**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 230 OF 2013**

***CONSOLIDATED WITH PETITION NO. 231 OF 2013***

**BETWEEN**

**JOSEPH MWAURA KINUTHIA....1ST PETITIONER**

**MARGARET WARURIE MWAURA.....2ND PETITIONER**

**AND**

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

**JUDGMENT**

## Introduction

1. The 1st Petitioner, Joseph Mwaura Kinuthia in Petition No.230 of 2013, and the 2nd Petitioner, Margaret Warurie Mwaura in Petition No.231 of 2013 have filed their respective Petitions alleging violations of their constitutional rights as set out in **Sections 72(3), 72(5), 74(1), 77(2)** and **79(1)** of the **Repealed Constitution**, by Kenyan Government servants and agents from 22nd October 1990 to 18th June 1992 at Kamiti Maximum Security Prison and Langata Women's Prison, respectively.

## Case for the Petitioner

2. In his Affidavit sworn on 2nd May 2013, the Ist Petitioner alleged that he was arraigned in the Chief Magistrate's Court in Nairobi at 6.15a.m. on 22nd October, 1990, and charged alongside seven other people, with the offence of treason contrary to **Section 40** of the **Penal Code** (Chapter 63 Laws of Kenya). He was subsequently remanded at the Kamiti Maximum Security Prison for 20 months.

3. He claimed that while at Kamiti Maximum Security Prison, he was subjected to cruel, harsh, inhuman and degrading treatment throughout the period that he was held there. That due to the harsh conditions in the prison, he fell ill with high blood pressure and to-date undergoes treatment for migranes, eye sight disorders, joint pains and tooth cavities.

4. He claimed that while in custody, he was provided with three old and badly torn blankets which were heavily infested with lice and bed bugs; that his cell was permanently lit with a bright bulb day and night which made it impossible to sleep; that he was attacked by mosquitoes at night; he was subjected to regular beatings by prison warders; he was denied treatment when sick; he was denied toothpaste and a

tooth brush leading to development of tooth cavities; he was locked up at Block B reserved for hardcore armed robbers and murderers thus subjecting him to rare sleep as his sleep was interrupted by screams and yells of hallucinating inmates pleading with the hangman to spare them and he was fed one meal a day (with badly cooked food)

5. He further alleged that as a result of his arrest and incarceration, he was laid off from the M/s. Rumba Kinuthia & Co Advocates, the law firm in which he was working as an Accountant. That since his release he continues to suffer as he cannot secure a job and now depends on the returns from a small-time poultry keeping venture. And that he has suffered massive and irreversible damage to his health, financial and social life and seeks damages.

6. The 2nd Petitioner is the wife of the 1st Petitioner and the sister-in-law to Mr. Rumba Kinuthia Esq. the advocate acting for the Petitioners herein. In her Affidavit sworn on 2nd May 2013, she alleged that she was arraigned by Special Branch Police officers in Court on 22nd October 1990 at 6.30 am and charged with the offence of misprision of treason contrary to **Section 40** of the **Penal Code**. She stated that she pleaded not guilty to that charge and was thereafter locked up at Langata Women's Prison while awaiting trial.

7. She claimed that at the Prison, she was locked up in solitary confinement; was denied a bed, mattress or sleeping mat and was forced to sleep on a cold concrete floor with only two torn blankets infested with lice; was denied reading material including the Bible; was given one meal per day consisting of bad cooked ugali and beans; was denied sanitary facilities; was subjected to constant brutal beatings and verbal abuse and was denied medical attention. During her Court visits, she claimed that she was driven in a car that was part of a heavily armed General Service Unit convoy with sirens blaring as if she was a dangerous criminal.

8. She further claimed that she was released on 22nd December 1990 after the Attorney General had entered a *nolle prosequi* in her case and that her prosecution was illegal, malicious and a violation of her fundamental rights and freedoms.

9. In addition, that as a result of her arrest and incarceration, she lost her job as a corporal in the Kenya Police Force and she claimed that she now runs a poultry enterprise in Naivasha with her husband to sustain herself and her family. She also claimed that as a result of her ordeal she contracted serious and severe stomach ulcers and that she still undergoes treatment to date for that ailment.

10. In his Petition, the 1st Petitioner therefore seeks the following reliefs:

***"(a) A declaration that his fundamental rights and freedoms were contravened and or grossly violated by the Respondent's Special Branch Police Officers who were Kenyan government servants, agents, employees in its institutions for a period of two months by illegal arrest, malicious prosecution, harsh, inhuman or degrading treatment in Kamiti Maximum Security Prison and Langata women prison.(sic)***

***(b) A declaration that the Petitioner is entitled to the payment of damages and compensation for the violation and contravention of his fundamental rights and freedoms under the aforementioned provisions of the Constitution.***

***(c) An award of general damages, exemplary damages and moral damages on an aggravated scale under Section 84(2) of the Constitution of Kenya for the unconstitutional conduct by the Kenyan Government servants and agents.***

***(d) Any further orders, writs, directions of this Honourable Court may deem fit and just to grant***

***(e) Costs of the suit plus interest from the date of filing of the Petition."***

On her part, the 2nd Petitioner seeks the following reliefs;

***"(a) A declaration that her fundamental rights and freedoms were contravened and/or grossly violated by the Respondent's Special Branch Police officers and prison Officers who were Kenyan Government servants, agents, employees in its institutions for a period of Two (2) months by illegal arrest, malicious prosecution, harsh, inhuman of degrading treatment in Langata Women prison.***

***(b) A declaration that the Petitioner is entitled to the payment of damages and compensation for the violation and contraventions of her fundamental rights and freedoms under the aforementioned provisions of the Constitution.***

***(c) Award of general damages, exemplary damages and moral damages on an aggravated scaled under Section 84(2) of the Constitution of Kenya (former) for the unconstitutional conduct by the Kenyan Government servants and agents.***

***(d) Any further orders, writs, directions as this Honourable Court may consider appropriate; and***

***(e) Costs of the suit plus interests from he date of filing of the Petition."***

**The Respondent's Case**

11. The Respondent, the Attorney General, in response to the Petition filed grounds of opposition dated 21st May 2013.

12. He opposes the Petitions on grounds, *inter-alia*, that, the Petitions are an abuse of the Court process as they do not demonstrate how the Petitioners' rights have been violated and that the Petitioners have not tendered credible evidence to support any of the allegations made in the Petitions. He therefore seeks that the Petition be dismissed.

13. I now turn to determine whether the facts as they are disclose any violation of the Petitioners' rights under the Repealed Constitution. If I find in the affirmative, I will proceed to determine the appropriate remedy for the Petitioners, and if not, the inquiry ends there.

**Determination**

**Right to liberty**

14. The Petitioners allege a violation of the right to personal liberty as provided by **Section 72(3)** and **(5)** of the **Repealed Constitution**. In that regard, the evidence on record is that the Petitioners were arrested on 22nd October 1990 and arraigned in Court at 6.15 a.m. and 6.30 a.m., respectively. The applicable law at the time, i.e. **Section 72(1)** read together with **Section 72(3)** and **72 (5**) of the Repealed Constitution, obligated the arresting authority to present any suspect to a Court of law within 24 hours of arrest for misdemeanors and within 14 days for capital offences. In this case although the Petitioners have stated that they were arrested on 22nd October 1990, they failed to state the time that they were arrested to enable an easy computation of time. It is not enough to state, as they have, that they were arraigned in Court at 6.15 a.m. or 6.30 a.m. without more. With those scanty facts, I do not see how there was a violation of their right to liberty as protected by **Section 72(3)** of the Repealed Constitution. For avoidance of doubt, **Section 72(3)** of the Repealed Constitution provided as follows:

***"(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 offense 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."***

15. Clearly the above Section was not breached and in addition **Section 72(5)** of the **Repealed Constitution** provided as follows;

***"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 eitherunconditionally 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 for trial."***

In the instant case, the 1st Petitioner claimed that he was remanded at Kamiti Maximum Security for 20 months and released on 18th June 1992 while the 2nd Petitioner was remanded for 2 months and released on 22nd December 1990 after the Respondent entered a *nolle prosequi*. The 2nd Petitioner claimed that although the offence she was charged with was bailable, she was denied bail in violation of **Section 72(5)** aforesaid.

16. My view is that as regards the 1st Petitioner, he had no right to bail as treason was not a bailable offence. As regards the 2nd Petitioner, although release under **Section 72(5)** aforesaid was indeed a constitutional right, it was not absolute as is clear from the language of the above Section. The 2nd Petitioner may have been entitled to it but again she placed no material before me to warrant a finding in her favour. She was certainly before a competent Court and the question that one must ask is, if she had applied for such bail what were the reasons given for refusal? Did she seek the intervention of a higher Court? If not, why? This issue was presently very casually and I am in the circumstances unable to find any violation of **Section 72(5)** of the **Repealed Constitution** as alleged.

**Protection from torture**

17. The Petitioners alleges that while in remand at Kamiti Maximum Security Prison and Langata Womens' Prison, their right not to be subjected to torture and other cruel and degrading treatment protected under **Section 74(1)** of the **Repealed Constitution** was violated. **Section 74 (1)** provided that;

***'No person shall be subject to torture or to inhuman or degrading punishment or other treatment."***

18. I have elsewhere above reproduced the acts they complained of as amounting to torture i.e. being held in solitary confinement, not being provided with a sleeping mat, being given one torn blanket invested with lice and bedbugs, a bright light bulb being lit day and night, being fed with one meal a day comprising of half cooked *ugali* and beans being denied sanitary facilities and constant brutal beatings and verbal abuse.

19. The issue of what may comprise of torture in prison was adjudicated in the American case of ***Blanchard vs Minister of Justice, Legal and Parliamentary Affairs and Another [2000] 1 LRC 671 at 679*** where it was held that;-

***"The same complaint was raised in Le Maire vs Maas (1990) 45 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 intoit 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 unconstitutio*****nal."***

20. Although the issue above was about illumination, the decision is relevant to prison conditions generally. That is American jurisprudence and attractive and persuasive as it is, back home, Mumbi J. in ***Koigi Wamwere v Attorney General (2012) e KLR,*** took judicial notice of the conditions obtaining in our Country and stated as follows with regard to the claim of violation of rights while persons are 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. 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."***

21. The above position is of course in sharp contrast to the **Blanchard** case (supra) but I am in agreement with the Learned Judge. Recently, this Court in ***Hon. Gitobu Imanyara & 2 Others v Attorney General, Petition No. 78 of 2010***, observed as follows;

***"Connected with this issue is the conditions under which the Petitioners were held [in prison] together with insane prisoners andsometimes in solitary confinement. The conditions of our prisons were and may still be appalling. Each inmate, to that extent suffered terribly under those conditions and to isolate the Petitioners' case and pay them separately for their pain may well amount to discrimination."***

The Court reiterated the same sentiments in ***Tony Gachoka v Attorney General Petition No. 79 of 2010*** and obviously again a radical departure form **Blanchard (supra)**. I only wish to add as follows;

The issue of prison and remand conditions and the manner of treatment of inmates is a controversial subject around the world. The need to balance security with fundamental rights for example has been at the forefront of this debate. In **Rhodes vs Chapman 452 O.S. 337 (1981)**, a proposition was made that the Constitution is violated whenever falls far below the constitutional minimum regardless of the motivation of the prison officials and subsequent to **Rhodes,** *"a prisoner must show at least a connection between population and inadequate sanitation, food, protection from violence, healthcare services etc."*

Further, in the case of **Wilson vs Seiter III S.Ct.2321 (1991)**, it was held that for an eight amendment claim to be sustained, the claim *"of cruel and unusual prison conditions must be supported by proof of both an objective and a subjective component"* This burden of proving that the conditions are objectively cruel and unusual and while demonstrating that the conditions are the result of culpable acts by agents of the State can be particularly difficult to meet - see **International Human Rights Law Practise by Francisco Forest Martin et al at page 390.** Heavy as the burden may be, it must still be carried by a claimant in the specific circumstances obtaining.

The above background would show that the position taken by Mumbi J. and this Court is expressive of

the unique situation in Kenya and coupled with the evidential burden placed on the Petitioners no other conclusion can be reached than that I am unable to find that the prison conditions the Petitioners found themselves in amounted to torture, inhuman or degrading punishment in violation of **Section 74(1)** of the **Repealed Constitution.**

Having so said however, the Petitioners have also alleged that they were subjected to constant brutal beatings and verbal abuse for no apparent reason by prison warders. In that regard, this Court in **Tony Gachoka case (supra)** stated as follows;

***"As can be seen, there is nothing untold or special with regard to the Petitioner's situation, and am unable to find that the conditions would per se amount to torture. But that is not the end of the matter because the Petitioner has also alleged brutal beatings before and after his arraignment in Court and I will regard that matter as torture and will take it into account while computing damages payable to him.I say so because beatings are personal and have nothing to do with general conditions obtaining."***

22. While I reiterate the above holding in the instant case, I am unable to make the same finding because unlike in the ***Tony Gachoka*** Case (supra) I have not seen any evidence at all to the effect that the Petitioners were subjected to beatings and continue to suffer medical conditions as a result of the beatings. At the very least, I expected documents showing documents showing that their present medical condition may have been as a result of torture in prison. Infact, during cross-examination, when asked by the State about the medical reports, the 1st Petitioner responded thus;

***"I did not carry my medical documents to show the medical conditions that I am suffering from"***

The 2nd Petitioner, when asked the same question responded that;

***"I have no witness to my suffering today and I left my documents at home. They are at home".***

23. Ordinarily, I would have given them the benefit of doubt but the present Petitioners have been before this Court in previous cases and their lawyer is a relative who knows the requirements for proof of claims such as this one. From the evidence, facts and pleadings before me therefore, I am unable to believe the Petitioners' claims that they were beaten while in prison. If at all the medical documents exist, why did they not put them on record at the time of filing the Petition or bring them to Court during the hearing? In any event, from the record again, it is obvious that the Petitioners do not have any medical documents to support their claim. I say so because, the 1st Petitioner stated as follows when asked by the Respondent about other medical records;

***"I was taken to the hospital in January 1992. I was given no documents".***

The contradictions in evidence and the conduct of the Petitioners would in the circumstances lead me to the conclusion that there was no violation of the Petitioners rights as protected under **Section 74(1)** of the Repealed Constitution.

**Right to Fair Hearing**

24. The Petitioners alleged that their right to a fair hearing as provided under **Section 77(2)** of the **Repealed Constitution** was violated. This Section provided for the rights of a person had been charged with a criminal offence

25. As can be seen from the Affidavits and evidence of the Petitioners, they have merely alleged but have not demonstrated how their rights under **Section 77(2)** and **Section 79(1)** of the Repealed Constitution were violated. The rule that a constitutional Petition ought to state clearly the alleged

violation and relief sought was settled in the case of ***Anarita Karimi Njeru v Republic (1976-1980) KLR 154*** where the Court stated at Page 156 of the judgment that;

***"We would however again stress that if a person is seeking redress from the High Court or an order which invokes a reference to the Constitution, it is important (if only to ensure that justice is done in his case) that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed."***

26. Looking at the Consolidated Petitions, the Petitioners did not state in what way their right to fair trial were violated. I say so because they were indeed arrested and taken to Court. Later, the charges were dropped. The Petitioners failed to show that they were denied due process in any way or that the Court handling their case was not impartial. There is also no evidence that their trial, if at all one was held, was in secret or that they were denied the right to Counsel or that the court proceedings were conducted in any irregular manner. If any of those actions had been pleaded with sufficient particulars, favourable findings may have been made but not in the present case – see for example **Kartunnen vs Finland, UN Human Rights Committee Communication No.381/1989** where allegations of the impartiality of two lay Judges were made and found to be true thereby occasioning the right to a fair trial was contravened.

I am unable to find in the circumstances that their rights under **Section 77(2)** of the **Repealed Constitution** were violated.

**Conclusion**

27. The last issue to address is the 2nd Petitioner's prayer that her summary dismissal was unlawful, unjust and arbitrarily. This Court is unable to address that issue. Let her canvass it in the right forum i.e. the Courts established under **Article 162(2)** of the **Constitution**. To my mind, this Court has no jurisdiction under **Article 165(5)** of the **Constitution 2010** to adjudicate such claims. That is all to say regarding that aspect of her Petition.

28. Looking at the Consolidated Petition again, there is nothing left for me to determine. The Petition must fail and it is hereby dismissed with no order as to costs. As I am aware the Petitioners have already received judgments in their favour in other proceedings, all is not lost for them.

29. **Final Orders**

(i) In the event and from the foregoing, **Petition No.230** of **2013** is dismissed with no orders as to costs.

(ii) **Petition No.231**of **2013** is similarly dismissed with no orders as to costs.

30. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 4TH DAY OF JULY, 2014**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Kariuki – Court clerk

Mr. Okindo for Petitioner Mr. Wamotsa holding for Mr. Ngugo for Respondent

**Order**

Judgment duly delivered.

**ISAAC LENAOLA**

**JUDGE**