a witness but proceeded by way of submissions.

### **Petitioner's submissions**

18. The petitioner filed written submissions dated 31<sup>st</sup> January 2018 and filed in court on 5<sup>th</sup> February 2018. It was submitted that as a citizen, the petitioner was entitled to enjoyment of fundamental rights and freedoms enshrined in the 2010 constitution; that the petitioner's rights and fundamental freedoms were violated by the police and special branch who were servants and agents of the state and that he was held for 14 days from 1<sup>st</sup> December 1989 until 15<sup>th</sup> December 1989 when he was released without a charge.

19. It was contended that the petitioner was not informed why he was arrested; that he was held incommunicado and tortured at Nyayo House where he underwent interrogation; that he was kept naked in a cold water logged cell, and that he was physically assaulted. The petitioner's counsel contention was therefore that, these actions and events as told by the petitioner violated the Police Act, Criminal Procedure Code, Articles 19-40 of the Constitution of Kenya 2010 (section 70-80 of the repealed constitution) and various international human rights instruments, including the Convention Against Torture and relied on the definition of torture in Article 1 of the Convention. It was contended that the actions by the special branch amounted to torture.

20. On the respondent's contention that no material evidence was produced regarding torture, the petitioner's counsel relied on the case of **Wachira wa Kiarie v Attorney General Misc App. No 1184 of 2003(OS)** for the submission that the fact that the petitioner had stated under oath that he was held at Nyayo House where he was tortured and the respondent had not made an attempt to deny those allegation under oath, was an indication that the allegations were true. He also relied on the case of **Njuguna Githiri v Attorney General** (Petition No 204 of 2013), for the submission that the court should find that the petitioner's fundamental rights were violated.

21. It was contended that whereas the Special Branch was entitled to arrest the petitioner if they suspected that he had committed a crime, they had no legal authority to torture him, or hold him in custody to more than 24 hours in violation of his fundamental rights and freedoms.

22. Regarding damages, it was urged that due to the violations and after referring to decisions including that of *Dr Odhiambo Olel v Attorney General HCC No 366 of 1995* where Ksh4.5m was awarded for torture and detention; *Koigi wa Wamwere v Attorney General CA No 86 of 2013* where Kshs12 Million was awarded, they urged that Kshs5 million be awarded as general damages. They also asked for exemplary damages of Kshs 5 million and relied on the case of *Ruokers v Bernard (1964)AC 1129*, for the submission that exemplary damages are awarded where there is oppressive, arbitrary or unconstitutional action by government members or servants. They also relied on *Siewchand Ramanoop v the attorney General of Trinidad and Tobago* (PC Appeal No 13 of 2004) on why money award for constitutional violation should not be confined to compensatory damages in the traditional sense.

#### **Respondent's submissions**

23. The respondent filed written submissions dated 10<sup>th</sup> April 2018 and filed in court on 12<sup>th</sup> April 2018, submitting that the petition was filed after an inordinate delay and therefore the court should not aid an indolent litigant. They relied on the case of *Joan Akinyi Kabasellal & 2 Others v Attorney General* (Petition No 41 of 2014), for the submission that in determining whether there was inordinate delay the court should consider whether justice will be served by permitting a respondent whether an individual or the state in any of its manifestations should be vexed by stale claim. They also relied on the case of *Ochieng Kenneth K'ogutu v Kenyatta University & 2 Others* (Petition No 306 of 2012), for similar contention. (See also *Joseph Migere Onoo v Attorney General* (petition No 424 of 2013).

24. Secondly the respondents' counsel submitted that the burden of proving a case rests on the petitioner and relied on section 107 of the Evidence Act. It was contended that the burden of proving violation of constitutional rights was on the petitioner but which, they contended, was not discharged. They relied on the case of *Raila Amolo Odinga & another v IEBC & Others [2017]eKLR* (Petition No 1 of 2017 Sc) where the Supreme Court stated that it is *strite law* that whoever alleges must prove. They also relied on *Moses Wanjala Lukoye v Benard Wekesa Sambu* (Election Petition No 2 of 2013 Bungoma) for the same principle. It was submitted that the burden of proof in so far as this petition is concerned was on the petitioner since he was bound to prove his allegations but this burden was not discharged.

25. On whether the petitioner's rights were violated, the respondent's counsel submitted, relying on section 72(3) and (5) on the repealed constitution, that the arresting authority was obligated to present an arrested person to court within 24 hours if it involved a misdemeanor or 14 days of a capital offence. It was contended that although section 72 of the repealed constitution protected liberty, this right was limited by the same section where a person was suspected of committing a serious offence and the police were allowed to hold him for a reasonable period. It was therefore contended that the petition did not meet the threshold of a constitutional petition case.

#### **Determination**

26. I have considered this petition; the response thereto; submissions by counsel for the parties and the authorities relied on. The petition raises the question of violation of fundamental rights and freedoms that were guaranteed by the chapter 1v of the repealed constitution.

27. The petitioner is said to have been arrested by Police officers on 1<sup>st</sup> December 1989, taken to Central Police Station and later to his house at Buruburu where a search was conducted. He contended that some personal effects were taken from the house and he was then taken to Jogoo Road Police Station where he was locked in for some time.

28. He told the court that later that evening, he was taken to another Police Station and later ended up at Nyayo House where he was held incommunicado; was interrogated several times under threats of being killed; was kept in a dark cold and water logged cell and that he was physically assaulted and tortured for 14 days before he was released without charge or being produced in a court of law. He contended that these actions by state agents violated his constitutional rights and fundamental freedoms.

29. The respondent denied these allegations and contended that there was no proof that the petitioner was arrested; that he was held in any police station; or that he was tortured as he had alleged. It was the respondent's contention that the petitioner did not prove his case as required in law.

30. It is no doubt that the repealed constitution prohibited torture of any form and in absolute terms. Section 72(1) of the repealed Constitution provided that **No person shall be deprived of his personal liberty save as may be authorized by law.** The section went on to give instances when a person could be deprived of his liberty, one of which was; (e) **upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law of Kenya.**

31. Thus the constitution protected the liberty of an individual in that although a person could be arrested on suspicion of committing an offence, he was to be produced in a court of law within 24 hours if the offence he was suspected of committing was a minor one, or 14 days where the offence was of a capital nature. Where the police were unable to comply with the above requirements, it was their obligation to satisfy the court that they had justifiable reasons for not doing so.

32. All forms of torture were prohibited acts under the repealed constitution. In the case of *Albanus Mwasia Mutua v Republic* [2006] eKLR, the Court of Appeal termed it a violation of constitutional right guaranteed by **section 72(3) (b)** where an arrested person was not brought before Court within the stipulated period. The Court observed 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"**.

33. Section 74(1) which prohibited torture provided that **"no person shall be subjected to torture or to inhuman degrading punishment or other treatment"**. Article 1 of *The United Nations Convention against Torture and other Cruel and Inhuman or Degrading Treatment* defines the term 'torture' as;

***“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.”***

34. And in In Republic v Minister for Home Affairs and others Ex parte Stanze [2007] eKLR the Court held that;

***“Torture means inflicting of intense pain to the body or mind; to punish, to extract confession or information or to obtain sadistic pleasure. It means infliction of physical founded suffering or the threat to immediately inflict it, where such infliction or threat is intended to elicit or such infliction is incidental to means adopted to elicit, matters of intelligence or forensic proof and the motive is one of military, civic or ecclesiastical interest. It is a deliberate inhuman treatment causing very serious and cruel suffering “inhuman treatment” is physical or mental cruelty so severe that it endangers life or health. It is an intentional act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack or human dignity.”***

34. The acts complained of by the petitioner would no doubt fall within the prohibited degree of torture. I would say, without testation, that although the police can arrest someone without warrant if suspected of committing a cognizable offence, searches of one’s premises and body without a search warrant was unlawful under the repealed constitution and, therefore, any acts of that sort were unlawful.

35. Having said that, the question before me and that has to be answered, is whether the petitioner has proved his case against the respondent. This is because the respondent’s counsel has argued that the petitioner did not do so. I would be prepared to hold that the petitioner was treated in the manner he claims he was, that is; he was tortured and treated as he says he was, in violation of his rights and fundamental freedoms.

36. This is because in those days state agents would certainly do the things the petitioner has complained of. They would arrest people without warrant; search their premises; keep them in police cells or even in Nyayo House and treat them in all manners in violation of their human rights and fundamental freedoms without keeping any records of such occurrences. The history of this country during those dark days is clear that the police, Special Branch or other state agents never kept records of their activities or victims. It would, therefore, be difficult for a victim to get records of his treatment from the same people that had wanted them disappear. That notwithstanding, the fact of arrest by police officers would be material to establish the petitioner’s case.

37. I have really agonized over this petition. Here is a man who has narrated how he was arrested, taken to various Police Stations, including Nyayo House, treated in a manner that would certainly amount to torture and inhuman and degrading treatment and eventually released after 14 days without being subjected to any known lawful process. These actions cannot be countenanced in a democratic state.

38. However, it was important for the petitioner to attempt to prove his arrest or ***“forced disappearance”***. The petitioner stated that he was arrested in the morning of 1<sup>st</sup> December 1989 from his office. That means there were other people in that office. He said that his father though late, was in the office. He was taken to his house where a search was conducted and some items taken away. He was held away from home for 14 days. Despite all this, no body or other independent witness, not even the petitioner’s immediate family member testified to corroborate the petitioner’s evidence that he had disappeared and for the entire period of two weeks and that they did not know where he was.

39. After the petitioner was released, he certainly went home narrated to his family what had happened. They could even have attempted to look for him in Police Stations or anywhere else. Such evidence would have been critical in buttressing the contention that indeed the petitioner at least disappeared from his office and when he resurfaces after 14 days, he told them where he had been, That would have assisted the court in making a just determination in this case. Otherwise what the court is left with is evidence of the petitioner, a single witness, against depositions on behalf of the respondent, one saying this and the other that, leaving the court in a dilemma of who it should believe and who not to believe. In such a scenario, the burden is on the petitioner to prove his case. That is what sections 107, 108 and 109 of the Evidence Act demand.

40. In the circumstances of this case, having considered the evidence on record, it is clear to me that the petitioner has not discharged the burden of proof to enable this court find in his favour. Consequently and for the above reasons, this petition is declined and dismissed with no order as to costs.

**Dated Signed and Delivered at Nairobi this 14<sup>th</sup> Day of December 2018.**

**E C MWITA**

**JUDGE**