

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NO.833 OF 2009 (O.S.)

BETWEEN
CHARLES GACHATHI MBOKO..... APPLICANT
AND
THE HON. ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

Introduction

1. The Applicant, Charles Gachathi Mboko was a commissioned army officer with the then and now defunct Kenya Armed Forces. He was allegedly arrested on 27th December 1995 at 1.00pm at the Recruits Training School, Eldoret. At the time of his arrest he was of the rank of a Captain and in his Originating Motion dated 15th December 2009, he alleges that his fundamental rights and freedoms under Sections 70, 72, 74, 76, 77, 78, 79, 80 and 82(3) of the Repealed Constitution were violated by National Intelligence Security Officers (hereinafter NSIS) and other government servants, agents and institutions on diverse dates between 1995 and 1996. He therefore seeks the following orders;

“1) A declaration that the Plaintiff's fundamental rights and freedoms under Sections 70, 72 (3&5), 74(1), 76(1), 77, 78(1), 79(1) & 80(1) 82(3) have been and were contravened and grossly violated by National Intelligence Security Service officers and other Government servants, agents employees and institutions in 1995 and 1996 and on diverse dates thereafter.

2) A declaration that the Plaintiff is entitled to the payment of damages and compensation for the violations and contravention of his fundamental rights and freedoms under the aforementioned provisions of the Constitution.

3) General damages, exemplary damages on an aggravated scale under Section 84(2) of the Constitution of Kenya for the unconstitutional conduct by Government servants and agents.

4) Any further order, writs, directions, as this Honourable Court may consider appropriate.

5) Costs of the suit, with interest at Court rates.”

Case for the Applicant

2. In his Affidavit sworn on 15th December 2009, he alleged that he was arrested without a warrant of arrest while on duty under the command of one, Captain Kisento. He was then taken from Eldoret by NSIS officers to their Nakuru Office and upon arrival, he was put in the boot of a saloon car and driven to a place he later discovered was the Naivasha Maximum Security Prison. He claimed that while at that Prison, he was interrogated on allegations that he was organizing a military coup against the Government of Kenya. During the interrogation sessions, he claimed that he would be hit with pieces of timber, and the interrogators would pull and twist his private parts. He was also allegedly put in a room with blood on the walls and was also later moved around while blind folded and kept in solitary confinement for 107

consecutive days at both Naivasha and Kamiti Maximum Security Prisons without charge in a Court of law or Court Martial contrary to **Section 74(1) of the Repealed Constitution**.

3. He testified that for that whole period, he was locked up in a room that was 3 meters by 2 meters with no mattress to sleep on and nothing to cover himself with. That the lights were on throughout the night and he further stated that he was blind folded even when bathing and was put in a cage to dry up thereafter.

4. He claimed that he was released on 11th April 1996 and even after the release, he was continuously trailed by NSIS officers and was dismissed from the Army without any reason and he could not get employment thereafter and as a result, the Government effectively destroyed his life at the young age of 33 years. He also alleged that as a result of the incarceration and torture meted upon him, his life has been ruined and he has suffered bodily injuries and psychological trauma which he has never been able to recover from.

5. He urged the Court to award him Kshs.20,000,000/= as compensation for the degrading and inhuman treatment that he was subjected to and he relied on the case of **Otieno Mak'onyango v Attorney General HCC Misc Applic No. 845 of 2003** where the Petitioner was awarded Kshs. 20,000,000/= and also **Oduor Ongwen & 20 Others v Attorney General Petition No.777 of 2008** where the Petitioners were awarded between Kshs.2, 500,000/= to Kshs.6, 500,000/= as damages for similar constitutional violations.

The Respondents' Case

6. In response to the Originating Motion, the Respondent, the **Attorney General**, filed a Replying Affidavit sworn on 18th October 2013 by Lieutenant Colonel Paul Mwangemi Kindochimu, the in-charge of all personal records at the Kenya Defence Headquarters.

7. He acknowledged that the Applicant was a Kenya Defence Forces Officer enlisted on 18th August 1986, commissioned as an officer on 21st August 1987 and whose services were terminated on 10th April 1996 by the National Defence Council following a report from NSIS directly pointing to his involvement in subversive activities, an allegation which could only be dealt with by the Criminal Investigation Department (CID) as the offence he was being accused of was not one that could be dealt with by Military authorities.

8. The Respondent denied any involvement in the allegations of solitary confinement, torture, failure to be accorded the protection of the law and forced confessions as claimed by the Applicant. It was also the submission of the Respondent that the Applicant must prove facts relied on in alleging a violation of his rights and also claimed that the Applicant failed to adduce medical reports proving that he was tortured which failure would negate his claim that for 107 days he was in unlawful confinement without charge. Further, that he failed to produce entries in any occurrence book that would ascertain that he was arrested and detained in any known police station within Kenya.

9. The Respondent added that the facts upon which the Originating Motion is based are fabricated as there was no coup attempt in Kenya in 1995 and so no proper claim could be made on such fabricated evidence.

10. The Respondent further contends that the Applicant was guilty of laches as he took 18 years before instituting the Petition. He relied on the cases **of Attorney General of Uganda & Another v Omar Awadh & 6 others (EACJ No. 2 of 2012)**, **Peter Ngari Karume and Others v Attorney General (2009) e KLR**, **Berry v The State of New York 2005-034.502**, **Jeerwan Triphrangsikul v Kurusapa Business Organisation CC No. 8794/2544 of 2003** and **Joyce Nakacwa v Attorney General and Others Petition No. 2 of 2001 (2020) UGCC1** all which espoused the principle that a party who wishes to enforce his rights must do so within a reasonable time and must generally be prompt in doing so.

11. The Respondent finally thus urged me to strike out the Originating Motion with costs.

Determination

12. Before I turn to examine whether the Applicant has established that his rights and freedoms have been violated by the Respondent, I must first deal with what I would deem as a preliminary issue raised by the Respondent that the Applicant has filed this Petition eighteen (18) years from the date of the alleged cause of action; that therefore such a claim cannot be entertained because of laches.

13. To determine that issue I will do no better than reiterate my earlier findings in **David Gitau Njau & 9 Others v Attorney General Petition No. 340 of 2012** that a claim based on the Constitution does not have time limitation since the Repealed Constitution and The Rules made under it i.e. **Legal Notice No. 133 of 2001** (Constitution of Kenya (Protection of Fundamental rights and Freedoms of the Individual) Practice and Procedure Rules, 2001, do not place any limitations on the citizens' rights to institute a suit for the redress of violation of fundamental rights and freedoms under Section 84 of the Repealed Constitution.

14. Turning to the authorities relied on by the Respondent, I have also recently distinguished their applicability in the context of the violation of fundamental rights and freedoms under the Repealed Constitution. In ***Gitau Njau & 9 Others v Attorney General*** (supra) I expressed myself as follows;

“I must state that I am not persuaded by the authority of Peter Ngari Kagume & Others v Attorney General (supra) cited by the Respondent where the Applicant had filed his Petition 24 years late. I note that the judge in that case did not expressly hold that there were limitations imposed for filing of proceedings to enforce constitutional rights as enshrined under the Bill of Rights. The judge simply, in my view, did not find a justification as to why the suit had been commenced 24 years later. I must also state that I agree with the Respondents that it is ideally prudent to institute proceedings as early as possible from the time the alleged breach occurs for obvious reasons but I am clear in my mind that there is no limitation period imposed by the Repealed Constitution and the Rules made under Section 84 for seeking redress for violation of fundamental rights and freedoms and in the particular circumstances of this case. “

I went on to state as follows;

“Turning to the authority of the East Africa Court of Justice, Attorney General of Uganda & Anor v Omar Awadh & 6 Others (supra) also relied on by the Respondent, I find it to be distinguishable with our instant case. As stated above, our Constitution is silent on the time frame within which to institute a claim for violation of fundamental rights and freedoms. But the East Africa Community Treaty at Article 30(2) has stipulated a time limit within which a claim to the Court can be instituted as either within two months of the action complained of or on the day it came to the knowledge of the complainant.”

It must however go on record that although this Court has been lenient on parties that seek redress for violation of fundamental rights in past political regimes, it is obvious that the Court's indulgence is being abused by parties that have slept on their rights and give no serious explanations for the delay. In subsequent matters, obviously that issue will be at the fore of the Court's consideration of any claim.

15. Having said so, and in the specific circumstances of this case, I must hold that this Motion is properly before this Court and I will now proceed to examine whether the Applicant has established any violation of his fundamental rights and freedoms.

Right to Personal Liberty

16. The Petitioner claimed that his rights under **Section 72 (3) and (5) of the Repealed Constitution** were violated. This Section provided for the right to personal liberty as follows;

“72 (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.

(5) If a person arrested or detained as mentioned in subsection (3) (b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall, unless he is charged with an offence punishable by death, be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.”

17. 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 and if suspected of having committed a capital offence, within 14 days of arrest. In the instant case, the Applicant claims that he was arrested on 27th December 1995 and released on 11th April 1996, without charge. A simple count would reveal that he was held in incarceration for 107 days.

18. The Respondent has however claimed that the Applicant had failed to adduce evidence of his arrest and called upon the Court find that the facts relied on were fabricated.

19. I have considered this aspect of the case and I am inclined to believe the Applicant and for good reason; In his Affidavit, Lieutenant Colonel Paul Mwangemi Kindochimu confirmed that the Applicant was arrested as alleged and handed over to the Kenya Police and CID as subject matter was one which could not be dealt with by military authorities. That, to my mind, is sufficient confirmation that the Applicant was actually arrested and incarcerated and without any evidence to the contrary, I am compelled to believe the Applicant that he was also held in unlawful incarceration for 107 days. In so holding I am aware that Miss Gitiri for the Respondent also argued that in 1995 there was no attempted coup in Kenya but I also note, as I have said above, that Lieutenant Colonel Mwangemi also stated that the Applicant had been involved in subversion which was an offence to be handled by the CID and that is also sufficient evidence that the Applicant was indeed arrested and locked up on suspicion of engagement in subversive activities against the Government of Kenya.

20. The Respondent has also taken issue with the Applicant's allegation that he was held in unlawful detention for 107 days but the issue is straightforward. He was discharged from the Armed Forces on 10th April 1996 and subsequently released from incarceration on 11th April 1996. I see no reason to doubt the Applicant's evidence in that regard and the Respondent's argument that no record of incarceration was produced by the Applicant is escapist. How would a man suspected of having attempted to overthrow the Government have the luxury of all records of his unlawful detention? How can he be expected to have had Occurrence Book records which were never in the first place in his custody? I have no hesitation in finding that he was held contrary to **Section 72(3) of the Constitution** for 107 days as claimed.

Protection from torture and other cruel and degrading treatment

21. The Applicant alleged that his right not to be subjected to torture and other cruel and degrading treatment protected under **Section 74(1) of the Repealed Constitution** was violated at the time he was arrested and for the duration he was held at Kamiti and Naivasha Maximum Security Prisons.

22. **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."

23. The Applicant claimed that he was driven around blind folded, was held in solitary confinement for 107 days and during his interrogation he was hit with pieces of timber, his private parts were pulled and twisted and that he was held in a room with blood on the walls and that he has since suffered bodily injuries and psychological trauma.

24. In response to the allegations, the Respondent claimed that the Applicant had failed to produce a medical report that would demonstrate that the Applicant was indeed tortured.

25. My view is that whereas it is indeed true that a medical report would have been good evidence to corroborate the Applicant's allegations the absence of that report is not fatal to his case. The Applicant testified under oath of the torture meted upon him and Miss Gitiri for the Respondent did little to discredit this account and her cross- examination with respect, added little value to the Respondent's case. I therefore believe that from the evidence before me, Applicant was tortured as he claims. I say so knowing fully well that Lieutenant Colonel Mwangemi claimed in his Affidavit that the Ministry of Defence cannot bear responsibility for the actions of the Kenya Police and admitted that the mistreatment visited upon the applicant was beyond the Respondent's control.

26. Torture is a serious violation of fundamental rights and freedoms and is not permissible or excusable under any circumstances. Perhaps in recognition of this fact, the **Constitution, 2010** has expressly provided that Protection against torture and other inhuman degrading treatment is one of the fundamental rights and freedoms that cannot be derogated from.

27. In that regard, I need not repeat the findings of the High Court in cases such as *Harun Thungu Wakaba & Others –v- The Attorney General Nairobi HC Misc. Appl. 1411 of 2009(OS)*; *Wachira Waheire -v- The Attorney General Nairobi HC Misc. 1184 of 2003(OS)*, *Rumba Kinuthia & Others –v- The Attorney General, Nairobi HC Misc. Appl. No. 1408 of 2004* and *Cornelius Akelo Onyango & Others -v- The Attorney General Nairobi HC Misc. 233 of 2009* where the above point was forcefully made. The facts as set out above point to a clear violation of Section 74 of the Repealed Constitution and in the circumstances, I find and hold that the Applicant was subjected to torture, cruel and degrading treatment contrary to that Section of the Repealed Constitution.

Protection against arbitrary search or entry

28. The Applicant contended that his right of protection from arbitrary search or entry was violated as provided for under **Section 76 (1) of Repealed the Constitution** which read thus;

“(1) Except with his own consent, no person shall be subjected Protection against to the search of his person or his property or the entry by others on his arbitrary search or premises.”

From the facts before me, I do not see how this right was violated. Not an iota of evidence was tendered in support of the claim. That is all there is to say on this aspect of the Motion.

Right to fair hearing

29. The Applicant further alleged that his right to a fair hearing as provided under Section 77(1) of the Repealed Constitution was violated. This section required that when a person is charged with a criminal offence, he shall be afforded a fair hearing within a reasonable time by an independent and impartial court. The Court of Appeal in the case of *Julius Kamau Mbugua -v- Republic Criminal Appeal No 50 of 2008* held that **Section 77 of the Repealed Constitution** protected rights in the course of the trial. In the instant case, the Applicant was never arraigned in any court. In light of that interpretation as given by the Court of Appeal I do not find a violation of the Applicant's right to a fair hearing as alleged.

Other alleged Violations

30. The Applicant also claimed that his rights under **Sections 78, 79, 80 and 82 of the Repealed**

Constitution were violated. Section 78 protected freedom of conscience, **Section 79** protected the freedom of expression, **Section 80** freedom of assembly and association while **Section 82** protected from discrimination. I do not see how these rights were violated because the Applicant failed to plead facts that would clearly demonstrate their violation. In fact looking at his Motion he has indeed said nothing about their violation and the Court even with the fact of his long incarceration cannot assume that all these rights were necessarily thereby violated. That being so, I am unwilling to belabour the same and for good reason.

Reliefs

31. Having found a violation of the Petitioner's rights under **Sections 72 and 74** of the **Repealed Constitution** this Court must award the Petitioner an appropriate remedy.

32. The Applicant prayed for general, aggravated/exemplary damages of Kshs.20,000,000/=. In Jennifer Muthoni Njoroge & 10 Others (Supra), this Court articulated the criteria to be used in awarding damages in this torture type of cases. I expressed my mind as follows;

“In awarding damages therefore, I shall use the following criteria; (i) The torture inflicted on each Petitioner (2) The length of time the Petitioners were held in unlawful custody (iii) The decided cases on the subject matter (iv) what is fair and reasonable in the circumstances of each case, and I have chosen to give a lumpsum in each case.”

33. I shall take the same approach in this case and I must also state that the the High Court has recently stated its view on the issue of exemplary damages and has generally declined to grant exemplary damages for alleged violations of the Constitution in changed political circumstances - See **Benedict Munene Kariuki and 14 Others -v- the Attorney General High Court Petition No. 722 of 2009, Samuel Waweru Kariuki (supra)**. I see no reason to depart from the reasoning in those cases with regard to exemplary and/or punitive damages.

34. On the basis of the above principles, and bearing in mind that the violation of the Applicant's rights as set out elsewhere above were part of the same transaction, I believe that a global award in respect of all violations is sufficient. In the circumstances, I award the Applicant **Kshs.3,500,000/-** as general damages. He shall also have the costs of this Motion plus interest on general damages and costs from the date of judgment until payment in full.

Conclusion

35. The final orders to be made are that Judgment is entered in favour of the Applicant against the Respondent in the following terms;

(a) General damages of **Kshs.3,500,000/-** as compensation for torture, degrading treatment and unlawful confinement by agents of the Government of Kenya for the 107 days that he was unlawfully incarcerated.

(b) Costs of this Motion together with interest on damages and costs from the date of Judgment until payment in full.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 7TH DAY OF MARCH, 2014

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Mr. Maimbo holding brief for Miss Gitiri for Respondent

No appearance for Petitioner

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE