



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.261 OF 2014**  
**BETWEEN**  
**ROBERT NJERU NYAGA.....PETITIONER**  
**AND**  
**THE ATTORNEY GENERAL..... RESPONDENT**  
**JUDGMENT**

**Introduction**

1. In his Petition dated 10<sup>th</sup> June, 2014, the Petitioner, Robert Njeru Nyaga, alleges a violation of his fundamental rights and freedoms as set out under **Sections 72, 74 and 77 of the Repealed Constitution**. He claims in that regard that his rights were infringed when he was arrested by officers of the Kenya Army on 1<sup>st</sup> August, 1982 and thereafter following a failed *coup de tat*. He also alleges that he was subjected to physical and psychological torture, cruel, inhuman and degrading treatment, deprivation of his fundamental human rights and protection of the law during the material time.

2. In his Petition aforesaid he has sought the following orders;

*“(a)A declaration that the brutal arrest, the cruel, inhuman and degrading treatment inflicted on the Petitioner upon being taken into custody, the cruelties, violence, brutalities and extreme and inhuman and degrading conditions that the Petitioner was subjected to in the various military, police and prisons custody that he was held constituted breaches of the fundamental rights and freedoms of the Petitioner as to human dignity, protection of law, prohibition against torture, cruel, inhuman and/or degrading treatment or punishment guaranteed by Sections 70(a) and 74(1) of the Former Constitution (now Articles 27(1), (2), 28 and 29 (a), (c), (d), (f) of the Constitution of Kenya.)*

*(b) A declaration that the period that the Petitioner was detained incommunicado in military, police, and prisons’ custody without being arraigned before a Court of law or without being accorded a trial constituted a period of arbitrary, unlawful, illegal detention and violation of the fundamental rights as to human dignity, personal liberty, freedom from cruel, inhuman and degrading treatment and/or punishment and the protection of law including right to a fair trial guaranteed by Sections 70(a), 72(3), 74(1) and 77 of the Former Constitution (now Articles 27(1), (2), 29(a) 49(1) (f) & 50(2) of the Constitution of*

*Kenya.)*

*(c) General damages consequential to the declarations of violations of the fundamental rights and freedoms of the Petitioner in prayers (i), (ii) above as may be assessed by this Honourable Court.*

*(d) Aggravated, punitive and/or exemplary damages for the arbitrary, highhanded and oppressive conduct by security officers of the Government towards the Petitioner.*

*(e) Cost of the Petition.*

*(f) Interest on all monetary awards.”*

### **The Petitioner's case**

3. The Petitioner in his oral evidence testified that he was serving as an officer of the Kenya Air Force at the time of the attempted coup of 1<sup>st</sup> August, 1982, having been enlisted under service No. 023958.
4. On that day he alleged that he was in Nanyuki Barracks when he was told by fellow servicemen that the Government had been overthrown and he was then instructed to proceed to the armory. While there he had an announcement on radio that the Air Force officers who had attempted to overthrow the Government had been overpowered and arrested. Later on the same day, at around 3.00pm, while at the Air Defense Control Unit, he was arrested by Kenya Army soldiers and was taken to the Supplies Section where he was locked up to 12<sup>th</sup> August, 1982.
5. On 12<sup>th</sup> August, 1982 he was taken to the Kenya Air Force Administration Block while being made to walk on his knees and being abused as “**educated rubbish**”. He was thereafter allegedly subjected to continuous interrogation by army officers and later on, he was moved to a nursery school within the Nanyuki Barracks where he was confined for a period of two days with minimal food and water. He was also not provided with blankets.
6. On 14<sup>th</sup> August, 1982 he was allegedly moved to Kenya Air Force Eastleigh Base where he was detained at the Guardroom and later on moved to Kamiti Medium Prison Block Two. While at Kamiti he stated that he was detained on a starvation diet of half a cup of porridge for breakfast and a slice of ugali and a few pieces of green vegetables for lunch and supper.
7. He claimed that on 11<sup>th</sup> November, 1982 he was moved to Naivasha G.K Maximum prison and on 3<sup>rd</sup> December, 1982 he was interrogated and thereafter taken to Kamiti Maximum Prison where he was detained in Block B, Room 8 in an overcrowded cell without ventilation and with very little food.
8. He further stated that on 10<sup>th</sup> December, 1982 he was interrogated by an Army officer who tried to persuade and coerce him to confess to his having participated in the failed coup and also that he had committed the offence of mutiny. He was thereafter taken to a Court Martial at Langata Barracks where charges were read to him and he pleaded not guilty. He was then taken to Kamiti Maximum Prison where he was detained in an overcrowded and dirty cell in Block G Room 51 and in starving conditions.
9. On 14<sup>th</sup> March, 1983 he and other servicemen were called out from his cell at Kamiti Maximum Prison and taken to Kahawa Barracks where he was told that he had been released from prison, dismissed from the Air Force and given some old clothes to wear.
10. It is the Petitioner's submission therefore that he was held in detention for a period of eight months in violation of his right to liberty under **Section 72** of the **Repealed Constitution** and that

he was never accorded a trial after his plea of not guilty was entered at the Court Martial.

11. He also contends that in the course of and immediately after his arrest, he was subjected to untold torture, cruel, inhuman and degrading treatment by officers of the Kenya Army, in violation of **Section 74 (1) of the Repealed Constitution**.
12. It is his further submission that while he was placed in various military, police and prison establishments, he was subjected to cruel, inhuman and degrading treatment including being locked in overcrowded cells, deprived of sleep and rest, denied food, water to drink and use, use of toilet facilities and being interrogated for days on the same subject while being coerced into a confession; in violation of his right not to be subjected to cruel, inhuman and degrading treatment as provided for under **Section 74 of the Repealed Constitution**.
13. He further contended that he was detained without access to any persons from the outside world who would render assistance to him including his family members, friends, lawyers and doctors in violation of his right to human dignity.
14. The Petitioner has for the above reasons sought for an award of general damages of Kshs.15,000,000.00 as compensation for violation of his fundamental rights and freedoms and in addition he has sought an award of Kshs.5,000,000.00 as aggravated and exemplary damages. He relied on the decision of **Peter Kariuki vs Attorney General Civil Appeal No. 79 of 2012** in that regard.

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

15. The Respondent, the Attorney General, opposes the Petition through the following Grounds of Opposition filed in Court on 17<sup>th</sup> March, 2015.

***“(1) That the Petition is grossly and incurable defective in substance and should be struck out at the earliest.***

***(2) That the Petitioner herein was never brutally interrogated, physically and or mentally tortured, incarcerated without contact to the outside world, occasioned extreme duress and excessive inhuman treatment, extreme psychological trauma as alleged in the Petition.***

***(3) That the Ministry of Defence, the Kenya Defence Forces or its predecessor the Kenya Armed Forces were never involved in any alleged brutal interrogation, physical and/or mental torture, incarceration of the Petitioner without contact to the outside world neither did they occasion extreme duress and excessive inhuman treatment, extreme psychological trauma as alleged in the Petition.***

***(4) That it is therefore clear that the Ministry of Defence should not be held accountable for alleged violations of the rights of the Petitioner which violations are said to have been committed at institutions which are not part of the Ministry of Defence.***

***(5) That the Petitioner's actions constituted the offence of mutiny as he did not receive the order to arm himself from his immediate superior through the right chain of command.***

***(6) That the rules and regulations as espoused in the Armed Forces Act were strictly adhered to in dealing with the disciplinary case against the Petitioner.***

***(7) That the Kenya Armed Forces (as it was then) was professional in undertaking its statutory mandate and it does not condone false imprisonment, human rights abuses and/or torture as alleged in the Petition.***

***(8) That the Kenya Armed forces (as it was then) being custodians of the rule of law***

***respects and upholds each individuals equality and freedom before the law as enshrined in the Constitution.***

***(9) That the Petition is otherwise incompetent, misconceived, misplaced and is an abuse of the process of his Honourable Court as the Petitioner's rights and fundamental freedoms have not been breached and the same ought to be dismissed."***

16. In addition to the above grounds he filed written submissions and stated that the Petitioner has failed to prove his case to the required standard and as such he cannot be granted any judgment in his favour. He relied on the case of ***Peter Ngari Karume & Others vs Attorney General Constitutional Applic No.128 of 2006*** to the effect that a party must prove his allegations when the rival side disputes it.

17. On the claim of damages, it is his contention that damages in constitutional matters are awarded to give just satisfaction. He then urged the Court not to award exemplary or aggravated damages as they are not warranted.

### **Determination**

18. It is the Petitioner's contention that while he was serving as an officer of the Kenya Air Force he was arrested on 1<sup>st</sup> August, 1982. He testified that upon arrest he was kept in different Military barracks and later on transferred to Kamiti Maximum Prison and Naivasha Maximum Prison up to 10<sup>th</sup> December 1982, when he was arraigned in the Court Martial at Langata Barracks. Those facts are not contested and it is therefore clear that he was held in custody for a period of 131 days before being arraigned in a court of law.

19. In that regard, **Section 72(1), (2) and (3) of the Repealed Constitution** provided for the right to personal liberty as follows;

***"(1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases - in execution of the sentence or order of a court, whether established for Kenya or some other country, in respect of a criminal offence of which he has been convicted; in execution of the order of the High Court or the Court of Appeal punishing him for contempt of that court or of another court or tribunal;***

Section 72 (2) and (3) provided as follows;

***"(2) A person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention."***

***"(3) A person who is arrested or detained –***

- a. ***for the purpose of bringing him before a court in execution of the order of a court; or***
- b. ***upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.***

The law as set out above is very clear; that a person arrested for having committed a

misdemeanor, must be produced in Court within 24 hours of arrest. It has been alleged that the Petitioner may have participated in a mutiny, a misdemeanor.

20. In the case of *Albanus Mwasia Mutua vs Republic Criminal Appeal No.120 of 2004*, it was held that where an accused person is not arraigned in Court within 24 hours of his arrest, the burden of proving that the person arrested has been brought before a Court as soon as is reasonably practicable rests upon any person alleging that the provisions of the section have been complied with.
21. The Respondent claimed that the Petitioner had committed the offence of mutiny and the Kenya Army acted in a professional manner in undertaking its statutory mandate. This Court cannot accept that explanation as a defence because it is invalid. I say so because **Section 72(2) and (3) of the Armed Forces Act (Cap 109; now repealed)** and which was the law in force at the time provided;
- “(1) The allegations against a person arrested under section 70 or section 71 shall be investigated without unnecessary delay, and as soon as practicable thereafter either proceedings shall be taken to deal with the allegations or he shall be released from arrest.*
- (2) Wherever any person subject to this Act is arrested and remains in custody for more than eight days without his being tried by court martial or dealt with summarily-*
- (a) a special report on the necessity for further delay shall be made by his commanding officer to the prescribed authority in the prescribed manner; and*
- (b) a similar report shall be made to the prescribed authority and in the prescribed manner every eight days until a court martial sits or the offence is dealt with summarily or he is released from arrest.”*
22. It is obvious that the Respondent does not have a valid explanation as to why the Petitioner was kept in custody for 131 days without being charged with any offence and he was therefore held unnecessarily long in total disregard of the law as can be seen above.
23. **Section 72 of the Repealed Constitution** is also very clear that upon arrest the Petitioner had to be presented in the Court Martial within 24 hours but he was presented 131 days later in clear violation of **Section 72** of the repealed Constitution, and I so find.
24. The Petitioner further claims that upon his arrest he was subjected to untold torture, cruel suffering and degrading treatment by officers of the Kenya Army as he was being beaten and forced to kneel on concrete floor and taunted as **“educated rubbish”**.
25. At the various civilian prisons he was held in, he also claimed that he was locked up in overcrowded cells, deprived of sleep and rest, food, water for use and drinking, denied use of toilet facilities and was continuously interrogated by Kenya Army officers for days.
26. In that context, **Section 74(1) of the Repealed Constitution** provided that, **“No person shall be subject to torture or to inhuman or degrading punishment or other treatment.”**
27. The above provision of the Repealed Constitution on protection against torture and other degrading inhuman treatment is also provided for under various international human rights law. (See **Article 5 of the United Nations Universal Declaration of Human Rights (“UDHR”)**, **Article 7 of the International Covenant on Civil and Political Rights (“ICCPR”)**, **Article 3 of**

**The Convention Against Torture (CAT), Article 8 of The European Convention on Human Rights (ECHR), Article 7 of The American Convention on Human Rights (ACHR), Article 9 of the Inter-American Convention to Prevent and Punish Torture and Article 9 of the African Charter on Human and Peoples Rights (Banjul Charter).**

28. It is obvious therefore that torture is prohibited in all its forms. Indeed, the general principle is that; *“there can never be a justification for torture”* in any circumstance. In any event, **Section 86(2)** of the **Repealed Constitution** also recognized that fact and provided that the protection against torture is one of those rights that could not be abrogated from by disciplined forces. It therefore follows that protection from torture is one of those fundamental rights and freedoms that cannot be limited or abrogated from at all.

29. In that context, in the case of *Republic vs Minister For Home Affairs and Others ex parte Sitamze Nairobi HCC NO.1652 OF 2004 120081 2 EA 323* Nyamu J stated as follows with regard to torture;

*“Torture means 'infliction of intense pain to the body or mind; to punish, to extract a confession or information or to obtain sadistic pleasure. It means infliction of physically founded suffering or the threat to immediately inflict it, where such infliction or threat is intended to elicit or such infliction is incidental to means adopted to illicit, matter of intelligence or forensic proof and the motive is one of military, civic or ecclesiastical interest. It is a deliberate inhuman treatment causing very serious and cruel suffering'. "Inhuman treatment" is physical or mental cruelty so severe that it endangers life or health. It is an intentional act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.”*

30. I am in agreement with the learned judge and it is therefore clear in my mind that being forced to kneel down on concrete floors and taunted as **“educated rubbish”** are torturous acts inflicted upon the Petitioner in violation of his right to protection from torture and other inhuman treatment as was provided for under **Section 74** of the **Repealed Constitution**.

31. As regards the Petitioner’s claim that he was subjected to torture in various civilian prisons, I opine as follows;

32. Firstly; in *Blanchard vs Minister of Justice, Legal and Parliamentary Affairs and Another [2000] 1 LRC 671 at 679* it was held that;

*“The same complaint was raised in Le Maire vs Maas (1990) 745 F Supp 623 The Plaintiff, a convicted murderer, serving a life sentence, objected that the twenty four hour continuous lighting in his cell disturbed his sleep and caused other psychological effects. It amounted, so he contended, to cruel and unusual punishment in breach of the eighth Amendment. The defendant, the Prison Superintendent, justified the constant illuminations as a security measure so the disciplinary segregation unit could see into the cell. There was no evidence, however, that there was need to see the cell for twenty-four hours per day. No reason was offered why the cell could not have a switch outside so that guards could see into it when they needed to. Panner CJ held (1990) 745 F Supp 623 at 630, “there is no legitimate penological justification for requiring the Plaintiff to suffer physical and psychological harm by living in constant illumination. The practice is unconstitutional.”*

33. It is clear that the American case above represents the ideal situations that ought to obtain in any prison. However, in *Koigi Wamwere vs Attorney General (2012) eKLR*, Mumbi Ngugi recognised the fact and took judicial notice of past notorious conditions in Kenyan prisons and stated as follows with regard to the claim of violation of the Petitioners rights while held in prison;

*“I have set out in detail some of the averments of the Petitioner with regard to what he considers to be acts of torture committed against him by state and state agents during his detention and incarceration in his two trials. Weighed against the definition of torture set out above, I must, regretfully, find that there were no acts of torture as recognised in law committed against the petitioner during his detention in prison. What the petitioner was subjected to was the same deplorable conditions to which other prisoners in Kenya are subjected to. The poor diet, lack of adequate medical and sanitation facilities, lack of an adequate diet, have been hallmarks of prison conditions in Kenya. The discriminatory dietary regulations that the petitioner refers to, if they were indeed in force as the petitioner avers, are doubtless a carry-over from the discriminatory colonial regulations which independent Kenya inherited and has not seen fit to question and change.”*

The judge concluded thus;

*“To find that the poor prison conditions amount to torture which entitles the petitioner to compensation would open the door for similar claims by all who have passed through Kenya's prison system. Looked at against the definition of torture, however, I find and hold that there was no violation of the Petitioner's rights under Section 74 with regard to the above instances cited as illustrations of the torture he was subjected to while in detention.”*

34. I agree with the reasoning of the learned judge as regards torture generally in prisons within Kenya at the material time. I also take judicial notice of the fact that prison conditions were not pleasant at all in the past and may still be especially as they relate to diet, beddings and sanitation. I did not hear the Petitioner to claim that the harsh prison conditions were peculiar to him as compared to other inmates. I therefore do not find a violation of his protection to cruel, inhuman and degrading treatment while being held in prison. I am also expectant that this matter will be resolved someday by higher Courts than this one.

35. Having found that the Petitioner's right to liberty as provided for under **Section 72** of the **Repealed Constitution** was violated as well as the protection from torture as provided for under **Section 74(1)** of the **Repealed Constitution** were violated, this Court must grant him a remedy as the Constitution itself empowers the Court to grant an appropriate remedy.

36. In doing so I will be guided by the principle urged by the Respondent that damages in constitutional cases are awarded to give just satisfaction and not merely to restore an individual to the place he was before the acts complained of took place. Lord Wolf in his paper **“The Human Rights Act 1998 and Remedies in M Andenes and D Fairgrieve (eds), Judicial review in International Perspective: 11(2000), pp 429-436** has suggested some possible principles to be followed while granting relief or a remedy where fundamental rights have been infringed. These principles are;

- a. *If there is any other remedy in addition to damages, that other remedy should usually be granted initially and damages should only be granted in addition if necessary to afford just satisfaction.*
- b. *The court should not award exemplary or aggravated damages.*
- c. *An award should be “of no greater sum than that necessary to achieve just satisfaction.”*

*(d) The quantum of the award should be “moderate” and “normally on the low side by comparison to tortious awards.*

*(e) The award should be restricted to compensating the victim for what happened “so far as the unlawful conduct exceeds what could lawfully happen.”*

- f. *Failure by the claimant to take preventive or remedial action will reduce the amount of damages.*
- g. *There is no reason to distinguish between pecuniary and non-pecuniary loss. What matters is that the loss should be “real and clearly caused by the conduct contrary to the fundamental rights.*

37. I am persuaded by his Lordship's statements and applying the above principles in the instant Petition, the Petitioner sought general damages of Kshs.15 Million and aggravated damages of Kshs.5 million. This Court has held in the past that aggravated damages and exemplary damages are not to be awarded for two reasons; firstly, the actions complained of are as a result of the same transaction and secondly, they are not awardable in changed political circumstances - See cases of *Dominic Arony vs Attorney General Misc. Appl.494 of 200*, *Benedict Munene Kariuki and 14 others vs the Attorney General High Court Petition No.722 of 2009*, and *Jennifer Muthoni Njoroge and 10 Others vs Attorney General Petition No.340 to 350 of 2009*.

38. In the circumstances and doing the best I can, while aware of awards in the similar cases such as *David Gitau Njau & 10 Others vs Attorney General Petition No.340 of 2012* and *Gerald Gichohi & 9 Others vs Attorney General Petition No.587 of 2012*, I shall award the Petitioner a global figure of **Kshs.2, 500,000.00** as general damages.

39. The final orders shall be as follows;

(a) **A declaration is hereby issued that the period that the Petitioner was detained incommunicado in military, police, and prisons' custody without being arraigned before a Court of law or without being accorded a trial constituted a period of arbitrary, unlawful, illegal detention contrary to Section 72(3) of the Repealed Constitution of Kenya.**

(c) **General damages of Kshs.2,500,000.00 is awarded to the Petitioner plus interest from the date of this judgment until payment in full.**

40. The Petitioner shall also have the costs of the Petition plus interest thereof.

41. 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

Miss Kabita for Petitioner

Mr. Kuria for Respondent

**Order**

**Judgment duly delivered.**

**ISAAC LENAOLA**

**JUDGE**

**11/9/2015**