



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL PETITION NUMBER 6 OF 2012

JOSEPH KAROBIA KINYUA.....PETITIONER

VERSUS

1. COMMANDER OF KENYA ARMY.....1ST RESPONDENT

2. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGEMENT

1. The Petitioner then **No. 73450 SPTE Joseph Karobia Kinyua of 81 Tank Battalion** was arrested on the 6th November 2008 and detained in solitary confinement up to the 3rd February 2009 when he was arraigned in a Court Martial sitting at Kenya Military Academy, Lanet and charged with various civil offence. After a full trial, he was convicted and sentenced to serve prison jail for a concurrent sentence of three(3) years, which sentence was confirmed on appeal in October, 2009, in **Nakuru HCRA No. 67 of 2009**.

2. In his Amended Petition dated 23rd April 2012 and filed on even date, the Petitioner states that he was unlawfully detained in custody for eighty-seven(87) days beyond the period in within which he ought to have been arraigned in court as provided in the Repealed Kenya Constitution. He further states that during the period he was inhumanely tortured – which actions by the Respondents' violated the statutory and mandatory provisions of both the Armed Forces Act, Chapter 199 and the Kenya Constitution, 2010.

In his Affidavit in support of the Amended Petition sworn on the 23rd April 2012, he narrates the ordeal he underwent while in detention, that he was placed in a closed cell contrary to the ethics of an army officer, denied all visitors including his family members and his cell put on fire whereupon he was injured leading to hospitalization, for a total of 87 days, and thereafter up to the end of trial when he was convicted and sentenced.

The Petition is premised upon the provisions of Section 49(1) (f) of the Constitution of Kenya 2010 as read with Section 72 (2) of the Armed Forces Act, Chapter 199 Laws of Kenya and Section 22(1) (3), (4), 23(i) (3) of the Constitution. It is his contention that the unlawful detention and torture were in violation of the procedure of arrested persons subject to the Armed Forces Rules and that the delay of 87 days in charging him were never explained by the prosecution during the trial save on appeal when he raised the same and the appellate court held that under the Armed Forces Act and Rules, a subject could be detained for upto 72 days, but the balance of 15 days were not explained.

3. Under Article 23(3) (a) and (e) of the Constitution, he brings these proceedings for compensation for

the unlawful detention and torture against the respondents and seeks the following reliefs among others:

(b) A declaration that he was unlawfully detained and tortured which amounted to breach of his fundamental rights and freedoms as enshrined in Chapter 4 of the Constitution.

(c) An order for compensation assessed at KShs.27,800,000/= being KShs.300,000/= daily for eighty-six(86) days the Petitioner was in custody and KShs.50,000,000/= for torture and inhumane and degrading treatment occasioned to the petitioner while in unlawful custody.

(d) Costs of the petition to be awarded to the petitioner.

4. The Respondents through the office of the Attorney General opposes the Petition by its Grounds of Opposition dated 17th March 2015 and filed on the 18th March 2015, that the application is bad in law, incurably defective an abuse of the court process and lacks merit.

5. Parties filed written submissions. In the court's view, the issues that arise from the affidavit evidence and submissions are:

(a) Whether the petitioner's detention and alleged torture was in contravention of his constitutional rights and fundamental freedoms as enshrined in Chapter 4 of the Constitution *visa-viz* the provisions of the Armed Forces Act, Chapter 199 Laws of Kenya.

(b) Whether the unlawful detention and torture were explained during the court martial trial and if not, who had the burden to explain the same.

(c) Whether the petitioner is entitled to compensation for the unlawful detention and torture and if so, to what extent.

(d) Who bears the costs of the Petition.

6. It is not in dispute that the petitioner was subject to the Armed Forces Rules and Regulations as relates to the rights of arrested persons and that he was detained in solitary cells for a period of 87 days before being arraigned in a court martial and charged with various civil offences.

Section 42 of Chapter 199 states that:

“all persons subject to this Act shall enjoy all rights and fundamental freedoms enshrined in Chapter 4 of the Constitution unless limited to the extent specified in Article 24(5) of the Constitution, this Act or any other Act.

Section 54 of Chapter 199 states:

(1) The rights of an arrested person in Article 49 of the Constitution may be subject to limitation in respect of a person to whom this Act applies as set out in Subsection (2) and (3)

2(3)- An accused person shall not be held in custody for more than eight days before he or she is arraigned before a commanding officer or a court martial unless the commanding officer, for reasons to be recorded in writing, is satisfied that the continued arrest of the accused person is necessary.”

(4) The commanding officer shall review his or her decision in Subsection (3) after the lapse of eight(8)days until the accused person is brought before a commanding officer or a court-martial.”

7. During the court-martial trial, the petitioner was represented by counsel and it is deemed that he was advised of his constitutional rights including violation of his rights subject of this petition, and that if not

raised during the trial, it is deemed that he waived his right and opportunity as held in **Criminal Appeal No. 67 of 2009 – The Petitioner herein -vs- Republic** where Maraga, J (as he then was) stated that although he found the delay of 72 days inordinate and since the issue of violation was not raised during his trial, his hands were tied by the Court of Appeal decision in **Joseph Amos Owino -vs- R(2009)KLR**. In this case, the Court of Appeal held that where an accused is represented, the court will assume that he was advised of his constitutional rights and where he does not raise their violation at the earliest opportunity he is deemed to have waived them(his rights).

However, this position has been overturned by yet another Court of Appeal decision, where a five judge bench in **Julius Kamau Mbugua -vs- R (2010) KLR** on the 8th October 2010 and after considering previous superior courts' decisions on the subject held:

“--Under Section 72(3) of the Constitution, the burden to explain the delay is on the prosecution and we reject a proposition that the burden can only be discharged by the prosecution, if the person raises a complaint.

But if the prosecution does not offer any explanation, then, the court as the ultimate enforcer of the provisions of the constitution must raise the issues.”

This court's understanding is that the burden to explain any delay in arraigning a suspect in court ought to be explained by the prosecution whether or not the suspect raises it in court. And that even if the suspect does not raise the violation, whether represented by counsel or not, the court as the defender and enforcer of the constitution will raise the issues.

The Judges of appeal proceeded to hold that the breaches of the appellants constitutional rights logically give rise to a civil remedy – a money compensation, as stipulated in Section 72(6) of the repealed constitution, now found in Article 22 and 23(3) of the Constitution 2010.

8. The Respondents' in their submissions relied heavily on **Section 54 of Chapter 199** on the Limitation of rights of an arrested person subject to the Act. However, no submission was tendered on the provisions of **Section 54(3) and (4)** where the commanding officer is mandated to give reasons in writing that he is satisfied that the continued arrest of the person is necessary. These provisions are couched in mandatory terms.

I have perused through the court martial proceedings. I find no indication as to the compliance of the provisions of Section 54(3) and (4). No explanation was given as required under Chapter 199.

9. The court appreciates that members of the Kenya Defence Forces have limitations in enjoyment of their constitutional rights. However, under Section 42 of the said Act, it is clearly stated that persons subject to the Act shall enjoy all the rights and fundamental freedoms enshrined under chapter four of the constitution unless limited to the extent specified in Article 24(5) of the constitution, this Act or any other Act.

Section 3 of the Constitution states clearly that any law that is inconsistent with the constitution is void to the extent of its inconsistency – and this is a mandatory provision. The court finds and holds that Section 72(2) of the Armed Forces Act as read with Rule 6 of the Rules under the Act that provides for holding of suspects for up to 72 days before arraigning them to court to be unconstitutional. Having so stated, it therefore follows that the petitioner was unconstitutionally held in custody for 87 days and further, since no explanation was proffered by the Respondents for the delay, and there having been no reasons given in writing by the Commanding officer after every eight days of detention as provided under Section 54 (3) and (4) of Chapter 199, he is entitled to monetary compensation for the contravention of his constitutional rights pursuant to provisions Constitution, under of Article 22, and 23(3) (a) (e) of the Constitution, under which these proceedings are brought. Section 72(6) of the Repealed Constitution provided for a remedy by way of damages to a person who is unlawfully arrested, tortured and detained. The court being the defender and enforcer of the constitution, will rise to the occasion to award compensation to the petitioner. See **Arbanus Mwasia Mutua -vs-R (2006) KLR**.

10. The Petitioner stated that while in solitary detention, he was tortured. He was confined to a closed cell, was denied visitation even by his family, that there was an attempt on his life when his cell was put on fire. Though he was charged for attempted suicide, the court found no merit in the charge. No attempt was made to investigate further how the fire was started in his cell and by who. The petitioner was hospitalised following the injuries in the fire. A medical report produced during his trial shows that he the petitioner sustained injuries while under the mercy and protection of the respondents. Mental torture is as bad as physical torture, if not worse. See **Kihoro vs AG (1993) KLR**.

11. The Respondents, relying on the case **Zablon Ombati Ongeru -vs- AG, Nakuru Petition No.8 of 2010**, urged the court to award KShs.10/= If a finding is made that the petitioner was unlawfully held.

The petitioner's proposal on assessment of damages through his Advocates is unsupported by any tangible evidence. The court has considered the authorities tendered by the petitioner.

In **Nairobi Petition No. 497 of 2012 Frank M. Munuku -vs- Defence Force and another**, Justice Lenaola in 2013 awarded the petitioner a sum of KShs.5,000,000/= for unlawful detention, torture and inhumane treatment.

In Court of Appeal **Civil Appeal No. 79 of 2012 (Nairobi) Peter M. Kariuki -vs- AG**, the petitioner, an ex service Kenya Army Officer was awarded KShs.15,000,000/= for violation of his constitutional rights.

The circumstances of the above petitions were different and not comparable with the present petition.

12. In **John Mureithi Kiagayu -vs- R Petition No. 141 of 2011 (2013) KLR**, the petitioner was unlawfully detained for forty-eight(48) days. He was awarded KShs.2,000,000/= for torture and unlawful detention.

With respect to Mr. Maragia's submission on damages, I find the same without basis. To propose a sum of KShs.300,000/= per day for eighty six(86) days is overly exaggerated and without a leg to stand on. The court has not been told for instance, how the computation was arrived at or the basis of such sums.

In **Nakuru High Court Petition No 7 of 2010 – Lechornai Lorkurani -vs- A.G**, the court awarded a sum of KShs.500,000/= in 2011 to the petitioner who had been detained unlawfully for 10 days before being charged with the offence of murder.

In Nairobi **High Court Petition No. 340 of 2012 David Gitau Njau & 9 others -vs- AG**,

The Petitioners ex-service Kenya Air Force officers were unlawfully detained in custody for 8 months and tortured. The court awarded each of-them KShs.5,500,000/= as damages for violation of their constitutional rights.

13. In awarding damages for unlawful detention and torture, the court will consider and take into account the length of the unlawful detention, the nature and extent of torture and what is fair and reasonable compensation.

The petitioner herein was detained an unlawfully in solitary confinement for a period of eighty-seven (87) days. He was tortured, his cell was put on fire, he sustained serious injuries leading to hospitalization.

Having taken into account the above, and considered awards in other decided and comparable cases on subject, this court shall award the petitioner a sum of KShs.800,000/= as reasonable compensation for contravention of his constitutional rights and fundamental freedoms by the Respondents.

14. For the above reasons, this court proceeds to find in favour of the petitioner and enters judgment against the Respondents as follows:

(a) A declaration that the Petitioner's Constitutional rights as enshrined in Chapter 4 of the Constitution

were breached by the Respondents' unlawful, unexplained detention and solitary confinement for eighty-seven(87) days and torture contrary to **Section 72(3)(b)** of the Repealed Constitution and Section 42 and 54 of the Armed Forces Act Chapter 199 Laws of Kenya

(b) That pursuant to the provisions of Article 22(1)(3)(4) and 23(1) (3)(e)of the Constitution the petitioner is entitled to compensation for the violation of his constitutional rights to freedom, torture and cruel inhumane treatment contrary to Section 72 (3)(b) now Article 49 (i)(f)(h) and Article 25(a) of the Constitution.

(c) Consequently an award of KShs.800,000/= is made to the petitioner who will also have costs of the petition.

Orders accordingly.

Dated, Signed and delivered and in open court this 10th day of July 2015

JANET MULWA

JUDGE