



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

**PETITION NO 154 OF 2012**

**JOHN IRERI JOSIAH ..... PETITIONER**

**VERSUS**

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

**JUDGMENT**

**Introduction**

1. This petition, in which the petitioner alleges violation of his constitutional rights, is expressed to be brought under Articles 25(a), 27(2), 28, 29(d), 30(1)(a) and 49(1)f(i) of the Constitution of Kenya, 2010 and sections 70, 72(2), 72(6) 73(2), 74(1), 77(1), 77(1)(B) and 84(1) of the former constitution. The alleged violations were committed by the State and State agents in 1988. The petition is dated 12<sup>th</sup> April 2012 and is supported by an affidavit sworn by the Petitioner on the same date. The petitioner has also filed submissions dated 11<sup>th</sup> September 2012.

**The Petitioner's Case**

2. The petitioner's case is that his fundamental rights and freedoms were contravened and grossly violated by police officers, prison warders and other Kenya government servants and agents on diverse dates in various State institutions in 1988, to wit on 22<sup>nd</sup>, 23<sup>rd</sup> and 24<sup>th</sup> March 1988 at Kileleshwa Police Station and between 24<sup>th</sup> March 1988 to 5<sup>th</sup> April 1988 and on 11<sup>th</sup> July 1988 to 10<sup>th</sup> August 1988 at Industrial Area, Kamiti Maximum and Manyani Prisons.

3. The petitioner alleges that he was arrested on 22<sup>nd</sup> March 1988 and taken to Kileleshwa Police Station; that he was beaten mercilessly, with slaps, rubber whips, broken chair pieces, kicks and blows until he was numb; that the torture was repeated for the 3 days that he was held in the police station; that after every session of beating he would be returned to a dark cell flooded with cold water where pressurized water would be sprayed on him for several hours., He contends that this was in violation of his right to freedom from torture or inhuman degrading treatment contrary to Article 25(a) and 29(d) of the Constitution.

4. The petitioner states that during the three days he was held in custody allegedly for stealing by servant contrary to Section 281 of the Penal Code, neither his friends nor relatives knew of his whereabouts or could communicate with him, and that as a result, his physical, psychological and economic life was

messed up.

5. The petitioner avers that on 24<sup>th</sup> March 1988, he was charged in court with the offence of stealing by servant contrary to section 281 of the Penal Code at the Senior Principal Magistrate's Court in Kibera Criminal Case No. 2677 of 1988; that he was remanded at Industrial Area, Kamiti and Manyani Prisons on various occasions where he alleges that he was subjected to continuous hard labour, cruel treatment, slaps, kicks, blows and all kinds of inhuman treatment contrary to Article 30(2) of the Constitution. He was convicted on 11<sup>th</sup> July 1988 and sentenced to 18 months imprisonment, but on 11<sup>th</sup> July 1988, he was released on bail pending hearing of his appeal in HCCA No. 286 of 1988.

6. The petitioner claims that upon his release on bail, he sought treatment at Mathari Hospital due to the torture he was subjected to at Kileleshwa Police Station, and at the various prisons where he had been held. His conviction and sentence were set aside on 10<sup>th</sup> July 1989.

7. The petitioner avers that at the time of his arrest, he was employed at the University of Nairobi as an Electrician Grade II. His services were terminated following his arrest on the basis of the criminal proceedings and he lost all his benefits, allowances and salary due to the said arrest. He states that he is entitled to be paid general, exemplary, and moral damages on an aggravated scale for the unconstitutional conduct by the servants and agents of the State, and asks for the grant of the following orders:

1. ***A declaration that the petitioner's fundamental rights and freedoms were contravened and grossly violated by the Respondent's police officers and prison warders who were Kenyan Government servants, agents and/ or employees ad in its institutions on at Kileleshwa police station, Industrial area Prisons Kamiti Maximum Prisons and Mayani Prisons.***
2. ***A declaration that the petitioner's fundamental rights and freedoms were grossly violated by the Respondent Prison warders while he was arrested remanded and /or serving sentence at Industrial Area, Kamiti Maximum Prisons, Mayani Prisons, and/ or detained at Kileleshwa Police station and that he is entitled to a compensation amounting to Kenyan Shillings one hundred million (Ksh100,000,000) for his horrific suffering and physical injuries, but bluntly submits himself to any reasonable Ward that this Honourable court may deem fit to alleviate his unjustified and long running suffering and psychological and physical anguish.***
3. ***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 and malicious prosecution under the aforementioned provisions of the constitution amounting to Kenyan Shillings one hundred million (Kshs100,000,00) but bluntly submits himself to any reasonable award that this honourable may deem fit grant.***
4. ***A Declaration that the petitioner is entitled to payment of damages and compensation for loss of salaries, allowances and future earnings at Nairobi University due to unlawful prosecution amounting to Kenyan Shillings one hundred million (100,000,00) but bluntly submits himself to any reasonable award this honourable court may deem fit and just to grant.***
5. ***General damages, exemplary damages and moral damages on an aggravated scale of the constitution of Kenya for the unconstitutional conduct by the Kenyan Government its agents and / or servants be awarded.***
6. ***Costs of the petition and interest.***
8. Mr. Okal for the petitioner referred the court to the medical report by Dr Ochieng dated 21<sup>st</sup> December 2011 from Mathari Hospital and a psychiatric report of the same date both attached to the petitioner's affidavit. He submitted that the arrest of the petitioner was unlawful and violated his fundamental rights; that he was in good health when he was arrested, and that he was unable to get his job back after his release. Mr. Okal submitted that there was no time limit for violation of

fundamental rights and relied on the cases of **Ann Njogu & Others vs The Republic Misc. Criminal Appeal No 551 of 2007** and **Otieno MC Anyango vs Attorney General High Court Case No 845 of 2003**.

### **The Respondent's Case**

9. The respondent opposes the petition and has filed an affidavit in reply sworn by **Mr. Anthony Kibuchi** on 10<sup>th</sup> July 2012 and submissions of the same date. In his affidavit, Anthony Kibuchi, a Deputy Commissioner of Police and currently the Provincial Police Officer in charge of Nairobi Area, states that there are no records to show that the petitioner was ever arrested on the said dates and detained at Kileleshwa Police Station or any police station or prison; that he has looked at the documents attached to the petitioner's affidavit and noted from the charge sheet that the Petitioner was arrested on 23<sup>rd</sup> March 1988 and arraigned in court on 24<sup>th</sup> March 1988, which complied with the law that once arrested, a person should be arraigned in court within 24 hours. He avers further that the petitioner was charged with the offence of stealing by servant, found guilty and sentenced to 18 months imprisonment, and consequently, his confinement was legal.

10. The respondent denies the allegations of torture contained in the petitioner's affidavit and avers that the Kenya Police is professional in executing its mandate competently and proficiently; that they are sworn to uphold the law, and that it is not the policy to torture suspects in any manner while in their custody. He states further that Police Occurrence Books are destroyed 10 years after the last entry and the Police Cell Registers are destroyed 5 years after the last entry; and it is therefore not practical to locate, retrieve and authenticate the relevant entries in the Occurrence Book and Cell Register given that the alleged cause of action took place over 24 years before the filing of the Petition.

11. Ms. Makori for the respondent submitted that the petitioner's arrest was legal and no evidence had been adduced to show that the petitioner was confined for more than 24 hours. She pointed out that the alleged violation occurred in 1988, 24 years ago, yet the petitioner had not done anything to vindicate his rights in that period. She submitted therefore that the delay in filing the petition cannot be rectified by filing the petition 24 years later and relied on the case of **Lt. Col Peter Ngari Kagume and Others -vs- Attorney General Constitutional Application No. 128 of 2006** and **Wachira Waheire vs- Attorney General HCC 1184 of 2003**.

### **Determination**

12. The basis of the petitioner's complaint is his arrest, trial, imprisonment and subsequent release on appeal in 1988-1989. At the time of his arrest on 23<sup>rd</sup> March 1988, he was employed as an Electrician Grade II by the University of Nairobi, and was arrested and charged in court with the offence of theft by servant. The charge sheet attached to his affidavit as **JI 3** indicates that he was arrested on 23<sup>rd</sup> March 1988 and charged in court the following day. There was therefore no incarceration in violation of the former constitution.

13. The petitioner alleges that he was tortured in the three day period that he was held at the police station. However, he has not adduced any evidence to support the allegation of torture. He was in police custody for the period then mandated by the Constitution, not for three days as alleged, as he appears, from the documents he filed in court, to have been charged within 24 hours of his arrest. There is also nothing to support the allegation of torture for the period he was held in Kileleshwa Police Station.

14. The petitioner has alleged torture while he was held in prison. The evidence before me indicates that following his conviction on 11<sup>th</sup> July 1988, he was released on bail pending appeal on 10<sup>th</sup> August 1988. I have considered his averments and the documents in support. He relies on a medical and psychiatric report prepared in 2011, 23 years after the alleged acts of torture. The petitioner has not placed anything before the court that shows any nexus between the events of 1988 and the alleged medical condition referred to in the medical reports he relies on.

15. A distinction has to be drawn between those cases of persons who were arrested in the height of political repression in the 1980s as recognised in the Nyayo House torture cases and those, such as the petitioner, who were arrested for commission of cognisable criminal offences and whom, from all the evidence, were dealt with in accordance with the law then in force, including being released on reasonable bail pending trial and appeal.

16. While the victims of political repression in the 1980s could argue (at least for a time), that it was not possible to lodge claims in relation to violation of fundamental rights due to the political climate then subsisting, the same cannot be said of persons who were charged with criminal offences. If indeed there had been acts of torture committed against the petitioner, there was nothing preventing him from raising the issue either before the trial court or the court that heard his appeal. That he chooses to do so now, 24 years later, indicates that this petition is just an afterthought, intended to take advantage of the situation in which those who were arrested and tortured for political views have been able to obtain damages for violation of their rights. Coming as it does 24 years after the event, and 10 years after the opening up of the political space, the delay, even had the petition been on violation of political rights and not based on an arrest, trial and conviction for a criminal offence, would have made the petition unmerited.

17. The petitioner has alleged violation of his rights while in prison. At the time he was in prison, he was serving a sentence of imprisonment imposed by a court of competent jurisdiction after a trial mandated by law for an offence recognised in law. He has not produced any evidence to suggest that he received treatment different from what others serving terms in the same penal institutions were subjected to, and I can therefore find no basis for the allegation of torture while in prison.

18. The upshot of my findings above is that this petition has no merit and is hereby dismissed with no order as to costs.

**Dated Delivered and Signed at Nairobi this 8<sup>th</sup> day of May 2013**

**MUMBI NGUGI**

**JUDGE**

**Mr. Okal instructed by the firm of Okal & Co. Advocates for the Petitioner**

**Ms. Makori instructed by the State Law Office for the Respondent.**