



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

**PETITION NO.200 OF 2013**

**BETWEEN**

**NGETHE WA MURIMI alias**

**NGETHE KURIA MURIMI.....PETITIONER**

**AND**

**THE ATTORNEY GENERAL..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. In his Petition dated 15<sup>th</sup> April 2013, the Petitioner, Ngethe wa Murimi alias Ngethe Kuria Murimi, alleges that his fundamental rights and freedoms were contravened and grossly violated by Special Branch Police officers for ten days at Nakuru Central Police Station and eight days at Nyayo House Torture Chambers in June 1987.

2. In his Petition, he now seeks the following orders;

*(a) A declaration that the Petitioner's fundamental rights and freedoms were contravened and grossly violated by the Respondent's Special Branch police officers who were Kenyan government servants, agents, employees and in its institutions on diverse dates at Nakuru Central Police Station for ten days between 1<sup>st</sup> June 1987 and at Nyayo House Torture Chambers for eight days from 18<sup>th</sup> January 1989 to 26<sup>th</sup> January 1989.*

*(b) A declaration that the Petitioner is entitled to the payment of damages and compensation for the violations and contravention of his fundamental rights and freedoms under the aforementioned provisions of the Constitution for a total of 18 days.*

*(c) General damages, exemplary damages and moral damages on an aggravated scale under section 23(3) of the Constitution 2010 for the unconstitutional conduct by the Kenyan government servants and agents be awarded. (sic)*

**The Petitioner's case**

3. The Petitioner claims that he was arrested on 1<sup>st</sup> June 1987 by Special Branch Police officers at his

home in Nakuru whereupon he was told to write a document on a clandestine movement known as the Kenya Patriotic Front which was allegedly formed by his cousin, Koigi wa Wamwere. He was then locked up and released after 10 days on 11<sup>th</sup> June 1987 without any charge.

4. On 10<sup>th</sup> August 1988, when he was at work at the Ministry of Co-operative Development in Laikipia District, he was given ten days' leave to go to his home. He decided not to go directly but to lie low in Laikipia for two months, apprehensive of being arrested.

5. On 10<sup>th</sup> October 1988, he received information from someone at his home that a letter alleging absenteeism of duty on his part from his employers had been served on his family. He still declined to go home for fear of being arrested and on 18<sup>th</sup> January 1989, he states that he was arrested when he finally decided to go to his Engashura home. Upon arrest, he was bundled into a waiting police land rover, blindfolded and driven to a place he later discovered was Nairobi. On arrival he was taken straight to a dark cell in the basement of Nyayo House where he was locked up. Before day break, he was taken in a lift to the 24<sup>th</sup> floor where he was presented to a panel of about ten people for interrogation.

6. He was immediately ordered to strip naked and was beaten mercilessly with slaps, rubber whips, broken chair pieces, kicks and blows until he was covered by blood all over his body. After each session of beatings, he would allegedly be returned to the dark cell which was then flooded with cold water and that pressurized water would be intermittently sprayed on him for several hours while naked. He states that these acts were repeated for eight days, in violation of his freedom from torture, cruel, inhuman and degrading treatment as was provided for under **Section 74(1) of the Repealed Constitution**.

7. He states further that he was locked in the dark cold cell for eight days and was kept without food, a sleeping mat, blanket or drinking water for the entire period. He alleges that between the date of his arrest and release, none of his family members or friends knew of his whereabouts and claims that the said acts violated his freedom from torture, cruel, inhuman and degrading treatment.

8. He also contends that upon his release, he was unable to go to work for fear of being arrested as well as fear of further incarceration at Nyayo House. As a result of failure to return to work, he lost his job at the Ministry of Co-operative Development on 17<sup>th</sup> April 1989 and he fled into self-exile in Dar-es-salaam, Tanzania from April 1989 to December 1991.

9. He alleges that as a result of the aforesaid actions, he has suffered physically, psychologically and economically and claims that he continues to suffer trauma to date.

10. In his written submissions, the Petitioner added that the **Kenya Police Act** and the **Criminal Procedure Code (CAP 75 Laws of Kenya)** did not empower the police to torture him and that his constitutional rights as provided for under **Sections 74 and 77 of the Repealed Constitution** were violated by the Petitioners.

11. It is therefore the Petitioner's case that he is entitled to compensation for the violation of his fundamental rights and freedom aforesaid and has pleaded to be awarded special, general and exemplary damages of Kshs.8,000,000.00.

### **The Respondent's case**

12. The Respondent, the Attorney General opposes the Petition through the following grounds of opposition filed in Court on 17<sup>th</sup> September 2014:

***(i) That the Petition has been brought after inordinate delay of 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 were committed by officers of the government.*

*(iv) That the Respondent herein shall be gravely prejudiced if the petition is allowed to proceed as the would be witnesses have retired, left service or died.*

*(v) That the petition filed by the Petitioner is defective in substance, and does not come under any provisions of the law.*

*(vi) That the petition is otherwise an abuse of the process of this honourable court and shall at the earliest opportunity seek by way of viva voce evidence.*

*(vii) That alternatively, the issues raised by the Petitioner can properly canvassed by the Truth, justice and Reconciliation Commission.*

The Respondent did not file written submissions and nothing significant came out of the cross-examination of the Petitioner.

### **Determination**

13. It appears to me that the Attorney General is aggrieved by the inordinate delay in filing the Petition and I note that the issue of inordinate delay has been the subject of determination in previous cases based on past injustices in Kenya and that is why in the case of ***Dominic Arony Amolo vs Attorney General Misc Applic No. 494 of 2003*** it was held that the **Limitations of Actions Act (Cap 22) Laws of Kenya** was not applicable in regard to claims for enforcement of the Bill of Rights and in the related case of ***John Ndungu Kinyanjui vs Attorney General Petition No. 199 of 2013*** this Court stated as follows;

*“To my mind, despite the fact that the 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 petition had not been filed as early as the alleged breach occurs. Obviously, the State would be prejudiced heavily by the inordinate delay. The officers who may have been responsible cannot be found and it would not have a means to defend itself. There is also a likelihood of Petitioner being prejudiced. Given the passage of time, memory may fail leading to inconsistencies. Records are also lost. 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.”*

I reiterate the sentiments above in the instant Petition and will address the Petitioner’s complaints despite the obvious delay in its filing.

14. Having said so, the facts leading to the Petition are not contested. The issue therefore is whether those facts, as pleaded, disclose a violation of the Petitioner’s rights.

### **Right to liberty**

15. The Petitioner claimed that he was arrested for the first time by Special Branch Police officers at his Nakuru home on 1<sup>st</sup> June 1987 and released on 11<sup>th</sup> June 1987. He was then held in custody for a period of 10 days and later, he was arrested on 18<sup>th</sup> January 1989 at his Engashura home, driven to Nairobi and thereafter to Nyayo Torture Chambers. On both occasions he was not taken to any Court of law.

16. In that context, the applicable law at the time was **Section 72(1)** read together with **Section 72(3)** and **72 (5)** of the **Repealed Constitution**. This provision obligated the arresting authority to present any suspect to a court of law within 24 hours for a misdemeanor and within 14 days for capital offences. **Section 72** of the **Repealed Constitution** thus provided as follows;

**(1) No person shall be deprived of his personal liberty save as may be authorized by law....**

**(2) A person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.**

**(3) A person who is arrested or detained-**

**(a) for the purpose of bringing him before a court in execution of the order of a court; or**

**(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty- four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.**

17. In this case the Petitioner was not told of specific accusations against him but as he stated, he was only being interrogated on whether he knew about the Kenya Patriotic Front and of Hon. Koigi Wamwere who was related to him as his cousin.

18. The law did not allow the State or its agents to hold the Petitioner for a period of ten days without presenting him to Court and he was supposed to be presented to Court within 24 hours of his arrest. He was never so presented. His being held in detention for a period of eighteen days in total without trial was therefore unlawful and in clear violation of **Section 72** of the **Repealed Constitution**, and I so find.

### **Protection from torture**

19. The Petitioner also claimed that while being held at Nyayo House he was tortured. **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”**. **Article 28** of the **Constitution** similarly grants the same right.

20. The law on protection against torture and other degrading and inhuman treatment is also clear under all international human rights instruments. For example, **Article 5** of the **United Nations Universal Declaration of Human Rights (“UDHR”)** states that **“No one shall be subjected to torture or to cruel, in-human or degrading treatment or punishment”** and since the adoption of the UDHR on December 10, 1948, this provision has been reproduced in several other international human rights instruments including the **International Covenant on Civil and Political Rights (“ICCPR”)**, **The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment**, **The European Convention on Human Rights (ECHR)**, **The American Convention on Human Rights (AmCHR)**, **The Inter-American Convention to Prevent and Punish Torture** and **The African Charter on Human and Peoples Rights (Banjul Charter)**.

21. Looking at the law above, torture is prohibited in all its forms and the general principle is that there can never be a justification for torture and indeed it is perhaps the reasons why it is one of those fundamental rights and freedoms that can never be abrogated from.

22. This Court has held in previous cases such as; **James H Gitau Mwara vs Attorney General Misc No. 56 of 2005**, **Harun Thungu Wakaba & 20 Others vs Attorney General HCCC No. 1411 of 2004**, **Wachira Waheire vs Attorney General Misc Civil Applic No. 1184 of 2003** and **Rumba Kinuthia vs Attorney General HCC No. 1408 of 2004**, that the acts of beating someone with whips, kicks, slaps, broken chair pieces, kicks and blows constituted torture and solitary confinement in a dark cell flooded with cold water equally amounts to torture.

23. Without saying more, it is my finding that the Petitioner was subjected to torture while being held at Nyayo House and elsewhere, in violation of **Section 74(1)** of the **Repealed Constitution**.

### **Remedies**

24. Having found that the Petitioner's rights under **Sections 72 and 74** of the **Repealed Constitution** were violated by the Respondent, this court must award him an appropriate remedy.

25. I reiterate in doing so that the Petitioner was incarcerated at Nakuru central police Station for ten days and at Nyayo House Torture Chambers for eight days. He was also tortured during the eight days he was held at Nyayo House. In that regard, in ***Benedict Munene Kariuki and 14 others vs the Attorney General High Court Petition No. 722 of 2009***, the Court stated that a global figure is most appropriate in cases for enforcement of constitutional rights and freedoms because the acts complained of were as a result of the same unlawful transaction. The High Court has also been reluctant in awarding punitive damages for reasons that they are not awardable in changed political circumstances - See ***Jennifer Muthoni Njoroge and 10 Others vs Attorney General Petition No. 340 to 350 of 2009***.

26. In the event, the Petitioner has sought an award of Kshs.8,000,000.00 but I shall award him **Kshs.1,500,000.00** for violation of his rights under **Sections 72 and 74** of the **Repealed Constitution**. I have done so having taken into account specifically the period of 18 days in which he was in unlawful incarceration. I have also taken into consideration the torture acts inflicted upon him for 8 days while he was held at Nyayo House Torture Chambers.

### **Disposition**

27. The final orders to be made therefore are that Judgment is entered in favour of the Petitioner against the Respondent in the following terms;

*(a) A declaration is issued that the Petitioner's fundamental rights and freedoms were contravened and grossly violated by the Respondent's Special Branch police officers who were Kenyan government servants, agents, employees and in its institutions on diverse dates at Nakuru Central Police Station for ten days between 1<sup>st</sup> June 1987 and at Nyayo House Torture Chambers for eight days from 18<sup>th</sup> January 1989 to 26<sup>th</sup> January 1989.*

*(b) A declaration is issued that the Petitioner is entitled to the payment of damages and compensation for the violations and contravention of his fundamental rights and freedoms under the aforementioned provisions of the Constitution for a total of 18 days.*

*(c) Payment of damages of Kshs.1,500,000.00.*

*9d) Costs of the Petition.*

*(e) Interests on (c) and (d) above until payment in full at Court rates.*

28. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 20<sup>TH</sup> DAY OF JANUARY, 2017**

**ISAAC LENAOLA**

**JUDGE**

**DELIVERED AND SIGNED AT NAIROBI THIS 25<sup>TH</sup> DAY OF JANUARY, 2017**

**E. CHACHA MWITA**

**JUDGE**