

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO 300 OF 2015

IN THE MATTER OF ARTICLES 19, 20, 21 (1), 22 (1), 23 (1) AND (3) AND 165 (3) (A), (B),(D), (I), (11), 6 AND 7 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27 (1), (2), 28, 29 (A), (D), (F) (EQUIVALENT SECTIONS 70 (A), 72 (3), 74 (1) & 66 OF THE FORMER OF THE CONSTITUTION OF KENYA 2010

BETWEEN

REV. JAMLIK MUCHANGI MIANO..... PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....RESPONDENT

JUDGEMENT

Rev. Jamlik Muchangi Miano (hereinafter referred to as the petitioner) instituted this petition on 17th day of July 2015 seeking declarations that his arrest, cruel and degrading treatment, torture and violence subjected upon him while in custody at the Industrial Area Police Station and Nyayo House cells constituted breach of his fundamental rights enshrined in the repealed constitution. He also sought a declaration that he was arbitrarily and unlawfully and illegally detained in police custody and Nyayo House Cells for 75 days which was a breach of his fundamental rights to his dignity, liberty and freedom from cruel and degrading treatment. The petitioner also prays for general damages and costs of this petition.

Briefly, the petitioner avers that on 24th November 1985 while preaching at Kiaragana PCEA Church, he was arbitrarily arrested by three armed police officers from the pulpit and locked at Baricho Police Station cells for one day and thereafter transferred to Kerugoya Police Station where he was locked for another one day before being released on a P22 form. Even though no charges were preferred, the petitioner avers that he was questioned in connection with being a member unlawful organizations such as Mwakenya, February 12 Movement and other Anti-Government movements.

The petitioner further avers that in June 1992 upon releasing the *Jitengeme* Magazine with a headline "Moi: God's name in vain" he was arrested by police and led to Industrial Area Police Station where he was incarcerated for period of 21 days before being arraigned in court charged with the offence of sedition, which charges were never pursued.

Subsequently in 1982 upon releasing another copy of the said magazine, he was arrested and taken to Industrial Area Police Station where he was brutally assaulted by a police officer. He was held in isolation for 21 days and arraigned in court charged with the offence of sedition which charges were never pursued. Further the said publications were impounded.

Subsequently the petitioner registered his own magazine named "*Watchman*" and upon releasing its first

edition entitled *"Devils whip on Kenyans"* the police impounded all the copies and he was arrested and detained for 21 days and during the same period he was again arrested and held at Nyayo House in solitary confinement for a total of 13 days.

The Respondent filed a Replying affidavit sworn by a one Henry Kipkosgei Barmao dated 26th October 2015 in which he avers the constitution does not operate retrogressively, hence the petitioner cannot rely on rights enshrined in the repealed constitution, and that no police occurrence book numbers have been provided, that the P22 relied by the petitioner is disputed, that the petitioners allegations are denied and no medical reports have been produced to support the alleged injuries and that the alleged cause of action took place over 30 years ago hence the Respondent will be highly prejudiced.

The petitioner filed a supplementary affidavit on 20th November 2015 in which he annexed a copy of a charge sheet which clearly shows the OB number. He also annexed some communications from an international organization touching on the arrest and local news paper cuttings on the issue.

Hearing proceeded before Onguto J on 27th January 2016 and the petitioners evidence essentially highlighted the averments in his petition and affidavits. Upon cross-examination the petitioner admitted that he had no evidence to prove that the arrests were brutal.

Both counsels filed written submissions which they also highlighted orally before me after I directed that the case proceeds from where it had reached. In his submission, the petitioners counsel submitted that this petition was filed after 22 years and that there is no limitation for filing proceedings of this nature and cited several decisions in support of this position.^[1] Counsel submitted that the petitioner was subjected to torture, inhuman and degrading treatment and illegal confinement^[2] and urged the court to grant the reliefs sought.

Counsel for the Respondent submitted that constitutional violations must be pleaded with clarity, and with reasonable precision cite the constitutional provisions said to have been violated^[3] and urged the court to find that the assertions were not proved and in particular cited lack of evidence to prove the alleged torture^[4] and insisted that it was incumbent upon the petitioner to adduce evidence to prove torture^[5] and emphasised on absence of medical reports and lack of occurrence book entries to confirm the alleged bookings at the police cells. In counsels view, the news paper cuttings relied upon were not conclusive evidence^[6] and reiterated that the suit was instituted after 30 years and urged the court to consider public interest considerations and decline the reliefs sought.

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^[7] 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^[8] and further the state cannot shut its eyes on its past failings^[9] 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. In considering such delays, the court cannot avoid taking judicial notice of the immense difficulties which prevailed at the said period making impossible for aggrieved persons to file cases of this nature against the government. In fact it is the promulgation of the constitution of Kenya 2010 that opened the doors of justice thereby making it possible for aggrieved persons to institute cases of this nature and in addressing the delay, the court must bear in mind the reality of transitional justice and focus on the delay after the 2010 constitution. In short, an inordinate and unexplained delay after the 2010 constitution ought in my view to be sufficiently explained. As for the present case considering the foregoing reasoning and the date of filing this petition and bearing in mind the dictates of transitional justice, I find that it would be unfair to uphold the defence of limitation in the present circumstances.

I have carefully analysed, evaluated and considered the evidence tendered by the petitioners and the affidavits filed in court. I have also considered the rival 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 are entitled to the reliefs sought in the petition.

Counsel for the Respondent opted not to call witness but cross-examined the petitioner. 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*^[10] it was held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted. It is trite that where a party fails to call evidence in support of his case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate his pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against the defence is uncontroverted and therefore unchallenged.^[11]

As mentioned above, the Respondents' counsel opted not to call witnesses but cross-examined the petitioner. Since no evidence was tendered to support the Respondents case the petitioners' evidence remains unchallenged. Counsel for the Respondent participated in the trial and cross-examined the petitioner. 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.

The Respondent cited absence of occurrence book records from the various stations the petitioner was held. To me, it was for the Respondent to avail such records if it was disputing the alleged arrest and confinement. The charge sheet relied upon by the petitioner did disclose a police case number, date the petitioner was arraigned before court, court case file number and above all O.B. No. 54 of 13/8/92 confirming indeed the petitioner was arrested and arraigned in court. The charges are also stipulated in the charge sheet. The Respondent cannot opt not to call evidence to rebut the petitioners case and raise issues that they ought to have addressed by adducing evidence.

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 citizens to enjoy the rights guaranteed by it in the fullest measure subject, of course, to permissible restrictions.^[12]

The spirit of the constitution must preside and permeate the process of judicial interpretation and judicial discretion.^[13] 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.^[14] The privy council in the case of *Minister for Home Affairs and Another vs Fischer*^[15] 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*[\[16\]](#) 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 Petitioner narrated the several arrests he was subjected to, the confinements and charges preferred against him which were never pursued. 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[\[17\]](#) 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.

The Respondents counsel placed great emphasis on absence of medical reports to proof the alleged torture. 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 actions complained of. The court should examine the case in light of the provisions of the Constitution. When the constitutionality of an act of state agents is challenged on grounds that it infringes a fundamental right, what the court has to consider is the “*direct and inevitable effect*” of such actions. This would help the court in arriving at a more objective and justifiable approach. In my view, actions that amount to inhuman and degrading treatment are 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.

The claim before the court is for violation of fundamental rights under the above provisions, hence absence of medical reports is in my opinion immaterial. As was held in the Greek[\[18\]](#) case cited by Lenaola J. (As he then was) in the case of *Milka Wanjiku Kinuthia & Others vs The Attorney General*[\[19\]](#) “*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 de-grading if it grossly humiliates him before others, or drives him o 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.^[20] In this case, we are not essentially dealing with personal injuries 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 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 petitioner to inhuman and degrading treatment.

The petitioner claims damages as a result of the said breach of his fundamental rights. 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 the petitioners rights were violated and that he is entitled to damages. On the quantum of damages, 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.^[21] 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;^[22]

- 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.*

I note that arriving at the award of damages is not an exact science, and also I am aware 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.^[23]

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.^[24]

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.^[25]

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.^[26] 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.

I am persuaded that the petitioner has proved to the required standard that his rights were violated. 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 find that the petitioner is entitled to an award of damages. Doing the best I can, I find that an award of Ksh. 5,000,000/= would be reasonable in the circumstances considering the numerous arrests, period of confinement, the degrading and inhuman treatment subjected to the petitioner and the possible mental and psychological effect it may have had on him and the possible financial and social disruption occasioned to him. Accordingly, I enter judgement in favour of the petitioners as follows:-

- i. A declaration that the actions by the police enumerated in the petition constituted gross violation of the petitioners constitutional rights.*
- ii. That judgement be and is hereby entered in favour of the petitioner in the sum of Ksh. 5,000,000/= by way of general damages.*
- iii. That the above sum shall attract interests at court rates from date of filing suit until payment in full.*
- iv. The Respondents do pay the costs of this Petition to the petitioner plus interests thereon at court rates.*

Orders accordingly. Right of appeal 30 days.

Dated at Nairobi this 13th day of February 2017

John M. Mativo

Judge

[1] See David Gitau Njau & 9 Others vs The Hon A.G, Pet No. 340 of 2012, Dominic A. Amolo vs Then Hon A.G. Misc App No. 494 of 2003 and Wachira Waheire vs The Hon A.G. Misc Civ Case No. 1184 of 2003

[2] Counsel cited Samuel Rukenya Mburu vs Castle Breweries NBI HCCC No 119 of 2003 and the Greek case 1969

[3] Counsel cited the decisions in Anarita Karimi Njeru vs The Republic (1976-1980) 1 KLR & Trusted Society of Human Rights Alliance vs A.G & 2 Others {2012} eKLR

[4] Counsel cited the case of Margaret Wanjiru Ndirangu & 4 Others vs A.G {2015} eKLR

[5] Counsel relied on Peter Ngari Karume & 7 Others vs A.G

[6] Counsel relied on Rando Nzu vs The A.G HCC No 6 of 2011 & Wamwere vs A.G {2004} 1KLR

[7] 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

- [8] Joseph Migere Onoo vs Attorney General, Petition No. 424 of 2013
- [9] Gerald Gichohi and 9 Others vs Attorney General Petition No. 487 of 2012
- [10]{Milimani} Hccc no. 165b of 2000
- [11] Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001
- [12] See Mudholkar J in Sakal Papers v Union of India AIR 1962 SC 305 at p 311
- [13] State vs Acheson {1991} 20 SA 805
- [14] See Wechsler, {1959}. Towards Neutral Principles of Constitutional Law, Vol 73, Havard Law Review P. 1.
- [15] {1979} 3 ALL ER 21
- [16] Nairobi Criminal Application no. 701 Of 2001
- [17] Supreme Court Advocates on Record Association & Others vs Union of India {1993} 3SCC 441
- [18] Greek Case 1969 Y.B. Eur. Con. on H.R. 186 (Eur. Comm'n on H.R)
- [19] Supra note 1
- [20]See Joginder Kumar v. State of U.P. (1994) 4 SCC 260, paragraph 23
- [21]*Mbogo & Another vs Shah*{1968} EA 93
- [22] 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>
- [23] Koigi Wamwere v Attorney General{2015} eKLR
- [24]Attorney General v Ramanoop [2005] UKPC 15, [2006] 1 AC 338
- [25]This concept was well expressed by Mummery LJ in Vento v Chief Constable of West Yorkshire Police [2003] ICR 318, at 331: -
- [26] 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)