

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO 376 OF 2014

**IN THE MATTER OF ARTICLE 22, 23, 25 (A) AND ARTICLE 29 OF THE CONSTITUTION
OF KENYA 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 25 (A), 29 (C), 29 (D) AND 29 (F) OF THE CONSTITUTION
OF KENYA 2010**

IRENE WANGARI GACHERU..... 1ST PETITIONER

LUCY MWIHAKI MURIMI.....2NDPETITIONER

PAULINE WAIRIMU KAMAU.....3RDPETITIONER

ANASTASIA WANJIRU KIMANI.....4THPETITIONER

LUCY WANJIRU MULI.....5THPETITIONER

ESTHER WANJIKU MAINA.....6THPETITIONER

VERONICA WANJIRU GICHURU.....7THPETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....RESPONDENT

JUDGEMENT

By a petition dated 30th day of June 2014 expressed under the provisions of Articles 22, 23, 25 (a), 29 (a), (c), (d) & (f) of the Constitution of Kenya 2010, the Petitioners herein moved this honourable court seeking *inter alia* a declaration that their fundamental rights and freedoms were contravened by the police and General service Unit officers on diverse dates between 3rd March 1992 and 19th January 1993, a declaration that they are entitled to damages for contravention of the fundamental rights, General & Exemplary damages and costs of the case.

The petition is supported by seven separate identical affidavits sworn by each of the petitioners. They all aver that on 3rd March 1992, while at Uhuru Park "Freedom Corner", in Nairobi where they were peacefully agitating for the release of all political prisoners among them a one Hon. Koigi Wa Wamere, they were without any lawful cause and in contravention of their constitutional rights subjected to acts of torture, inhuman and degrading treatment by the police and General Service Unit officers.

The petitioners further aver that in addition to the acts of brutality particularized in the petition and in their affidavits, they were arrested and bundled into a police vehicle and forcefully taken to their respective rural homes an act which violated of their constitutional rights. The petitioners aver that the

acts complained of were not justified at all and aver that they were at all material times peaceful and unarmed.

The petitioners further aver that shortly after they were transported to their rural homes, they returned to Nairobi and were housed at a Banker at the all saints cathedral from 4th March 1992 to 19th January 1993 when all the political prisoners were released and that while in the said banker the police continued attacking them, harassing them and generally committing acts which were in violation of their rights.

The petitioners further aver that as a consequence of the matters pleaded above, they suffered physically, psychologically, economically and politically and that they were tortured for expressing their fundamental rights of freedom of expression and association enshrined in the constitution and particularly for agitating for release of political detainees.

The Hon. Attorney General filed grounds of objection on 19th January 2016 in which they *inter alia* stated that the petition was filed after a delay of 22 years and that the petitioners acts violated provisions of the repealed Public Order Act and that the rights in question were not absolute under the repealed constitution.

Even though counsel for the Respondent did not address the issue of limitation in their submissions, I find it necessary to address spare some time and ink to address it now. The question of limitation of time in regard to allegations of breach of fundamental rights has in many cases been raised by the State and our courts have consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights[1] with a section of our judiciary holding that a court must always consider whether the delay in filing a petition alleging violation of constitutional rights is unreasonable and prejudicial to a respondent's defense[2] and further the state cannot shut its eyes on its past failings[3] nor can the court ignore the dictates of transitional justice. My understanding of the jurisprudence emerging on the issue of limitation is that courts will be reluctant to shut out a litigant on account of limitation of time unless there are obvious reasons to do so.

On 10th February 2016, the parties took directions before Onguto J that the petition would proceed by way of oral evidence and hearing commenced before the said judge on 11th April 2016. The first, second, third, fourth, sixth & seventh petitioners testified in court and essentially adopted their respective affidavits while the fifth petitioner did not attend court and was said to be out of the country. An application by the petitioners advocates to rely on the affidavit of the fifth petitioner and dispense with her oral evidence was disallowed, hence no evidence was tendered on behalf of the fifth petitioner.

Counsel for the Respondent informed the court that she was not calling any witnesses and opted to file written submissions.

In their submissions, counsel for the petitioner submitted that the petitioners rights were violated and cited the case of *Milka Wanjiku Kinuthia & Others vs The Attorney General*[4] where the court held *inter alia* that where fundamental rights are found to have been violated, the victims are entitled to appropriate reliefs including declarations of such violations and also damages. Counsel urged the court to find that the petitioners rights were violated and award each of the petitioners damages to the tune of **Ksh. 12,000,000/=**. Counsel did not elaborate how he arrived at the said sum.

The gist of the Respondents' counsels submissions is that the petitioners did not tender medical evidence to substantiate the alleged injuries, that the allegations in the petition are baseless, that the petitioners case is weak and that they did not prove the allegations to the required standard and cited the case of *Lt. Col. Peter Ngari Kagume & Others vs A.G.*[5] in support of the said position. Counsel urged the court if its inclined to award damages to be guided by the principles enumerated in the said case.

I have carefully analysed, evaluated and considered the evidence tendered by the petitioners, the affidavits filed in this court, I have also considered the rival the submissions filed by both parties, the applicable law and the authorities cited by both counsels and in my view the Petition raises the following issues:-

1. Whether the petitioners proved their case to the required standard.
2. Whether the petitioners' fundamental rights and freedoms under the repealed constitution were violated.
3. Whether the petitioners are entitled to the reliefs sought in the petition.

As pointed out above, counsel for the Respondent opted not to call witness but cross-examined the petitioners. Thus, the only evidence on record is the evidence tendered by the petitioners. In the case of *Interchemie EA Limited vs. Nakuru Veterinary Centre Limited*^[6] it was held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted.

In the case of *Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others*^[7] it was held that "it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged."

As mentioned above, the Respondents' counsel opted not to call witnesses but cross-examined the petitioners. Since no evidence was tendered to support the Respondents case the petitioners' evidence remains unchallenged. The purpose of cross-examination is three-fold; **(a) To elicit evidence in support of a party's case;** **(b) To cast doubts on, or undermine the witness's evidence so as to weaken the opponent's case, and to undermine the witness's credibility;** **(c) To lay out a party's case and challenge disputed evidence.** But once a party cross-examines an opponent's witness, he can only rebut the issues raised during cross-examination by calling witnesses. Hence, failure to call witness leaves the petitioners evidence unchallenged.

Regarding the constitutional issues raised in the petition, it must be borne in mind that the Constitution must be interpreted in a broad way and not in a narrow and pedantic sense. Certain rights have been enshrined in our Constitution as fundamental and, therefore, while considering the nature and content of those rights the Court must not be too astute to interpret the language of the Constitution in so literal a sense as to whittle them down. On the other hand the Court must interpret the Constitution in a manner which would enable the citizen to enjoy the rights guaranteed by it in the fullest measure subject, of course, to permissible restrictions.^[8]

The spirit of the constitution must preside and permeate the process of judicial interpretation and judicial discretion.^[9] The disposition of Constitutional questions must be formidable in terms of some Constitutional principles that transcend the case at hand and is applicable to all comparable cases. Court decisions cannot be *had hoc*. They must be justified and perceived as justifiable on more general grounds reflected in previous case law and other authorities that apply to the case before the court.^[10] The privy council in the case of *Minister for Home Affairs and Another vs Fischer*^[11] stated that:-

"a constitutional order is a document sui generis to be interpreted according to principles suitable to its particular character and not necessarily according to the ordinary rules and presumptions of statutory interpretation... It is important to give full recognition and effect to those fundamental rights and freedoms....."

Lord Wilberforce, while delivering the considered opinion of the court in the above case observed:-

"A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to the language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation recognition of the character and origin of the instrument and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms....."

The recognition of the sanctity of the Constitution and its special character calling for special rules of interpretation was captured in the decision of the High Court of Kenya in the case of *Anthony Ritho Mwangi and another vs The Attorney General*^[12] where the court stated:-

“Our Constitution is the citadel where good governance under the rule of law by all three organs of the state machinery is secured. The very structure of separation of powers and independence of the three organs calls for judicial review by checking and supervising the functions, obligations and powers of the two organs, namely the executive, and the legislature. The judiciary though seems to be omnipotent, is not so, as it is obligated to observe and uphold the spirit and the majesty of the Constitution and the rule of law.”

My discernment from the foregoing jurisprudence is that in interpreting the Constitution, the court should attach such meaning and interpretation that meets the purpose of guaranteeing Constitutionalism, non-discrimination, separation of powers, and enjoyment of fundamental rights and freedoms.

The Petitioners' case is that their rights were violated by state agents. They assembled peacefully to agitate for the release of political prisoners. The police and General Service Unit officers were unleashed upon them and committed the acts complained of among them physical assault and forceful repatriation to their rural homes. They were not cowed. They regrouped and returned but this time they sought refuge at the basement of the All saints Cathedral but police persisted in their acts of harassment.

In their grounds of opposition, the Respondent asserted that the petitioners actions violated the repealed Public Order Act. This court cannot deviate from its own duty of determining acts which amount to infringement of constitutional rights of the citizens. In my view, every act of the state and its organs must pass through the test of constitutionality which is stated to be nothing but a formal test of rationality. The foundation of the courts power, as explained by the Supreme Court of India^[13] is the theory that the Constitution which is the fundamental law of the land, is the 'will' of the 'people', while a statute is only the creation of the elected representatives of the people; when, therefore, the 'will' of the legislature as declared in the statute, stands in opposition to that of the people as declared in the constitution-the 'will' of the people must prevail.

Since great emphasis has been placed on the violation of fundamental rights, we may notice that no prejudice needs to be proved in cases where breach of fundamental right is claimed. Violation of a fundamental right itself renders the impugned action void.^[14] A law which violates the fundamental right of a person is void. In cases of violation of fundamental rights, the Court has to examine as to what factors the court should weigh while determining the constitutionality of the statute or the actions complained of. The court should examine the provisions of the statute in light of the provisions of the Constitution. When the constitutionality of a law is challenged on grounds that it infringes a fundamental right, what the court has to consider is the "*direct and inevitable effect*" of such law. Further, in order to examine the constitutionality or otherwise of statute or any of its provisions, one of the most relevant consideration is the object and reasons as well as legislative history of the statute. This would help the court in arriving at a more objective and justifiable approach. In my view, a statute that sanctions inhuman and degrading treatment is out rightly unconstitutional.

Chapter 5 of the Repealed constitution contained the bill of Rights, that is Protection of fundamental rights and freedoms of the individual. Section 74 guaranteed the right to protection from inhuman treatment while the right to protection of freedom of conscience, expression, assembly and association were guaranteed under sections 78, 79, and 80 of the repealed constitution.

In my view, the allegations made by the petitioners were not rebutted since no evidence was tendered on behalf of the Respondent. Counsel for the Respondent dealt extensively on absence of medical reports. The claim before the court is for violation of fundamental rights under the above provisions and not for personal injuries, hence absence of medical reports is in my opinion immaterial. As was held in the Greek^[15] case cited by Lenaola J. (As he then was) in the case of *Milka Wanjiku Kinuthia & Others vs The Attorney General*^[16] "*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 in human 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 drives him to an act against his will or conscience."

The term "harassment" in its connotative expanse includes torment and vexation. The term "torture" also engulfs the concept of torment. The word "torture" in its denotative concept includes mental and psychological harassment.^[17] We are not essentially dealing with personal injuries in this case but with torture, harassment and the mental and physiological effects of such actions to the victims in addition to physical assault.

When a citizen is lawfully exercising his/her constitutional rights of expression or association as in the present case, his/her Fundamental Rights are not abrogated in toto. His dignity cannot be allowed to be comatosed. The right not to be subjected to inhuman treatment enshrined in the Constitution and a fortiori, includes the right to be treated with human dignity and all that goes along with it. Inhuman treatment has many a facet. It fundamentally can cover such acts which have been inflicted with an intention to cause physical suffering or severe mental pain. It would also include a treatment that is inflicted that causes humiliation and compels a person to act against his will or conscience. There is no shadow of doubt that any treatment meted out to a citizen which causes humiliation and mental trauma corrodes the concept of human dignity. The majesty of law protects the dignity of a citizen in a society governed by law. It cannot be forgotten that the State is governed by rule of law which has paramountcy. The Constitution as the organic law of the land has unfolded itself in manifold manner like a living organism in the various decisions of the court about the rights of a person under the bill of rights. When citizenry rights are sometimes dashed against and pushed back by the members of the police force, there has to be a rebound and the Constitution springs up to action as a protector.

It is the sacrosanct duty of the police authorities to remember that a citizen while in their hands are not denuded of their fundamental rights under the Constitution. The restrictions imposed on fundamental rights have the sanction of law by which the enjoyment of fundamental right is curtailed but the citizens basic human rights are not crippled so that the police officers can treat citizens in an inhuman manner. On the contrary, they are under obligation to protect fundamental rights of the citizens and prevent all forms of atrocities.

The law enjoins the police to be scrupulously fair to an alleged offender and to ensure fair investigation and fair trial and also to ensure that the citizens constitutional and fundamental rights are not violated. I find that the police subjected the petitioners to inhuman and degrading treatment.

The petitioners claim damages as a result of the said breach. The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting 'compensation' in proceedings under Article 23 of the constitution or seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalizing the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty, by not protecting the fundamental rights of the citizen.

A claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of which is guaranteed under the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is 'distinct from, and in addition to, the remedy in private law for damages for the tort' resulting from the contravention of the fundamental right. It is thus now well settled that award of compensation against the State is an appropriate and effective remedy

for redress of an established infringement of a fundamental right under the constitution. The quantum of compensation will, however, depend upon the facts and circumstances of each case.

I accept in principle that constitutional damages as a relief separate and distinct from remedies available under private law is competent because a violation of a constitutional right must of necessity find a remedy in one form or another, including a remedy in the form of compensation in monetary terms.

I have carefully considered the petitioners case and the relevant law and I find that their rights were violated and that they are entitled to damages. On the quantum of damages, I stand guided by the decision in *Mbogo & Another vs Shah*^[18] whereby it was held that award of damages entails exercise of judicial discretion which should be exercised judicially and that means that it must be exercised upon reason and principle and not upon caprice or personal opinion.

The jurisprudence that has emerged in cases of violation of fundamental rights has cleared the doubts about the nature and scope of the this public law remedy evolved by the Court. The following principles clearly emerged from decided cases:-^[19]

1. Monetary compensation for violation of fundamental rights is now an acknowledged remedy in public law for enforcement and protection of fundamental rights;
2. Such claim is based on strict liability;
3. Such claim is distinct from, and in addition to remedy in private law for damages for tort;
4. This remedy would be available when it is the only practicable mode of redress available;
5. Against claim for compensation for violation of a fundamental right under the constitution, the defence of Sovereign immunity would be inapplicable.

In *Koigi Wamwere v Attorney General*^[20] the court awarded the petitioner **Ksh. 12,000,000/=** and in arriving at the said sum observed that "accepting that the award of damages is not an exact science, and knowing that no monetary sum can really erase the scarring of the soul and the deprivation of dignity that some of these violations of rights entailed."

Award of damages is an exercise of discretion of the trial court but the same should be within limits set out in decided case law and must not be inordinately so low or so high as to reflect an erroneous figure.

When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under is discretionary and, moreover, the violation of the constitutional right will not always be coterminous with the cause of action in law.^[21]

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in helping the court arrive at a reasonable award. The court must consider and have regard to all the circumstances of the case.

An injury suffered as a result of discrimination, harassment or inhuman and degrading treatment is no less real because it does not possess tangible physical or financial consequences. And the difficulty in assessing the amount of compensation for that type of injury should not deter a court from recognizing its

potential.[22]

It is self evident that the assessment of compensation for an injury or loss, which is neither physical nor financial, presents special problems for the judicial process, which aims to produce results objectively justified by evidence, reason and precedent. Subjective feelings of upset, frustration worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on and the degree of their intensity are incapable of

objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to be an artificial exercise. There is no medium of exchange or market for non-pecuniary losses and their monetary evaluation, it is a philosophical and policy exercise more than a legal or logical one. [23] The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution.

Although they are incapable of objective proof or measurement in monetary terms, hurt feelings are none the less real in human terms. The courts and tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available in the calculation of financial loss or compensation for bodily injury.

Considering the nature of the violations of the petitioners constitutional rights, the above legal principles and bearing in mind the fact that it may not be easy to quantify denial of fundamental rights and freedoms, I award each of the petitioners, namely, the first, second, third, fourth, sixth and seventh petitioners **Ksh. 3,000,000/=**. Accordingly, I enter judgement in favour of the said petitioners excluding the fifth petitioner as follows:-

- i. A declaration that the actions by the police and General Service Officers enumerated in the petition constituted a gross violation of the petitioners constitutional rights.
- ii. That judgement be and is hereby entered in favour of the petitioners as follows:-
 - a. Irene Wangari Gacheru.....Ksh. 3,000,000/=
 - b. Lucy Mwihaki Murimi.....Ksh. 3,000,000/=
 - c. Pauline Wairimu Kamau..... Ksh. 3,000,000/=
 - d. Anastasia Wanjiru Kimani..... Ksh. 3,000,000/=
 - e. Lucy Wanjiru Muli..... Ksh. 3,000,000/=
 - f. Esther Wanjiku Maina..... Ksh. 3,000,000/=
 - g. Veronica Wanjiru Gichuru.....Ksh. 3,000,000/=
- iii. That the above sums shall attract interests at court rates from date of filing suit until payment in full.
- iv. That the fifth petitioners case against the Respondent be and is hereby dismissed with no orders as to costs.
- v. The Respondents do pay the costs of this Petition to the petitioners plus interests thereon at court rates.

Orders accordingly

Dated at Nairobi this 20th day of January 2017

John M. Mativo

Judge

[1] See Joan Akinyi Kabasellah and 2 Others vs Attorney General, Petition No 41 of 2014, Dominic Arony Amolo vs Attorney General, Nairobi High Court Misc. Civil Case No 1184 of 2003 (OS) [2010] eKLR, Otieno Mak'Onyango vs Attorney General and Another, Nairobi HCCC NO 845 of 2003

[2] Joseph Migere Onoo vs Attorney General, Petition No. 424 of 2013

[3] Gerald Gichohi and 9 Others vs Attorney General Petition No. 487 of 2012

[4] Pet Nos 281 of 2011, 282 of 2011 and 283 of 2011

[5] Pet. No. 128 of 2006

[6] {Milimani} Hccc no. 165b of 2000

[7] Nairobi (Milimani) HCCS No. 1243 of 2001

[8] See Mudholkar J in Sakal Papers v Union of India AIR 1962 SC 305 at p 311

[9] State vs Acheson {1991} 20 SA 805

[10] See Wechsler, {1959}. Towards Neutral Principles of Constitutional Law, Vol 73, Havard Law Review P. 1.

[11] {1979} 3 ALL ER 21

[12] Nairobi Criminal Application no. 701 Of 2001

[13] Supreme Court Advocates on Record Association & Others vs Union of India {1993} 3SCC 441

[14] A.R. AntuallyvsNayak& Another {1988} 2 SCC 602

[15] Greek Case 1969 Y.B. Eur. Con. on H.R. 186 (Eur. Comm'n on H.R.)

[16] Supra note 1

[17] See Joginder Kumar v. State of U.P. (1994) 4 SCC 260, paragraph 23

[18] {1968} EA 93

[19] V.K. Sircar, Compensation for Violation of Fundamental Rights, a new remedy in Public Law Distinct

from relief of damages in tort, <http://ijtr.nic.in/articles/art7.pdf>

[20] {2015} eKLR

[21] Attorney General v Ramanoop [2005] UKPC 15, [2006] 1 AC 338

[\[22\]](#) This concept was well expressed by Mummery LJ in *Vento v Chief Constable of West Yorkshire Police* [2003] ICR 318, at 331: -

[\[23\]](#) As Dickson J said in *Andrews v Grand & Toy Alberta Ltd* (1978) 83 DLR (3d) 452, 475-476, (cited by this court in *Heil v Rankin* [2001] QB 272, 292, para 16)