



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.223 OF 2013

BETWEEN

PETER NJUGUNA MWANGI ALIAS MATERERO.....1ST PETITIONER

JOSEPH NJOROGE MBURU.....2ND PETITIONER

HENRY MBUGUA TURI.....3RD PETITIONER

AND

THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

Introduction

1. The Petitioners have filed this Petition claiming that their right and protection against torture as was stipulated under **Section 74(1) of the Repealed Constitution**, was violated, by Kenya Police officers and officers of the General Service Unit sometime between March 1992 and January 1993.

The Petitioners' case

2. Petitioners' case is as contained in the Petition dated 23rd April 2013 and their Supporting Affidavits all sworn on 23rd April 2013 and can be summarized as herebelow.

3. That on 3rd March 1992, they were at Freedom Corner within Uhuru Park in a peaceful fast agitating for the release of their friend Hon. Koigi wa Wamwere and 53 other political prisoners, namely:

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|---------------------------|---------------------------|
| 1. Mirugi Kariuki | 27. Mwanga Aate Seikwo |
| 2. Rumba Kinuthia | 28. Charles Kuria Wamwere |
| 3. Harris Akong'o Arara | 29. Jethro Sakuo |
| 4. Sheik Aziz Said Rimo | 30. Charles owuor |
| 5. Joseph Mwaura Kinuthia | 31. James Mawa |

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| 6. James H. Gitau Mwaru | 32. Daniel Muli |
| 7. Harun Thungu Wakaba | 33. Sabastian Kamau |
| 8. Geoffrey Kuria Kariuki | 34. David Gitundu |
| 9. Kibathi Muigai | 35. Kennedy Maina |
| 10. Harrison Githaiga Gicheru | 36. Dixon Jowe Aliech |
| 11. Loli Wambua Kamau | 37. Gibson Maina Kimani |
| 12. Stephen Mulili Kituu | 38. Milton Chege Kimani |
| 13. Philip Tirop Arap Kitur | 39. Samuel Mwangi |
| 14. Nduthu Karimi | 40. Boniface Mawa Matunda |
| 15. Kang'ethe Mungai | 41. John Kibe |
| 16. Peter Nguthu Mburu | 42. Mutiso Mwangire |
| 17. Joseph Mugero Wainaina | 43. Dickson Nabwire Namadoa |
| 18. Raphael Wambua Mutwili | 44. Effermont Ng'ang'a |
| 19. Peter Kamande Gitau | 45. Hassan Hussein Juma |
| 20. George Kamau Njenga | 46. James Kisenge Musyoka |
| 21. Daniel Njuguna Kihunga | 47. George Anyona |
| 22. John Ogola Ojiro | 48. Augustine Njeru Kathangu |
| 23. Francis Gachie Nakitari | 49. Odhiambo Pia |
| 24. Simon Gathi Mwaniki | 50. Edward Okongo Oyugi |
| 25. Patrick Ngunjiri | 51. Isaiah Ngotho Kariuki |
| 26. Wilson Awour Angonga | |

4. While at Uhuru Park, they allege that they were brutally battered with boots and batons, slaps, rubber whips, kicks and blows and had tear gas thrown at them by the Kenya Police and GSU officers. Thereafter, they were arrested by the same officers and bundled into a police vehicle known as the 'Black Maria' and taken to their rural home in Limuru. Those actions, the Petitioners deposed, were a violation of their fundamental rights and freedoms from any form of violence, freedom from torture in any manner, and freedom from being treated or punished in a cruel, inhuman or degrading manner as protected by **Articles 25(a) 29(c), (d), (f) of the Constitution (formerly Section 74 of the Repealed Constitution).**

5. The Petitioners further state that on 28th February 1992, they, alongside mothers of the above named political prisoners, presented to the Attorney General, a Petition to the Government for the release of the said political prisoners who had been jailed for various offences including treason, sedition or belonging to an unlawful organization. It was also their deposition that the brutality and atrocities they underwent, together with the women and supporters of the campaign for the release of the political prisoners, was thus unjustified.

6. Further, that they were unarmed and only had in their possession blankets and clothes, water, hymn books and bibles and a tent that had been donated to them by a well-wisher. That they were therefore taken by surprise by the brutality and violence which was to say the least, horrifying. This attack, the Petitioners state, was perpetrated on 3rd March 1992 between 4.00pm – 9.45pm and using the cover of darkness, 50 police women raided the remaining women and men sympathizers, arrested them, bundled them into police vans and dispersed them to various police stations before deporting them to their home districts.

7. Furthermore, they depose that the brutal attack and violence by the police did not deter their efforts as they were back to Nairobi in less than 5 days to continue with their peaceful campaign and hunger strike at the All Saints Cathedral Church grounds where they were hosted by 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. That during their 10 month camp at the Church, the police continued to attack them and they contend that they suffered trauma, physical and psychological pain as a result of the torture for supporting the campaign for the release of the political prisoners. For the above reasons they now pray for the following orders:

a. A declaration that the three petitioners' fundamental rights and freedom from torture were contravened and grossly violated by the Respondent's Kenya Police Officers and General Service Unit Officers (GSU) who were Kenyan Government servants, agents, employees and its institutions on diverse date and time on 3 March 1992 and up to 19 January 1993.

b. A declaration that each of the three petitioners is entitled to the payment of general damages, exemplary damages and moral damages and compensation for the Torture, violations and contraventions of their fundamental rights and freedoms under Section 23(3) of the Constitution of Kenya 2010. (sic)

c. General damages, exemplary damages and moral damages for the torture for each petitioner.

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

e. Costs of the suit, and interest.

8. In oral evidence before this Court, the 1st Petitioner (PW1) testified that he was 57 years old and a farmer in Kinangop. He reiterated that he was one of the sympathizers, and even witnessed the women at Freedom Corner stripping naked, to protest at the continued detention of the political prisoners and that although two political prisoners were initially released, others remained incarcerated. It was his evidence that the police brutality meted on the protesters was documented in 'The Society' Magazine as the editor was bold enough to report items that the mainstream press could not report. On cross-examination, he stated that on 3rd March 1992 they were about 20 – 30 people at Freedom Corner and that they were attacked between 4.00pm – 9.30pm after which they were arrested but not booked in any police station. Further, that since they were unarmed and had committed no crime, there was no need for 100 police officers to arrest them. He also confirmed that he did not have any medical or psychiatric report for the injuries he allegedly suffered.

9. On further cross-examination by the Court, PW1 stated that he came to Court after 23 years when his lawyer decided to file the case although he had contacted his advocate 10 years earlier. He explained that he was indeed beaten and sustained injuries on his legs but never went to hospital because of his religious faith, he being a follower of Assemblies of Yahweh.

10. The 2nd Petitioner (PW2) testified that he was 46 years old and a farmer in Nyandarua South. It was his evidence that during the police attack, he was accosted by two police officers, a man and woman, who kicked him on the leg and on the head with a gun butt and that he was also injured on the chest. He testified that he is today unable to lift heavy weights as a result of the injuries.

11. On cross-examination, PW2 stated that his co-Petitioners were not his relatives but that they lived together in Limuru. He testified further that he was invited to Uhuru Park alongside 60 other people to fast because of the need to support women protesters at the Park including Monica Wangu Wamwere. Further, that although he was arrested on the material day, he was not booked in any police station. He testified that he came to Court 23 years after the incident complained of because during the KANU regime, no Court could hear a case such as this one. On further cross-examination, PW2 stated that he was treated in an unnamed hospital for the alleged injuries (by one Dr. Lucas Munyua) who sent him to Nairobi X-ray Centre for further tests but he did not produce treatment notes or x-rays for the injuries he alleges to have suffered.

12. The 3rd Petitioner (PW3) testified that he was 57 years old and a farmer in Narok and it was his evidence that he was at Freedom Corner with his co-Petitioners where he was tortured and sustained injuries on the head, finger and clavicle. On cross-examination, he further testified that he was arrested on 3rd March 1992 and dropped in Limuru at 11.00 pm. And that later that night, he was taken to Tigoni General Hospital which referred him to Kijabe Hospital for X-ray services. He did not have treatment notes with him because his wife had allegedly burnt them. On further cross-examination, he stated that he went to All Saints Cathedral three days after he was beaten and that he did so despite his injuries out of the passion for the release of political prisoners. That he camped at the church bunker until the political prisoners were released and it was his testimony that he came to court late as there was no justice in the Government of the time and that he had no funds to file the case anyway.

13. In their written submissions, the Petitioners submitted that they were entitled to the enjoyment of fundamental rights and freedoms under **Section 74** of the **Repealed Constitution** which did not allow for any derogation by the Government. That therefore, the Police had no lawful, legal or statutory power to unleash violence on them and they further claim that the violence meted upon them amounted to torture, inhuman and degrading treatment.

14. The Petitioners in addition referred the Court to their affidavits and evidence in Court submitting that they had established that they had sustained injuries and suffered psychological trauma from the beatings, tear gas, brutal arrest and night transport to their homes and urged the Court to find that they had proved their case on a balance of probability and were therefore entitled to the orders now sought including exemplary damages to punish the Respondents for their actions.

Respondent's case

15. The Respondent, the Attorney General, represented by Mr. Moimbo, State Counsel, cross-examined the witnesses having filed no formal response to the Petition.

Determination

16. I shall determine the Petition based on the issues arising from pleadings and oral evidence as herebelow.

Protection from torture

17. The Petitioners' case is that they were part of a group of people who had camped at Freedom Corner within Uhuru Park, Nairobi, on diverse dates between March 1992 and January 1993 agitating for the release of Koigi wa Wamwere and other political prisoners and it is their evidence that they were brutally battered with boots and batons, slaps, rubber whips, kicks and blows and had tear gas thrown at them by Kenya Police and GSU officers particularly on 3rd March 1992. It is their contention that these acts amounted to torture. They alluded to cruel degrading and inhuman treatment but the Petition was largely predicated on allegations of torture.

18. In that context, **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 29 (d) and (f) similarly provide as follows:

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;**

(e) ...;

(f) **treated or punished in a cruel, inhuman or degrading manner.**

19. In that context, PW1 testified that during the alleged attack by the police and GSU officers on 3rd March 1992, he sustained injuries on his leg, PW2 was injured on the legs and chest and was hit on the head with a baton, and PW3 was injured on the head and had a broken finger and clavicle. That as a result of his injuries, the latter is unable to lift heavy weights. PW2 and PW3 further testified that they went to hospital for treatment and X-rays but none of the Petitioners produced any evidence to substantiate their allegations of physical injuries. That fact is fundamental in determining whether there was torture and that is why Nyamu J. in the case of *Col. Peter Ngari Karume & 7 Others v Attorney General Petition No. 128 of 2006* aptly stated:

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.

I agree with the learned judge and I adopt his sentiments as if they were mine.

20. I must further reiterate that this Court has continued to decry the casual manner in which the cases touching on the events of 3rd March 1992 at Freedom Corner are being prosecuted. The Petitioners, despite sentiments expressed by this Court, refused to present any evidence in support of their allegations and yet it must be remembered that it is incumbent upon the Petitioners to avail tangible evidence of violation of their rights and freedoms as alleged and not to merely state them and then expect the Court to take those statements as gospel truth.

21. I say so because for instance, PW 2 claimed in his testimony that he is unable to carry out duties as a result of injuries suffered. Why did he not subject himself to a medical examination that would help him prove that fact? On his part, PW1 testified that he did not go to hospital because of his religious faith, being a follower of Assemblies of Yahweh and that his religion does not believe in the taking of modern medicine. If that is the case, why did he not get any witness to testify on his behalf and corroborate that fact?

22. This Court is also alive to the fact that it has been over 20 years since the alleged police brutality and I am cognizant of the fact that treatment notes may not be on hand. PW3 did in fact testify that his wife

burnt all his treatment notes, save for X-rays, which he nonetheless failed to produce. PW2 was also allegedly treated by one Dr. Lucas Munyua who even ordered for X-rays to be done, which were also not produced. It is therefore evident that the Petitioners were attended to by doctors and/or medical staff in the said hospitals. Why was it so difficult to bring the medical reports or even have the doctors treating them testify on their behalf?

23. I also note that the only piece of evidence produced by the Petitioners was a copy of an extract of a Magazine, '**The Society**', dated 23rd March 1992, which they relied on as proof of their ordeals. It was their evidence therefore that the atrocities perpetrated to them and others at the Freedom Corner were documented in the said magazine as the mainstream press was not bold enough to report the same. The portions availed to the Court are two stories titled, '**State Tyranny**' and '**Suffering with Bitterness**'. The stories give a chilling account of the brutality meted on the women seeking the release of their sons at Freedom Corner but no connection whatsoever is made with the Petitioners who are all men.

24. I have had the opportunity to discuss the admissibility of that Magazine as documentary evidence in previous cases - See **Monicah Wangu Wamwere v AG Nairobi Petition No. 196 of 2013 [2016] eKLR** and **Margaret Wanjiru & 5 Others v Attorney General Petition No. 210 of 2013** and I have held in those two cases that the said magazine does not have any probative value as presented. I say so because first, I am in agreement with the finding of the Court in the case of **Tesco Corporation Ltd v Bank of Baroda (K) Limited, Civil Case 182 of 2007** that a newspaper is not a document covered within **Section 35** of the **Evidence Act**. The Section reads as follows:

1. In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say –

a. If the maker of the statement either –

i. Had personal knowledge of the matters dealt with by the statement; or

ii. Where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or I might reasonably be supposed to have, personal knowledge of those matters; and

b. If the maker of the statement is called as a witness in the proceedings;

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the Court unreasonable.

(2) In any civil proceedings, the Court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) of this section shall be admissible or may, without any such order having been made, admit such a statement in evidence-

(a) notwithstanding that the maker of the statement is available but is not called as a witness;

(b) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a

true copy in such manner as may be specified in the order or the Court may approve, as the case may be.

(3) Nothing in this Section shall render admissible any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.

(4) For the purposes of this Section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialed by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible.

(5) For the purpose of deciding whether or not a statement is admissible by virtue of this Section, the Court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a medical practitioner.

25. Secondly, I have read the aforesaid stories which are about the women whose sons had been detained. There are indeed photographs of women with captions of them demonstrating in solidarity with their sons. There are also two photographs of police dispersing a crowd, captioned, '**Police: Chasing Kenyans like rats**' and '**Kenya Police: Trigger Happy**'. Whereas the crowds being dispersed appear to include men, there is nothing that can show, with certainty, that the Petitioners were part of the said crowd and were tortured as alleged.

26. The above findings are important because the present Petition, like most others relating to the events of 3rd March 1992, are predicated on allegations of torture and no other violation of rights. Torture is not akin to a simple assault and even if the Petitioners were assaulted and a finding in their favour could be made, no evidence of any assault on each one of them has been placed before this Court.

27. It is not also enough that the Petitioners were at Freedom Corner on the material day, agitating for a genuine cause and that they were later that day rounded up and taken to their rural homes. It is also not enough that they returned to Nairobi and camped at the All Saints Cathedral for a year where there was constant harassment by the Police. What they have alleged in the present Petition is torture and even if the torture was not only physical but mental, the expectation of the law is the same which is that for torture to be proved the following elements must be in place;

i. Severity of pain and suffering.

ii. The intention of the torturer must be to cause severe pain and suffering at the least and that he is indifferent to the possibility of causing intense pain and suffering.

iii. The person or authority inflicting, instigating, or acquiescing in the act causing pain and suffering must be a public official or other person acting in an official capacity. **(See Koigi Wamwere v AG [2015] eKLR)**

28. Further, both under **Section 74** of the **Repealed Constitution** as well as **Article 29(d)** of the **Constitution**, as read with **Article 25(a)** thereof, there cannot be a defence to torture hence the well understood legal requirement that the threshold of severity of actions constituting torture is extremely high.

29. While therefore torture has been described as one of the most reprehensible of actions (See **Cox v Canada 539/93**), it cannot be pleaded as casually as the Petitioners have done in the present Petition. That is why in **Ireland v UK (1979 – 80) 2 EHRR 25** while the victims who were terror suspects had been herded, subjected to constant 'white' noise, sleep deprivation, given insufficient food and drink and were made to stand for long periods in a painful posture ('wall-standing'), the European Court of Human

Rights determined that the combined effects of all those actions did not amount to torture. Our Courts have however lowered that threshold – **See Koigi (supra)**.

30. However, in **Aydin v Turkey (1998) 25 EHRR 251**, the same Court found that the repeated rape of the complainant in police custody amounted to torture making the point that proof of torture is on a much higher pedestal than the present Petitioners have attempted to do and I have said why.

31. I should also add that while the High Court has generally found for example that the actions of the State at Nyayo House Torture chambers have constituted both torture as well as cruel, degrading and inhuman treatment, hardly has it gone further to differentiate what constitutes either of the violations. That fact notwithstanding, I reiterate that what happened to the Petitioners at Freedom Corner, if at all, and subsequently at All Saints Cathedral, cannot by any definition known to law, and even if the threshold could be considerably lowered, amount to torture. The Petitioners' claim in that regard must fail. Similarly, that feeble claim that they were subjected to cruel, inhuman and degrading treatment cannot stand because nothing was said of that claim save in the body of the Petition. The entire case in fact rested on the claim of torture.

Conclusion

32. Having held as I have done above, human rights' violations are a serious matter and this Court has over the years, stayed true to its duty and where violations have been proved, has granted appropriate remedies.

33. However, this Court has also decried the cut and paste pleadings that have now characterized the Freedom Corner cases. Worse of all, despite decisions showing that no torture can be proved from the events of 3rd March 1992, neither Counsel (mostly one particular advocate) nor parties, have taken the cue and either amend their pleadings or redesign the presentation of evidence. The effect is that being similar and almost word by word in pleadings and submissions, the cases have continued to collapse like dominoes even as the remaining parties soldier on. I have digressed.

34. Looking at the prayers in the present Petition, prayer (a) relates to allegations of torture on diverse dates from 3rd March 1992 up to 19th January 1993. Aside from the fact that no torture has been proved as relates to the events of 3rd March 1992, in fact no evidence of an unlawful action after that date has also been given. The almost a year long alleged torture would certainly have had long term effects on the Petitioners either physically or psychologically but no evidence in that regard was even alluded to let alone placed before me. That prayer must therefore fail.

35. Once prayer (a) has failed, no consequential remedy, including damages can be granted and therefore prayers (b), (c) and (d) must also fail.

36. On costs, ordinarily, they follow the event but the Court also has discretion to make any order on costs. I deem it fit therefore to order each party to bear its own costs.

Disposition

37. Since I find no merit in the present Petition, the same is dismissed but each party shall bear its own costs.

38. 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