



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.210 OF 2013**

**BETWEEN**

**MARGARET WANJIRU NDIRANGU.....1<sup>ST</sup> PETITIONER**

**CECILIA WANGU MACHARIA.....2<sup>ND</sup> PETITIONER**

**MARY NJERI KAMAU.....3<sup>RD</sup> PETITIONER**

**JACINTA MWIHAKI WAMWERE.....4<sup>TH</sup> PETITIONER**

**MARY NJERI KURIA.....5<sup>TH</sup> PETITIONER**

**AND**

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

**JUDGMENT**

**Introduction**

1. The Petitioners were among a group of women who were at Uhuru Park in a section known as “Freedom Corner” where they were holding peaceful demonstrations jointly with fellow mothers of political prisoners agitating for their release. They claim that during the peaceful demonstrations they were inhumanly and brutally battered with boots and batons, slaps, rubber whips, kicks and blows all over their bodies by Kenya Police Officers and General Service Officers between 3<sup>rd</sup> March 1992 and 19<sup>th</sup> January 1993.
2. They have therefore filed this Petition claiming a violation of their fundamental right not to be subjected to torture as was provided for under **Section 74(1)** of the **Repealed Constitution**
3. In the said Petition dated 17<sup>th</sup> April 2013, the Petitioners have sought the following orders;

***“(1) A declaration that the five (5) Petitioners’ fundamental rights and freedom from torture were each contravened and grossly violated by the Respondent’s Kenya Police Officers and General Service Unit Officers (G.S.U.) who were Kenyan Government servants, agents, employees and in its institutions on diverse date and time on 3<sup>rd</sup> March 1992 up to 19<sup>th</sup> January 1993.***

**(2) A declaration that the five (5) Petitioners are each entitled to the payment of General damages, exemplary and moral damages and compensation for the violations and contraventions of their fundamental rights and freedoms from torture under Section 23(3) of the Constitution of Kenya 2010.**

**(3) General damages, exemplary and moral damages for torture for each Petitioner.**

**(4) Any further orders, writs, directions, as this Honourable Court may consider appropriate.**

**(5) Costs of the suit, and interest.”**

### **The Petitioner’s case**

4. The contents of the Supporting Affidavits by all the five Petitioners are the same verbatim and I will summarize their depositions, as herebelow;
5. That on 28<sup>th</sup> February 1992, they had visited the then Attorney General, Amos Wako and presented him with a Petition to the Government for the release of all the 53 political prisoners who had been jailed for political offences such as treason, sedition or belonging to an unlawful organization during the one single party regime.
6. Thereafter, on 28<sup>th</sup> February, 1992 to 3<sup>rd</sup> March, 1992 they camped at Uhuru Park at what is now famously known as ‘The Freedom Corner’ in a peaceful camp agitating for the release of the political prisoners . They claimed that they did not have any weapons and the only possessions they had were their clothes, blankets to keep themselves warm at night, water to drink and wash their face, Bibles and hymn books. They also had a tent which was donated to them by a well-wisher and that other well-wishers including the Late Prof. Wangari Mathaai gave them moral support, food, clothing and water as they waited for the Government though the Attorney General to respond to their Petition aforesaid.
7. They averred that their only demand was for their sons and husbands to be set free and if not, they were determined to camp at the Freedom Corner and starve to death if need be.
8. On 3<sup>rd</sup> March, 1992 while still at the “Freedom Corner”, they alleged that they were brutally battered with boots and batons, slaps, rubber whips, kicks and blows all over their bodies by over 100 Kenya Police officers and General Service Unit officers. They also stated that they were left badly injured and some of the demonstrators like the Late Prof. Wangari Mathaai were taken to a hospital while unconscious. In the evening of the same day, between 4.00pm and 9.45pm, while still at the “Freedom Corner”, they were all arrested by over 100 police officers and bundled into a police vehicle known as “Black Maria” and allegedly taken to various police stations in Nairobi before being deported to their rural homes.
9. It is also their deposition that between one and five days after their deportation they came back to Nairobi and began their peaceful campaign and hunger strike afresh at the All Saints Cathedral Church compound. They were hosted at the basement of the Church from 4<sup>th</sup> March 1992 to 19<sup>th</sup> January 1993 when all the political prisoners were released on various dates between 24<sup>th</sup> June, 1992 and 19<sup>th</sup> January, 1993. They claimed that while hosted at the All Saints Cathedral Church, the Kenya Police Officers and General Service Unit Officers sporadically attacked them.
10. They deposed that between 24<sup>th</sup> June 1992 and 19<sup>th</sup> January 1993, the following political prisoners were released;

- |                               |                               |
|-------------------------------|-------------------------------|
| 2. Mirugi Kariuki             | (29) Mwanga Aate Seikwo       |
| 3. Rumba Kinuthia             | (30) Charles Kuria Wamwere    |
| 4. Harris Akong'o Arara       | (31) Jethro Sakuo             |
| 5. Sheik Aziz Said Rimo       | (32) Charles owuor            |
| 6. Joseph Mwaura Kinuthia     | (33) James Mawa               |
| 7. James H. Gitau Mwara       | (34) Daniel Muli              |
| 8. Harun Thungu Wakaba        | (35) Sabastian Kamau          |
| 9. Geoffrey Kuria Kariuki     | (36) David Gitundu            |
| 10. Kibathi Muigai            | (37) Kennedy Maina            |
| 11. Harrison Githaiga Gicheru | (38) Dixon Jowe Aliech        |
| 12. Loli Wambua Kamau         | (39) Gibson Maina Kimani      |
| 13. Stephen Mulili Kituu      | (40) Milton Chege Kimani      |
| 14. Philip Tirop Arap Kitur   | (41) Samuel Mwangi            |
| 15. Nduthu Karimi             | (42) Boniface Mawa Matunda    |
| 16. Kang'ethe Mungai          | (43) John Kibe                |
| 17. Peter Nguthu Mburu        | (44) Mutiso Mwangire          |
| 18. Joseph Mugero Wainaina    | (45) Dickson Nabwire Namadoa  |
| 19. Raphael Wambua Mutwili    | (46) Effermont Ng'ang'a       |
| 20. Peter Kamande Gitau       | (47) Hassan Hussein Juma      |
| 21. George Kamau Njenga       | (48) James Kisenge Musyoka    |
| 22. Daniel Njuguna Kihunga    | (49) George Anyona            |
| 23. John Ogola Ojiro          | (50) Augustine Njeru Kathangu |
| 24. Francis Gachie Nakitari   | (51) Odhiambo Pia             |
| 25. Simon Gathi Mwaniki       | (52) Edward Okongo Oyugi      |
| 26. Patrick Ngure             | (53) Isaiah Ngotho Kariuki    |
| 27. Shadrack Masika Mariwa    |                               |

11. It is the Petitioners' case that the State violated **Section 74** of the **Repealed Constitution** which protected them against being subjected to inhuman or degrading punishment or other treatment. They claimed that the acts of being subjected to beatings by the State agents amounted to torture which was prohibited under the Repealed Constitution as well as under international human rights instruments to which Kenya is a party.

12. The Petitioners have therefore sought general damages, exemplary and moral damages for torture totaling Kshs.5,000,000.00 for each of the Petitioners plus the declarations set out above.

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

13. The Respondent, the Attorney General opposed the Petition through a Replying Affidavit sworn on 21<sup>st</sup> July 2014 by Philip Ndolo MBS, the Deputy Director of Operations in the Kenya Police Service.

14. Mr. Ndolo deposed that the Constitution 2010 does not apply retrospectively and the Petitioners can only claim a violation of their rights under the Repealed Constitution.

15. He further stated that the Petitioners were never arrested by the Kenya Police and he termed their claims as mere allegations because they failed to identify the police officers who arrested them and also failed to prove the torture claims by availing medical records to authenticate the same.

16. The Respondent also filed written submissions and his case can be summarized as hereunder;

17. That the allegations contained in the Petition are baseless, obnoxious and vexatious and are borne out of malice, opportunism and herd mentality.

18. He also submitted that the Petitioners case is weak and they have failed to prove the allegations on a balance of probability and he urged the Court not to believe them because they had failed to

produce a single document to support their allegations against the State. It was his contention that it was not possible for the police to torture the Petitioners for the entire stated period without the Petitioners seeking medical attention. He therefore submitted that in the absence of any evidence, the Court should find that none of the Petitioners was tortured and the police officers were in any event carrying out their duties of dispersing the unruly crowd at Freedom Corner as mandated by law.

19. It is therefore the Respondent's case that the Petitioners ought to prove on a balance of probabilities that the allegations they have made against him are true. He relied on the case of **Col. Peter Ngari Kagume & Others vs Attorney General Petition No.128 of 2006** in that regard and that a Court of law has the responsibility of guarding the gates of justice and to only allow in those who merit the grant of the orders sought as provided for by law.

20. The Respondent therefore urged the Court to dismiss the Petition for lack of evidence and merit.

### **Determination**

21. It is the Petitioners' claim that they were allegedly tortured as they were inhumanly and brutally battered with boots, slaps, rubber whips, kicks and blows all over their bodies by Kenya Police Officers and General Service Unit Officers while holding a peaceful demonstration at Freedom Corner of Uhuru Park. They have therefore invoked the provisions of **Section 25(a), 29(c), 29(d) and 29(f) of Constitution 2010** to seek the orders elsewhere set out above.

22. In response, the State opposes their claim on two grounds; Firstly, Mr. Ndolo claimed that the Petitioners ought to have invoked the provisions of the **Repealed Constitution** as compared to **Constitution 2010** as it does not apply retrospectively. Secondly, he denied the allegations made by the Petitioners and claimed that they have failed to prove their case by availing any material evidence to the effect that they were at Freedom Corner and that they were tortured there or elsewhere.

23. I will first deal with the issue of retrospectivity and thereafter address the issue of prove. If I find that the Petitioners have placed sufficient material before the Court to enable it determine their claim against the State, I will then proceed to determine their claim of violation of their fundamental rights and freedom. If I do not find a violation of their fundamental rights and freedoms, the claim ends there but if I do find proof of the same then I will proceed to the last stage of determining the available remedy to them.

### **Whether the Constitution 2010 applies retrospectively.**

24. It is clear to me that the facts relied upon and giving rise to the claims in the Petition before me occurred between 3<sup>rd</sup> March 1992 and 19<sup>th</sup> January, 1993 before the promulgation of the **Constitution 2010** on 27<sup>th</sup> August, 2010. As is provided under **Article 264** of the **Constitution 2010**, the **1963 Constitution** stood repealed on the promulgation day. The question is whether the Petitioners can properly lodge a claim for violation of their constitutional rights under the **Constitution 2010** over actions that were undertaken during the existence of the **Repealed Constitution**.

25. This Court has severally held that it cannot enforce new rights created under the new Constitution unless those rights were recognized and protected under the previous Constitution because the Constitution 2010 does not have a retrospective effect. I am also of the view that this Court can enforce claims for the violation of fundamental rights and freedoms which occurred during the existence of the Repealed Constitution but such claims must be made by invoking the provisions of the Repealed Constitution as it was the law at the moment. In this regard, I am in agreement with **Majanja J** when he stated in **Duncan Otieno Waga vs Attorney General Petition No.94 of 2012** as follows;

*“I do not read the provision of the sixth schedule as entitling the court to retrospectively apply the constitution. The rights and obligations referred to are preserved to the extent that they can be enforced but determination of the nature and extent of those rights and obligations are determined in accordance with the legal regime existing at the time the right or obligation accrued. The acts of the respondent in relation to the petitioner must therefore be construed by reference to the former constitution particularly section 82 which prohibits discrimination.*

*Counsel for the petitioner has also referred to the provisions of Article 23(1) and 165 which read together entitle any person to apply to the court for redress where his or her fundamental rights and freedoms are threatened, violated or infringed. These provisions entitle this court to adjudicate violation of the constitution but they do not empower the court to apply the constitution retrospectively.”*

(See also this Court’s decision in *B.A & Another V Standard Group Limited & 2 Others (2012) e KLR.*)

26. In that context, I shall then proceed to determine the Petition on the basis of the rights and obligations of the parties as enshrined in the Repealed Constitution because it was the law in force at the time the alleged violations occurred. In saying so, it is clear to my mind that the Petitioners have claimed violation of their fundamental freedom and protection from torture which right was protected under the Repealed Constitution. (**Section 74(1)** thereof)

### **Whether the Petitioners have met the burden of proof**

27. I now turn to determine the allegation that the Petitioners have failed to establish and prove the facts they have relied on in their claim for violation of their fundamental right and freedom against the State.

28. It is true that if a party seeks to rely on a fact such a party bears the burden of proving that fact. In that regard, **Section 107 (1)** of the **Evidence Act (Cap 80 Laws of Kenya)** states as follows;

*“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”*

Further **Section 109** of the **Evidence Act** provides;

*“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”*

29. In the above context, and despite all the claims made, the Petitioners have failed to adduce any tangible evidence to prove any of the allegations they have made against the State. They did not provide any evidence to substantiate their claims that they were tortured and sought medical treatment at Nakuru Provincial Hospital or any other hospital. Such evidence would have been sufficient to prove their claims considering that those allegations were specifically denied by the Respondent in the Replying Affidavit sworn by Mr. Ndolo. Even if I was for a moment to assume that due to passage of time, they would not be able to acquire the requisite documents to prove that they sought the medical attention, the Petitioners still had other ways of proving their case. Why did they not for instance have other witnesses testify on their behalf? I believe it would not have been difficult for them have other women whom they were with at the Freedom Corner testify for them and that would have corroborated their testimony. I am also of the view that it was possible for them to get a witness (es) from the All Saints Cathedral Church where allegedly they kept camp from 4<sup>th</sup> March 1992 to 19<sup>th</sup> January 1993, a period close to one year. Certainly, they must have been at the Church’s compound with the approval and knowledge of the Church’s leadership.

30. In any event, I note that the Petitioners failed to respond or challenge the allegations of denial

made in the affidavit of Mr. Ndolo hence the untidy situation the Court finds itself in. This Court will not tire reminding the victims of historical injustices such as the Petitioners that it is a Court of law and it operates within the parameters of the law and nothing else. It is not enough for them to come to Court and make such serious allegations against the State and the violations meted upon them and fail to substantiate them with evidence. In that regard, the words of Nyamu J (as he then was) in *Peter Ngari Karume & 7 Others vs Attorney General (supra)*, when he expressed himself as follows, ring true today;

***“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.”***

He concluded on that issue as follows;

***“It is most probable that in the prevailing circumstances then, the Petitioners were subjected to physical beating, torture, detention without trial among other violations but the court is deaf to speculation and imaginations and must be guided by evidence of probative value. When the court is faced by a scenario where one side alleges and the rival side disputes and denies, the one alleging assumes the burden to prove the allegation. I have gone through the entire court record and there is absolutely nothing to support the allegations made by the petitioners.”***

I am in agreement with the learned judge and I adopt the same reasoning as if it were mine.

31. In that context, I find a lot of inconsistencies in the Petitioners oral evidence. For instance, PW1, Margaret Wanjiru Ndirangu testified that in the course of the demonstrations, the Kenya Police and General Service Unit officers brutally battered her with boots, batons, slaps, rubber whips, kicks and blows all over her body. She however stated during cross-examination that they were attacked at 4.00pm and the police officers left and she returned to Freedom Corner. She also stated that she did not shed any blood despite the alleged brutality. During cross-examination by the Court however, she stated that she had been so beat up that she was unable to run away and was as a result carried on an ambulance together with the Late Prof. Wangari Mathaai and was admitted at Nairobi Hospital for two days. After the two days she allegedly returned back to All Saints Cathedral where she camped for nine months where is the truth in that contradictory evidence.
32. PW2, Cecilia Wangu Macharia in her part testified that she was beaten and was taken to Central Police Station and thereafter to Nakuru. She then stated that she had no injuries but still went to Nakuru General Provincial Hospital and yet she still claimed that she went to hide at the All Saints Cathedral on 4<sup>th</sup> March, 1992, a day after the alleged beatings. On cross-examination by the Court she stated that she in fact had injuries all over her body especially on her chest. She claimed that as a result she developed high blood pressure and diabetes and she had medical documents to that effect. However, she failed to produce the said medical reports in evidence to support her allegation. Where again is the truth in such evidence?
33. PW3 Mary Njeri Kamau then testified that as a result of the beatings she was still suffering from chest pains as well pain in the ears and eyes. She failed to produce any evidence of the fact that she presently lives with that pain. PW4 Jacinta Mwihaki Wamwere on her part testified that she was beaten and taken to Central Police Station at 11.00pm on 3<sup>rd</sup> March 1992. While being cross-examined by the Court however, she stated that she was taken to hospital by her mother at 11.30pm while at Engashura village which is 10km from Nakuru town while PW5, Mary Njeri

Kuria testified that she was taken home together with PW2 Cecilia Wangu and PW3 Mary Njeri Kamau at 2.00 pm in the same day but were unable to prove that they were injured.

34. As can be seen from above, several inconsistencies are found in the Petitioner's testimonies. because the events of 3<sup>rd</sup> March, 1992 leading to the attack and thereafter are not consistent at all. The Petitioners have not been able to account properly as to what happened between 4.00pm and 9.45pm on that day. Were they continuously attacked during that period or were they attacked at 4.00pm and police left and returned later? For example, as I stated above PW1 testified that she was attacked at 4.00pm and she fled and returned to Freedom Corner while she also stated in the same breathe that she was carried by an ambulance and taken to Nairobi Hospital where she stayed for two days. PW2, stated that was beaten at 4.00pm and later taken to Central Police Station and then her home. PW4 on the other hand stated that she was beaten and taken to Central Police Station at 11.00pm and was taken to Nakuru Provincial General hospital by her mother at 11.30pm after having been taken to her village Engurusha by a police car. PW5, PW2 and PW3 said that they were taken to their homes at 2.00pm. Even if on 4<sup>th</sup> of March, 1993 yet they all returned and went to All Saints Cathedral, where is the truth in regard to the alleged torture committed by the State?
35. With all the above inconsistencies, I am unable to believe the Petitioners. In saying so, I am aware and I indeed take judicial notice of the time that has lapsed since the alleged violations took place. I am also conscious of the fact that memories fade with time, but I cannot find any justification for the inconsistencies in their testimonies. Such inconsistencies coupled with lack of evidence if they were to be admitted by this Court, would greatly prejudice the Respondent as he would not be able to defend the claims made against him.
36. Even if I was to take the Petitioners evidence at its face value, I would still face one more hurdle; lack of crucial evidence. It is not enough for the Petitioners to claim that they lost their treatment notes and cards and for instance PW2, PW3 and PW5 testified that they have since become sickly out of the violence meted upon them by State agencies; that they still suffer chest pains, diabetes, high blood pressure etc. If that is the case, why would they not produce current medical reports to that effect? It would not have been difficult for them to such medical reports giving their medical history and their present conditions.
37. To my mind, the reformed Kenyan Judiciary has an obligation to vindicate past violations of fundamental rights and freedoms in order to secure the Country's future but that can only happen if parties adhere to the most basic principles of presentation of evidence. This Court has severally held that in the arena of constitutional litigation, parties should seriously consider the manner in which they invoke the Court's jurisdiction and where they fail to do so, sadly, they must be told so.
38. In the instant case, the Petitioners may well have been at Freedom Corner on 3<sup>rd</sup> March 1992 but I have found no evidence that they were beaten as alleged. In addition, although the Affidavits in support of the Petition are replicas of each other, the evidence tendered orally sharply differed from what was contained in the said Affidavits. The drafting of the Affidavits and presentation of evidence in Court is a crucial exercise in the test of credibility of any case and the Petitioners and their Counsel failed that test.
39. Having found as I have, that would have been enough to dispose of the Petition, but this being a Court of first instance, it has an obligation and must resolve all issues in dispute. I therefore must address the claim made for regarding violation of the Petitioners' rights.

#### **Violation of the freedom and protection from torture and other cruel and degrading treatment.**

40. In that regard, the Petitioners alleged that they were tortured and were seriously injured by State agents being the Kenya Police and General Service Unit Officers. **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”***.

41. The law on protection against torture and other degrading and inhuman treatment is clear under all the 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.”*** Since the adoption of the UDHR on December 10, 1948, this provision has been reproduced in several other international human rights instruments, such as 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)**.

42. But what is torture? **Article 1 of CAT** defines it as follows;

***“For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”***

43. It is obvious therefore from the above that 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 reason why it is one those fundamental rights and freedoms that can never be abrogated from.

44. In that context, I have stated and shown why the Petitioners’ claim of alleged torture cannot succeed. The facts relied upon are inconsistent and contradictory and cannot be the basis of a favourable finding in their favour. I have also seen the “Society Magazine, Issue No.4” of 23<sup>rd</sup> March, 1992 which run a story captioned; “State Tyranny” and produced as annexure ‘MWN I’ in the affidavit of Margaret Wanjiru. Sadly, I am not able to appreciate the evidentiary and probative value of the magazine. Whereas I have seen images of women who have chained themselves, I do not know what value those images are to a claim of alleged torture. I have also seen images of women who apparently gave an interview to the Magazine and none of the Petitioners names are among those names.

45. I am therefore satisfied that the Petitioners have not established the threshold required of them to prove that they were tortured and as such do not find a violation of **Section 74(1) of the Repealed Constitution**.

### **Conclusion**

46. It is obvious that there is nothing more to say and the Petition herein is dismissed.

47. Let each Party bear its own costs.

48. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 11<sup>TH</sup> DAY OF SEPTEMBER, 2015**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Kazungu – Court clerk

Mr. Gitau for Petitioner

Mr. Kuria for Respondent

**Order**

Judgment duly delivered.

**ISAAC LENAOLA**

**JUDGE**

**11/9/2015**