



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

PETITION NO.199 OF 2013

BETWEEN

JOHN NDUNGU KINYANJUI.....PETITIONER

AND

THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

Introduction

1. The Petitioner has filed this Petition claiming that his right and protection against torture as was stipulated under **Section 74(1)** of the **Repealed Constitution**, was violated, by Kenya Police officers and officers of the General Service Unit on diverse dates in 1992 and 1993.

2. In his Petition dated 15th April 2013, he therefore seeks the following specific orders;

a. A declaration that the Petitioner's fundamental rights and freedoms from torture were each contravened and grossly violated by the Respondent's Kenya Police officers and General Service Unit officers (G.S.U) who were Kenyan government servants, agents, employees and in its institutions on diverse dates and times on 3rd March, 1992 up to 19th January 1993.

b. A declaration that the three Petitioners are each entitled to the payment of General damages, exemplary and moral damages and compensation for the violations and contravention of their fundamental rights and freedoms from torture under Section 23(3) of the Constitution 2010. (sic)

c. General damages, exemplary and moral damages for torture for each Petitioner.

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

e. Costs of the suit and interest.

The Petitioner's case

3. In his affidavit sworn on 15th April 2013, the Petitioner avers that on 3rd March 1992, he was at the Freedom Corner of Uhuru Park, with other people agitating for the release of Hon. Koigi wa Wamwere and 53 other political prisoners. These were:

(28) Wilson Awour Angonga

1. Mirugi Kariuki
2. Rumba Kinuthia
3. Harris Akong'o Arara
4. Sheik Aziz Said Rimo
5. Joseph Mwaura Kinuthia
6. James H. Gitau Mwara
7. Harun Thungu Wakaba
8. Geoffrey Kuria Kariuki
9. Kibathi Muigai
10. Harrison Githaiga Gicheru
11. Loli Wambua Kamau
12. Stephen Mulili Kituu
13. Philip Tirop Arap Kitur
14. Nduthu Karimi
15. Kang'ethe Mungai
16. Peter Nguthu Mburu
17. Joseph Mugeru Wainaina
18. Raphael Wambua Mutwili
19. Peter Kamande Gitau
20. George Kamau Njenga
21. Daniel Njuguna Kihunga
22. John Ogola Ojira
23. Francis Gachie Nakitari
24. Simon Gathi Mwaniki
25. Patrick Ngure
- (26) Shadrack Masika Mariwa
- (27) Edward Murithi Ndirangu
- (29) Mwanga Aate Seikwo
- (30) Charles Kuria Wamwere
- (31) Jethro Sakuo
- (32) Charles owuor
- (33) James Mawa
- (34) Daniel Muli
- (35) Sebastian Kamau
- (36) David Gitundu
- (37) Kennedy Maina
- (38) Dixon Jowe Aliech
- (39) Gibson Maina Kimani
- (40) Milton Chege Kimani
- (41) Samuel Mwangi
- (42) Boniface Mawa Matunda
- (43) John Kibe
- (44) Mutiso Mwangire
- (45) Dickson Nabwire Namadoa
- (46) Effermont Ng'ang'a
- (47) Hassan Hussein Juma
- (48) James Kisenge Musyoka
- (49) George Anyona
- (50) Augustine Njeru Kathangu
- (51) Odhiambo Pia
- (52) Edward Okongo Oyugi
- (53) Isaiah Ngotho Kariuki

The political prisoners had been jailed for the political offences of treason, sedition and belonging to an unlawful organization.

4. He also claims that on 3rd March 1992, while camping peacefully at the said Freedom Corner, with a number of other Kenyans, he was inhumanly and brutally battered by 100 Kenya Police officers and General Service Unit officers. He claims further that he was beaten with boots and batons, slaps, rubber whips, kicks and blows all over his body in violation of his right to protection against torture as was provided for under **Section 74(1) of the Repealed Constitution**. Thereafter, he was arrested and bundled into a police vehicle and taken to his rural home situated in the then Nakuru District.

5. He has also claimed that due to the level of brutality and violence meted on him, he was injured and some of the women with him at the time like the Late Prof. Wangari Mathaai were taken to hospital, unconscious.

6. He claims in addition that while at Freedom Corner, he did not have any weapon and the only possessions he had were clothes, blankets, water to drink and wash his face, Bibles and hymn books to keep him and others busy and there was also a tent which had been donated to them by well-wishers including the Late Prof. Wangari Mathaai who gave them moral support, food, clothing and water as they waited for the Government through Hon. Amos Wako, the then Attorney General, to respond to a Petition that had been presented on 28th February 1992, demanding for the release of all the 54 political prisoners named above.

7. It is also his case that after being deported to his rural home, together with other persons, he came back to Nairobi after a few days and began a peaceful campaign and hunger strike afresh, this time at the All Saints Cathedral Church compound. They were allegedly hosted at the bunker of the Church from 4th March 1992 to 19th January 1993 when all the political prisoners were released between 24th June 1992 and 19th January 1993. He claims that while at the All Saints Cathedral Church, the Kenya Police Officers and General Service Unit Officers continued to attack them sporadically.

8. He avers that his physical, psychological, political and economic life was messed up as a result of the above actions and to-date claims that he continues to suffer trauma.

9. It is his case therefore that the State violated **Section 74(1) of the Constitution**, which protected him against torture and it is his submission that the act of being subjected to beatings by the State agents amounted to torture which was prohibited under the **Repealed Constitution** as well as under international human rights instruments to which Kenya is a party.

10. For the above reasons, he seeks *inter-alia* general, exemplary and moral damages of Kshs.12,000,000.00.

The Respondent's case

11. The Respondent, the Attorney General opposes the Petition through grounds of opposition dated 19th March 2015 which read as follows:

i. That the Petition has been brought after inordinate Delay; Over thirty years after the alleged violation was committed.

ii. That no reasons whatsoever have been advanced to explain the long and inordinate delay.

iii. That the Petitioner has not shown by way of evidence that the alleged acts of violation were committed and further that if they were indeed committed, that government was involved.

iv. That the Petition filed herein is imprecise, it is based on generalities; and [is] therefore fatally defective.

v. *That the Petition, as filed herein, is an abuse of the court process.*

12. He also filed written submissions and it is his further case that the Petitioner had not demonstrated that the acts he complained of happened and that the State was responsible in any way. That in any event, that newspaper cuttings do not amount to evidence as provided under the **Evidence Act** and on that submission, he relied on the case of *Tesco Corporation Ltd v Bank of Baroda HCCC No.182 of 2007* where it was held that a newspaper cannot be admitted as evidence unless it had satisfied the criteria established under **Section 35** of the **Evidence Act (Cap 80 Laws of Kenya)**.

13. It is the Respondent's further submission that the gathering at Freedom Corner was in violation of **Section 2** of the **Public Order Act (Cap 56 Laws of Kenya)** and the Petitioner had not notified the Regulating Officer of the said meeting.

14. As regards quantum of damages in constitutional matters, the Respondent claims that exemplary damages are not awarded in changed political circumstances and he relied on the case of *Benedict Munene Kariuki and others v The Attorney General Petition No.722 of 2009* for that proposition.

15. The Respondent has therefore urged the Court to dismiss the Petition for lack of evidence and merit.

Determination

16. The Petitioner claims that he was beaten with boots, slaps, rubber whips, kicks and blows all over his body by Kenya Police Officers and General Service Unit Officers while holding a peaceful demonstration at Freedom Corner on 3rd March 1992 and even at All Saints Cathedral up to January 1993. He submits that these acts amount torture and thus a violation of his right as protected under **Section 74(1)** of the **Repealed Constitution**.

17. In response, the State opposes the claim on three grounds. Firstly, that the Petition has been filed too late in the day – over thirty years after the alleged incidents. Secondly, that the Petitioner has not availed any evidence to substantiate his allegations and lastly, that the Petitioner, on the material dates was engaged in unlawful actions. I shall address all the above issues herebelow.

Inordinate delay

18. Neither the **Repealed Constitution** or **Constitution 2010** makes provision for time in terms of filing a claim for enforcement of fundamental rights and in the case of *Dominic Arony Amolo v Attorney General Misc Applic No.494 of 2003* it was held that the **Limitations of Actions Act (Cap 22 Laws of Kenya)** was inapplicable in regard to claims for enforcement of the Bill of Rights. That finding has been upheld by our Courts over the last ten years and I have no reason to depart from the said holding.

19. To my mind however, despite the fact that the law does not impose limitations for filing of proceedings to enforce fundamental rights and freedoms, there must be a justification as to why a claim had not been filed as early as the alleged breach occurs. I say so because obviously, the State would be prejudiced heavily by the inordinate delay as the officers who may have been responsible may not be found and it would also not have the means to defend itself. There is also the likelihood of a Petitioner being prejudiced given the passage of time and memory loss leading to inconsistencies. Records may also be lost and crucial witnesses may not be traceable or have since passed on. It is therefore important to file a Petition as soon as the breach occurs only to mitigate against such factors.

20. In that context, the facts relied upon and giving rise to the claim in the Petition occurred between 3rd March 1992 and 19th January 1993, which is over twenty years ago. While it is true therefore that there is no limitation of time for filing cases for enforcement of fundamental rights and freedoms, it is also true that the Judiciary has over the last few years provided redress for human rights atrocities that occurred in previous regimes notwithstanding obvious delays in filing such claims. The political situation has also drastically changed and the law has similarly changed with a new Constitution that has brought a new dawn that has given the people of Kenya hope, especially those who have suffered historical injustices. I

am of the view in that regard that our Courts ought to examine each of the claims made for violation of fundamental rights and freedoms and only those that have been substantiated should be addressed notwithstanding the obvious delay in filing them and I shall now proceed to determine the present Petition on the basis of the evidence presented by the Petitioner.

Whether the Petitioner’s fundamental right and protection from torture was violated.

21. **Section 74(1)** of the **Repealed Constitution** protected the right not to be subjected to torture and other cruel and degrading treatment thus;

“No person shall be subject to torture or to inhuman or degrading punishment or other treatment”.

Under the **Constitution 2010**, prohibition against torture is provided for under **Article 29(d)** of the **Constitution** in the following terms;

“Every person has the right to freedom and security of the person, which includes the right not to be –

a. ...

b. ...

c. ...

d. subjected to torture in any manner, whether physical or psychological.”

Further, under **Article 25** of the **Constitution 2010**, freedom from torture, cruel, inhuman and degrading treatment cannot be limited and there cannot therefore be any justification for torture and torture is therefore prohibited in all its forms and elements.

22. With that principle in mind, it is the Petitioner’s claim that he was subjected to torture by the officers of the Kenya Police and General Service Unit because he was beaten all over his body using batons, rubber whips and that he was also tear-gassed.

23. Despite making a very serious claim however, he failed to adduce any tangible evidence to prove his allegations and I can do no better than agree with the sentiments of Nyamu J (as he then was) in ***Col Peter Ngari Karume & 7 Others v Attorney General Const Application No. 128 of 2006*** when he expressed himself as follows;

Turning to the alleged violation as aforementioned, it is incumbent upon the petitioners to avail tangible evidence of violation of their rights and freedoms. I have gone through the petitioners’ affidavits which have horrifying allegations. The Respondent has denied all those allegations. The allegations of violations could be true but the court is enjoined by law to go by the evidence on record. The Petitioners’ allegations ought to have been supported by further tangible evidence such as medical records, witnesses’ or rather oral evidence capable of being subjected to cross examination to test its veracity. The Petitioners did not provide such evidence except the averments of what transpired to them.

He concluded on that issue as follows;

It is most probable that in the prevailing circumstances then, the petitioners were subjected to physical beating, torture, detention without trial among other violations but the court is deaf to speculation and imaginations and must be guided by evidence of probative value. When the court is faced by a scenario where one side alleges and the rival side disputes and denies, the one alleging assumes the burden to prove the allegation. I have gone through the entire court record

and there is absolutely nothing to support the allegations made by the petitioners.

24. I generally agree with the above statements as applicable to this case and in addition, the law is clear on proof of any claim because **Section 107 (1)** of the **Evidence Act (Cap 80 Laws of Kenya)** provides that a party that seeks to rely on a fact bears the burden of proving that fact. This Court has similarly dealt with cases such as the present one where Petitioners have claimed that they were tortured while demonstrating at Freedom Corner and in ***Margaret Wanjiru & 5 Others v Attorney General Petition No.210 of 2013***, the Court expressed itself as follows;

“Even if I was for a moment to assume that due to passage of time, they would not be able to acquire the requisite documents to prove that they sought the medical attention, the Petitioners still had other ways of proving their case. Why did they not for instance have other witnesses testify on their behalf? I believe it would not have been difficult for them to have the women whom they were with at the Freedom Corner testify for them and that would have corroborated their testimony. I am also of the view that it was possible for them to get a witness (es) from the All Saints Cathedral Church where allegedly they kept camp from 4th March 1992 to 19th January 1993, a period close to one year. Certainly, they must have been at the Church’s compound with the approval and knowledge of the Church’s leadership.”

25. The words above are still relevant in this case and I have also noticed that the cases dealing with the issue of violation of rights at the Freedom Corner are largely filed by the same advocate and there is of course nothing wrong with that fact but it is very disheartening to witness the casual manner in which these cases are presented to this Court. They are nothing more than a copy and paste affair of each other and as was stated in ***Margaret Wanjiru & 5 Others v Attorney General (supra)***, this Court will not tire in reminding the victims of historical injustices, such as the present Petitioner, that this is a Court of law and which operates within the parameters of the law and nothing else. Sympathy alone cannot be the basis for favourable decisions.

26. In addition to the above, I note that the only piece of material evidence presented in this case was a copy of the **“Society Magazine Issue No.4”** of 23rd March 1992 which run a story captioned; **‘State Tyranny’**. It was produced as annexure ‘JMW I’. This Court has previously discussed the probative value of that magazine in ***Margaret Wanjiru & 5 Others v Attorney General (supra)***. After determining the applicability of **Section 35** of the **Evidence Act**, the Court concluded that the magazine could not be admitted as evidence because it did not provide any evidentiary value to the Petitioners’ case. Despite that finding, the Petitioner and other parties have continued to rely on the same magazine including in the instant proceedings. In the ***Margaret Wanjiru Case***, the Court stated thus:

“It is true that the magazine has run a story on women who were at freedom Corner seeking for the release of their sons and husbands. I have seen the images of women who have chained themselves, I do not know whose images are those and neither do I have the nexus as between them and the Petitioners...The magazine does not refer to any of the Petitioners”.

27. The above sentiments squarely apply to this case and it is my further finding that torture as known to law cannot be proved in the casual manner the Petitioner has done in the present case. I say so because in ***Samwel Rukenya Mburu v Castle breweries Nairobi HCCC 1119 of 2003*** Visram J (as he then was) stated thus:

“Prohibition against torture, cruel or inhuman and degrading treatment implies that an “action is barbarous, brutal or cruel” while degrading punishment is “that which brings a person dishonor or contempt.”

28. Similarly, the Court of Appeal in ***Koigi Wamwere v AG [2015] eKLR*** expressed itself thus;

“On our own consideration of the matters complained of, we come to the unhesitating conclusion that the ascription of the term torture to them was a subjective and loose stretching of the term, which, though conversationally and informally understandable, does not bear fealty to

the technical legal definition of torture. Torture is defined by the Convention against Torture Article 1 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 action 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, with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

We have highlighted the last phrase or sentence of that definition not only because it seems on the face of it, to be exclusionary of some of the complaints by the appellant but, more so because, whether by default or by design, they are missing from the appellant’s counsel’s quotation of the article in their submissions. It seems to us arguable that had counsel fully quoted the article, and given full weight and credit to the last phrase, the submissions made would necessarily have been either altered or otherwise qualified”.

29. It is obvious to me that a relook at the Petitioner’s complaints, coupled with an obvious lack of any evidence to back his claims, would lead a reasonable man to the conclusion that the Petitioner could not have been subjected to torture as he casually stated. In the circumstances, I find no violation of **Section 74** of the **Repealed Constitution** as claimed.

Conclusion

Having held as I have done above, the question as to whether the **Public Order Act** was violated by the Petitioner is moot once his larger claim has failed.

Disposition

30. For the above reasons, the Petition herein is without merit and is dismissed.

31. Let each party however bear its own costs.

32. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 20TH DAY OF JANUARY, 2017

ISAAC LENAOLA

JUDGE

DELIVERED AND SIGNED AT NAIROBI THIS 25TH DAY OF JANUARY, 2017

E. CHACHA MWITA

JUDGE