



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.714 OF 2009**

**BETWEEN**

**RUMBA KINUTHIA.....PETITIONER**

**AND**

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

**RULING**

1. On 24<sup>th</sup> February 2012, Mumbi Ngugi J dismissed the present Petition holding that it was an abuse of Court process.
2. On 21<sup>st</sup> May 2012, the Petitioner sought orders that the said judgment be reviewed and that this Court should make such further orders as it deems just in the circumstances.
3. The grounds in support of the Application are that:
  - i) *There is a discovery of a new matter, i.e. relevant Judgment of this Honourable Court delivered on 11<sup>th</sup> October 2011, long after we had filed our final Submissions on 6<sup>th</sup> June 2011.*
  - ii) *There is an error on the face of the record.*
  - iii) *There is yet another sufficient reason as envisaged by Rule 1(1) (b) in that this particular Petition was outside the ambit of Nyayo House Torture Chambers Petitions which were a Special Project spearheaded by the Kenya Human Rights Commission (K.H.R.C.) and which dealt specifically and exclusively with atrocities committed against individual citizens in the Nyayo House Torture Chamber during the KANU – Moi Regime Era.*
  - iv) *We have already withdrawn the notice of Appeal filed on 2<sup>nd</sup> March 2012 and this Application therefore falls within the purview of Order 45.*

4. In his Affidavit in support, the Applicant has deponed that his Petition, alleging violation of fundamental rights and freedoms, specifically freedom from torture, was improperly dismissed because:

i) He was indeed tortured for 26 days from 10<sup>th</sup> October 1979.

ii) He was again tortured for 15 days in October 1990.

iii) That although he was the Applicant in **Misc. Application No.1408/2004, Rumba Kinuthia vs AG** and where he was awarded Kshs.1.5 Million as compensation for violation of his fundamental rights and freedoms, the circumstances in that case were different and it was an error apparent on the face of the record for the learned judge to find that his complaints in the present Petition were addressed in that earlier judgment.

iv) That even if his Petition was brought after 30 and more years since the incident complained of, the High Court has consistently held that there is no limitation period for claims arising from violations of fundamental rights and freedoms to be filed.

v) The Respondent filed no response to the Petition.

vi) One Wafula Buke, a victim of torture in the Moi regime, filed two separate claims arising from his ordeals in the 1990s and both were determined separately and damages so awarded.

vii) It is just and fair to review the judgment aforesaid.

5. I note that the Respondent did not file any response to the Application before me and having reflected on the matter, I should state from the outset that I did not hear the Petition neither is the impugned judgment a decision of this Court. In that context, whatever my findings, it should not appear as if I am sitting on appeal over a decision of a Court of equal jurisdiction.

6. Secondly, a review of any past decision of any Court must be on grounds known to law and not the mere dissatisfaction that the impugned decision did not favour the Applicant. In fact in India, the only ground for a review of a constitutional decision is that of error apparent on the face of the record and not on a new plea that a Petitioner has discovered new-evidence which he was unable to produce at the hearing – see **Mohd. Yassin (Dr) v University of Kahsmir (1975) I S.C.W.R.** I am attracted to that reasoning and I also note that while the Applicant has invoked **Order 45** of the **Civil Procedure Rules** on review in civil matters, the Constitution of Kenya (**Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**, do not have any provision for review of any decision made under the Bill of Rights such as the impugned judgment.

7. Thirdly, even if other grounds can be argued including the fact that no appeal has been preferred (the one filed has apparently been withdrawn in the instant matter), or that the present Application was made without delay, the justice of the same would still rest on the question whether there has been an error on the face of the record. In that regard, it is the Applicant's Submission that Mumbi Ngugi J fell into an error when she made a finding that the Applicant ought to have ventilated the issues raised in the present Petition in **Misc. Application No.1408 of 2008, Rumba Kinuthia v AG** where the Applicant was granted certain orders with regard to violations of rights at a different location and time that what was pleaded in this Petition.

8. Since there is no objection raised to that plea, it is my view that the said issue alone is sufficient to warrant a review of the judgment because in this Court, Parties have filed more than one claim in respect of alleged violations during the Moi regime and they have been heard and their Petitions determined on their merit and nothing else. That includes the case of one Wafula Buke who instituted both **HCCC No.2995 of 1995** and **Petition No.800 of 2008** and where he was awarded damages for violation of his rights at different times.

9. Whereas therefore it would have been expected that the Applicant, an advocate of this Court, should have indeed filed all his claims of alleged violation of rights at one instance, that he did not do so is not in my view a bar to his Petition being determined on its merits despite that obvious lapse in judgment. The fact that he did not do so is not a breach of any known principle in law such as *res judicata*.

10. Having so stated, the Application for review must be granted, the judgment and order of dismissal of the present Petition made by Mumbi Ngugi J on 24<sup>th</sup> February 2012 is set aside and the Petition shall be heard *de novo* on its merits by any other Judge since Mumbi Ngugi J has in any event disqualified herself from the matter.

11. There shall be no orders as to costs.

12. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 1<sup>ST</sup> DAY OF NOVEMBER, 2016**

**ISAAC LENAOLA**

**JUDGE**

**DELIVERED AND SIGNED AT NAIROBI THIS 4<sup>TH</sup> DAY OF NOVEMBER, 2016**

**EDWARD MURIITHI**

**JUDGE**

**In the presence of:**

Victor – Court clerk

Mr. Muchoki for Petitioner

Mr. Ogomo for Respondent

**Court**

Ruling delivered.

**EDWARD MURIITHI**

**JUDGE**