



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.149 OF 2014

BETWEEN

BERNARD KINUTHIA GITAGIA.....PETITIONER

AND

THE HON. ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

Introduction

1. The Petitioner, Bernard Kinuthia Gitagia, by his Petition dated 10th March 2014 has sued the Respondent, the Attorney General, claiming that on diverse dates between 10th October 1990 and February 1992, Special Branch Police Officers as well as Youth Wingers of the then Ruling Party, the Kenya African National Union (KANU) ransacked his house, arrested and tortured him for allegedly having being a dissident alongside his brother, Rumba Kinuthia, Advocate. That as a result thereof, he suffered economic, physiological and emotional trauma and pain and since his fundamental rights and freedoms were also violated, he was entitled to the following orders;

“(a) A declaration that the Petitioner’s fundamental rights were contravened and grossly violated by the Respondents officers who are Kenya Government servants, agents and/or employees in its institutions in the period ranging 1990-1992.

(b) A declaration that the Petitioner is entitled to the payment of damages and compensation for the violation and contraventions of his fundamental rights and freedoms.

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

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

(e) Costs of the suit and interest.”

Petitioner's Case

2. By the Petition aforesaid, his Supporting Affidavit sworn on 10th March 2014 as well as his oral evidence in Court, the Petitioner set out his case as follows;
3. Firstly, that on 10th October 1990 while at his home in Kiambogo Village in Nakuru County, Special Branch Officers stormed his shop, arrested him and took him to Bondeni Police Station in Nakuru Town where he was locked up in a "private room". That later, he was interrogated about arms which his brother, Rumba Kinuthia, who had been arrested a day earlier, had allegedly hidden in the Petitioner's home.
4. That when he responded that his brother had not visited him in two (2) years, he was beaten with batons and kicks and was then locked up without food for two days.
5. He was thereafter released but lived in apprehension and fear which fears were confirmed when he was again arrested by Criminal Investigation Officers from Nairobi in March 1991. Before they did so, they allegedly ransacked his house, destroyed many household items and demanded to know where his brother aforesaid had hidden a cache of arms. They also demanded that he should dig parts of his land where they suspected that the arms had been buried.
6. He allegedly did so for three hours and when nothing was recovered, he was beaten until became unconscious and he was left where he fell.
7. He also stated that not long after the above incident, his business premises were invaded and ransacked by persons he did not know and he made a report at Elementaita Police Station and when the incident was investigated, a machete left behind by the raiders was traced to a local KANU Youth Winger and the matter ended there.
8. The Petitioner also stated that in 1992, the Chief, Kiambogo Location, Mr. Richard Kipkero came to his house with nine Police Officers, ransacked the house demanding the whereabouts of weapons that Rumba Kinuthia had allegedly hidden there and when none were found, they left.
9. It was his further evidence that all the above events caused him great distress and his fundamental rights and freedoms were violated, hence his prayers as set out elsewhere above.

The Respondent's Case

10. The Respondent, the Attorney General, filed Grounds of Opposition on 16th May 2014 and raised the following issues;
 - i. That the Petition is an abuse of the process of the Court and the same does not show what rights were violated and how.
 - ii. That the Petition was filed two decades after the alleged incidents and the delay has not been explained at all. That the same is therefore an afterthought since members of the Kinuthia Family, including Rumba Kinuthia who is also the Petitioner's Advocate, have all filed similar claims in the past and it is unclear why the present Petitioner filed his claim after all his relatives had done so.
 - iii. That the allegations of torture, inhuman and degrading treatment and all other allegations made by the Petition are not substantiated with credible evidence.
 - iv. That **"general, exemplary and punitive damages"** are not awardable in Constitutional matters and are only available in Civil Law.
11. For the above reasons the Respondent prays that the Petition be dismissed with costs.

12.He called no witness and filed no Affidavit in answer to the allegations of fact made by the Petitioner.

Determination

13.The present Petition raises both issues of fact and law. On the facts as pleaded in the Petition and in oral evidence before this Court, the Respondent filed no Affidavit to contest those facts and during the hearing, although the Petitioner was briefly cross-examined, no serious dent was made to his allegations. As was therefore stated by the Supreme Court of Uganda in **Prof. Oloka-Onyango & 10 Others vs Attorney General & Others Constitutional Petition No.8 of 2014**, where facts are not controverted, they should be accepted and deemed as unchallenged.

14.I am duly guided and will therefore hold and find that the Petitioner was arrested and held in police custody without trial for 2 days and was also periodically subjected to harassment and beatings as elsewhere above stated. If that be so, can it be said that his fundamental rights and freedoms were violated?

15.I have no doubt in holding that indeed it is so. **Section 72(3) of the Repealed Constitution** provided as follows;

“(1) ...

(2) ...

(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.”

16.In addressing the above **Section**, the Petitioner was arrested on 10th October 1990 and taken to Bondeni Police Station where he was locked up. He was transferred from Bondeni Police Station on 13th October 1990 to Nakuru KANU Offices where he was allegedly subjected to further torture, whereafter he was released after two days, without any criminal charges being preferred against him. Where a person is held in custody beyond the period stipulated by the Constitution, then obviously his rights and freedoms were violated under **Section 72 of the Repealed Constitution**

17.Regarding the allegations that he was harassed and beaten for allegedly having been party to a conspiracy to hide guns for unknown purposes, once I have found that those facts are uncontested, then it follows that under **Section 74(1) of the Repealed Constitution**, his rights were also violated. I say so and relying on the following decisions;

i. **Harun Thungu Wakaba vs Attorney General, Misc. Application No.1411 of 2009**

ii. **Wachira Waheire vs Attorney General, Misc. Application No.1184 of 2003**

iii. **Rumba Kinuthia & Others vs Attorney General, Petition No.280 of 2008**

iv. **Benedict Munene Kariuki & 14 Others vs Attorney General, Petition No.722 of 2009**

- 18.I agree with the findings in the above cases and would only hold and find that the Petitioner's right not to be subjected to physical and psychological torture was violated.
- 19.Having held as above, what are the remedies available to the Petitioner? He has sought declarations in terms of prayer (a) of his Petition and I have said that he is entitled to such a declaration.
- 20.As for exemplary and moral damages, in **Benedict Munene Kariuki (supra)**, this Court declined to award exemplary damages in addition to general damages for violation of the right not to be subjected to torture.
- 21.I adopt the same reasoning and will decline to grant any of those heads of damages.
- 22.As for damages for violations of fundamental rights and freedoms, this Court in the cases of **Harun Thungu Wakaba (supra)**, **Wachira Waheire (supra)**, **Rumba Kinuthia (supra)** etc found that where proof of such violations were made, the Petitioner was entitled to compensation for his pain.
- 23.I agree with the above decisions and taking into account the Petitioner's ordeal in the hands of agents of the State, I hereby award him Kshs.100,000/- as damages. I have not taken into account the alleged actions of KANU Youth Wingers as I am certain that post 1992 when Kenya became a *de jure* multiparty State, actions of political parties, whatever their links with the State, cannot be equated to actions of the State *qua* State.

Conclusion

24.In the event, the final orders to be made are as follows;

- (a) A declaration is hereby issued that the Petitioner's fundamental rights were contravened and grossly violated by the Respondents officers who are Kenya Government servants, agents and/or employees.*
- (b) A declaration is hereby issued that the Petitioner is entitled to the payment of Kshs.100,000/- damages and compensation for the violation and contraventions of his fundamental rights and freedoms.*
- (c) Prayers (c) and (d) of the Petition are dismissed.*
- (d) The Petitioner shall have costs of the Petition.*

25.Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 5TH DAY OF DECEMBER, 2014

ISAAC LENAOLA

JUDGE

In the presence of:

Kariuki – Court clerk

Mr. Lubullelah holding brief for Mr. Kinuthia for Petitioner

Mr. Kumba for Respondent

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE