Attorney General v Matu (Civil Appeal 31 of 2020)
[2025] KECA 403 (KLR) (28 February 2025) (Judgment)

Neutral citation: [2025] KECA 403 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 31 OF 2020

F TUIYOTT, AO MUCHELULE & GV ODUNGA, JJA

FEBRUARY 28, 2025

BETWEEN

ATTORNEY GENERAL ..... APPELLANT

AND

FRANCIS MARANGA MATU ..... RESPONDENT

(Being an appeal from the judgment and decree of the Employment and Labour Relations Court at Nairobi (S. Radido, J.) dated 22nd October 2018 in Petition No. 28 of 2013)

JUDGMENT

1. The respondent, Francis Maranga Matu, was enlisted in the Kenya Air Force in the year 1969, and commissioned as a second lieutenant on 22nd May 1970. He rose through the ranks and attained the rank of major on 14th December 1978. In the petition before the Employment and Labour Relations Court (ELRC) at Nairobi, he testified that he had travelled to Nyeri to attend the wedding of his brother-in-law when, on 1st August 1982, he received news through the radio that there was an attempted coup against the Government of Kenya. He immediately got his driver to drive him back to Nairobi with the intention that he goes to the Department of Defence for further instructions.

2. When the respondent got to Nairobi, he took his family to the quarters at Garden Estate. From here he drove to Kiambu Police Station from where got in touch with the officer in charge of operations at the Department of Defence to inform him that he had arrived in Nairobi and that he was at the police station. From there he and other officers were taken to Kenya Army Headquarters, and then to Airforce Headquarters Eastleigh. Between 2nd August 1982 and 13th August 1982, in company of other officers, the respondent was detained in various police stations in the name of waiting for further instructions from his superiors.

3. On 13th August 1982, the respondent was taken to Naivasha Maximum Prison where he was held incommunicado and detained in solitary confinement for 125 days. During the period of detention, he

was stripped naked and denied food, water and beddings. He spent the nights on cold floor and made to eat rotten food. He was denied reading materials. He was denied contact with the outside world, and allowed only 15 minutes of sunshine daily. He was subjected to continuous screaming, noise and cries from other inmates who were being tortured. He was never charged with any offence, or produced in court. His case was that the detention conditions were harsh, brutal and inhuman amounting to torture and violation of his fundamental rights and freedoms. Lastly, he was discharged from the force. He had no disciplinary problems. This is what led him to petition the High Court for redress, seeking a declaration that his fundamental rights and freedoms under Articles 27(4), 28, 20, 39(1), 49(1)(a), 49(12)(f), and 50(1) had been violated and denied; that he was entitled to compensation for unlawful termination of his service from the Kenya Airforce in the rank of major; that he was entitled to damages for loss of career and termination from employment at the age of 36 prior to attaining the age of retirement which was 44; that his pension and gratuity be revised as if he had retired at age 44 in the rank of major; that he had the potential for promotion to higher ranks in the Kenya Airforce; that throughout his career, he was not adversely mentioned in any report for disciplinary action.

4. During the hearing of the petition by the ELRC at Nairobi (S. Radido, J.), the respondent called Captain Joseph Kariuki Kuria who was his colleague in the Kenya Airforce and who had been arrested and detained in similar circumstances, his detention lasting 8 months. He also called Senior Private Gilbert Maina Githae of the Kenya Air Force who had been detained for 100 days.

5. The appellant, the Honourable the Attorney General, did not file any replying affidavit or lead any evidence in defence to the petition, but the record shows that his advocate cross-examined the respondent and his witnesses.

6. The learned Judge reviewed the evidence and the rival submissions. He noted that although the petition had been brought under the 2010 Constitution, it was clear that what was applicable were the provisions of the old Constitution; that the respondent had established that he had been subjected to torture and inhuman treatment and that his right to personal liberty had also been violated. The violation of the right to personal liberty was under section 72 of the repealed Constitution and that, under section 74 of the same Constitution, he had been subjected to torture, inhuman and degrading treatment. For the violations he was awarded Kshs.3,000,000/= in general damages, and then costs and interest.

7. The appellant was aggrieved by the decision and filed this appeal whose grounds were that the petition was tainted with laches and no explanation had been given for the inordinate delay in bringing it; that the findings of the learned Judge were based on no tangible evidence and that the burden of proof had been shifted; that the petition was incurably defective as it was premised on the 2010 Constitution when the alleged violations were during the repealed Constitution; and that the awarded general damages were excessive.

8. In his cross-appeal, the respondent set out the following grounds:-

> " 1) The judge erred in law and fact by failing to issue other declarations prayed for in the petition apart from the right not to be subjected to torture and inhuman treatment and the right to personal liberty. The learned judge erred in fact and law by failing to issue the following declarations prayed for in the petition:
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> a. A declaration that the petitioner's right guaranteed under Article 49(1)(a) of the *Constitution* of Kenya to be informed promptly in a language that he understands of the reason for his arrest was breached.

b. A declaration that the petitioner's right is guaranteed under Article 49(1)(f) of the *Constitution* of Kenya requiring him to be brought before a competent court of law as soon as reasonably possible, but not later than twenty-four hours after being arrested was breached.

c. A declaration that the petitioner's right guaranteed under Article 50(1) of the *Constitution* of Kenya requiring him to be accorded a fair hearing, or to have any dispute that can be solved by the application of law, decided in a fair and public hearing before a court or an impartial tribunal or body was breached.

d. A declaration that the petitioner's right of equality and freedom from discrimination on grounds of ethnicity guaranteed under Article 27(4) of the *Constitution* of Kenya was breached.

e. A declaration that the petitioner is entitled to compensation as a regular and service officer of the rank of Major in the Kenya Air Force arising from the unlawful termination of his services for the remaining term of eight years.

f. A declaration that the petitioner is entitled to damages as a redress in respect of loss of career, his services having been terminated at the age of 36 prior to attaining the retirement age of 44 as an officer of the rank of Major.

g. A declaration that the petitioner's pension and gratuity be revised as if he retired at age 44 in the rank of Major.

h. A declaration that the petitioner is entitled to damages as redress in respect of each of the above rights that were breached in relation to him.

i. An order consequential to the above declarations quantifying the amount of damages in respect of every one of the declarations given.

j. A declaration that the petitioner had the potential, education, training, and experience for promotion to higher ranks in the Kenyan Air Force.

k. A declaration that during the entire petitioner's career service, he had not been adversely mentioned in any report by higher authorities or in deed faced any disciplinary action either civil or court martial.

2. The learned judge erred in law and fact by awarding the respondent Kshs.3,000,000/- only for violations of the respondent's right not to be subjected to torture and inhuman treatment and to the right to personal liberty.

3. The learned judge erred in law and fact by failing to quantify and award damages to the respondent in respect of every one of the declarations in 1(a) to

(k) above totalling Kshs.47,000,000/-, despite being supplied with authorities of similar cases with similar facts as particularized below:

a. The learned judge erred in law by ignoring the judgments in Peter M. Kariuki –v- Attorney General [2014] eKLR, where the Court of Appeal awarded the petitioner Kshs.15,000,000/- as general damages for violation of his constitutional rights and Kshs.22,965,460/- being his salary arrears and allowances.

b. The learned judge erred in law by ignoring the judgment in Samuel Chege Gitau & 283 others –v- The Attorney General [2016] KLR, where the 5th petitioner by the name Major Josphat Nathan was awarded the sum of Kshs.46,142,056/- as damages.

c. The learned judge erred by failing to award the respondent the sum of Kshs.47,000,000/- in view of the fact that the respondent was of a similar rank as Major Josphat Nathan above."

9. When the appeal came for hearing, learned counsel Mr. Tuitoek was present for the appellant while learned counsel Mr. Nadio was present for the respondent. Counsel had filed respective submissions which were highlighted.

10. Learned counsel Mr. Tuitoek submitted that the learned Judge erred in finding that a constitutional petition has no time limit as to when it can be brought. He argued that this petition, that was brought 29 years after the alleged violations, was inordinately late. Reference was made to the decision of Daniel Kibet Mutai & 9 others –vs- The A.G [2019]eKLR in which this Court observed that before judicial discretion can be exercised in accepting or rejecting the explanation for the delay, appropriate facts must be placed on record. It was further argued that the respondent had failed to prove the allegations of violations of his rights, including the calling of medical evidence to support his claims of torture. Lastly, the learned Judge was wrong, it was submitted, in allowing the petition whose alleged violations were in 1982, and therefore the subject of the old Constitution, and yet it (the petition) was filed under the Articles of the 2010 Constitution.

11. In opposing the appeal, and in support of the cross-appeal, learned counsel Mr. Nadio submitted that the respondent had adequately explained that the delay in bringing the petition was because of the political environment and climate obtaining between 1980's and 2000's. Reference was made to the decision in Edwad Akongo Oyugi -vs- The A.G. [2019]eKLR wherein the petitioner's delay of 33 years was excused on the ground of the then obtaining political circumstances when it was difficult to approach the courts claiming such violations. On the claim that there was failure to establish the violations, it was submitted that the evidence of long detention, incommunicado, without trial and in hostile conditions had not been controverted and had been supported by evidence of the respondent's former colleagues who went through similar experiences.

12. With respect to the applicability of the 2010 Constitution, learned counsel submitted that the rights that were violated were non-derogable and were in either Constitution. Reference was made to the case of Samwel Kamau Macharia & Another -vs- Kenya Commercial Bank Ltd & 2 Others [2012]eKLR in which the Supreme Court observed that the *Constitution* is not necessarily subject to the principles against retroactivity as in ordinary legislation; that it looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order in quest of its legitimate object of rendering political good.

13. In support of the cross-appeal it was submitted that the superior court was bound to make a finding on each violation that had pleaded and proved; that the court, while exercising its constitutional jurisdiction, was concerned with upholding and vindicating any constitutional right that had been violated or contravened and ought to have made the claimed declarations that had been sought in the petition, and now that there was sufficient proof. The decision in Gitobu Imanyara & 2 Others -vs- A.G. [2016]eKLR was cited to us on the point. Lastly, it was submitted that the learned Judge erred in failing to quantify and award general damages to the respondent in respect of each and every one of the declarations as particularised in ground 1 of the notice of cross-appeal.

14. On the contention that the awarded damages were far below what was expected in a similar case, the respondent's counsel referred us to the decisions in Peter M. Kariuki -vs- A.G [2014]eKLR, and Samwel Chege Gitau & 283 Others -vs- A.G [2016]eKLR and asked was to revise the general damages from Kshs.3,000,000/= to Kshs.47,000,000/=.

15. In opposing the cross-appeal, the appellant's counsel submitted that the quest for Kshs.47,000,000/= was without basis and should be dismissed.

16. We have considered the record, the impugned judgment, the appeal, the cross-appeal and the rival submissions. Our duty under Rule 31(1)(a) of the Court of Appeal Rules, 2022 is to re-appraise the evidence and to draw inferences of fact. In Kenya Ports Authority -vs- Kustron (K) Ltd [2009]2 EA 212 it was observed that the consideration of a first appeal entails the re-evaluation of the recorded evidence to be able to make our own fresh and independent inference and conclusions thereon. As we do that, however, we are aware that we will not lightly interfere with the findings and conclusions of the trial court that had the benefit of seeing and hearing the witnesses. If we find that the superior court misdirected itself in some matter and as a result reached a wrong decision or where it is determined that, from the case as a whole, the Judge was clearly wrong and his decision amount to an injustice, we shall interfere. (See Mwanasokoni -vs- Kenya Bus Service Ltd [1985]KLR 931).

17. Our first question is whether there was unexplained delay by the respondent in filing the petition before the High Court.

    Ordinarily, where a party has taken a long time to file his claim against the respondent, the latter is faced with the difficulties of defending the same. The respondent will be faced with the difficulty of recalling the events around the case; the facts leading to the claim. Witnesses may be have disappeared, or even died. Documents may be difficult to trace. We understand the appellant to be saying that, owing to the passage of about 29 years since the alleged torture, the claim has put them in a difficult situation when it comes to responding to the circumstances of the said torture.

18. Good luck, this is not the first time our courts are having to deal with issues of violations or threatened violations of fundamental rights and freedoms during the period in question. For instance, the Supreme Court in Monica Wangu Wamwere & Others -vs- Attorney General, Petition Nos. 26, 34 and 35 of 2019 acknowledged the historical injustices and gross violations of fundamental rights that the State visited on those who sought or attempted, or even thought of, approaching courts for redress. Such claimants who have brought their claims following the promulgation of the 2010 Constitution are seeking to right the historical wrongs that they suffered and fall in the category of transitional justice claimants whom the courts have to treat differently from persons who are seeking justice in ordinary claims covered by the period of limitation.

19. We take the view that the respondent's petition fell within the category of a transitional justice claim, and therefore accept the finding by the learned Judge that the political circumstances in the country, and especially those related to the 1982 attempted coup, were such that it was difficult for the

respondent to file a petition. He could not approach the court to claim that he had been tortured by the State. Therefore, his explanation of the delay, which the trial court accepted, was plausible. The delay was not inordinate.

20. The second question regards whether or not, for the violations that occurred during the retired Constitution, it was right for the respondent to petition the High Court using provisions of the 2010 Constitution. It was the argument by the learned counsel for the appellant that the 2010 Constitution would not apply retrospectively for incidents that took place pre-2010.

21. Detention without trial; right to be informed of reasons for arrest; right to be treated with dignity; right not to be tortured or be treated in cruel, inhuman or degrading manner; and freedom of movement, are all rights and freedoms that were protected in the repealed Constitution, and are also protected in the 2010 Constitution (See Monica Wangu Wamwere (supra)).

22. The learned Judge observed as follows:-

> 28. The petitioner in the instant case has alleged torture, cruel and inhuman treatment which were prohibited by section 74 of the retired Constitution. The core content of that right is replicated in Article 29 of the *Constitution* of Kenya, 2010.

29. The petitioner also alleged detention without trial which was prohibited by section 72 of the retired Constitution.

30. The decision of the High Court in Margaret Wanjiru Ndirangu & 4 Others -vs- Attorney General [2015]eKLR is also intrusive."

23. We find no merit in the argument by Mr. Tuitoek that the petition was defective on the basis that the Articles of the 2010 Constitution were not applicable where the human rights grievances and violations related to the period before its promulgation.

24. We move on to consider, one, whether there was sufficient evidence to establish the violations contained in the petition, and, two, whether the respondent received a fair compensation in general damages for their violations.

25. The record shows that, the appellant did not call evidence to rebut the evidence by the respondent and his witnesses. The respondent and his witnesses were cross-examined by the appellant's counsel. We appreciate that this was the respondent's petition and that, whether or not the appellant called any evidence in rebuttal, the burden lay on him to establish the claims in the petition. (See Mbuthia Macharia - vs- Annah Mutua Ndwiga & Another [2017]eKLR). The legal and evidential burden were on the respondent. Did he discharge them?

26. There was no indication that the respondent and his witnesses had conjured up what befell them following the attempted coup. The respondent testified that he was a major serving in the then Kenya Air Force. He stated that he was arrested for no reason. He was detained for a total of 125 days, in conditions that were harsh, brutal and inhuman. He gave examples of the conditions. He would be stripped naked and kept without food, water or beddings. He would be physically assaulted by prison warders for not eating rotten food. He was denied reading materials. He was held incommunicado, being allowed only 15 minutes daily for sunshine. In the neighbouring cells, fellow prisoners were being tortured and were screaming and making noise as a result. At the end of the day, he was not charged with any offence. He was instead discharged from the service, cutting short the period he was to serve before retirement. He was not alone in the suffering. Two of his former colleagues testified to the same.

27. We must accept that the learned Judge was correct in finding that the claims in the petition were proved. There was no attempt on the part of the appellant to justify what happened to the respondent. The

onus of justifying any infraction of these rights lay with the appellant, and was not discharged. We have no doubt the respondent's detention was not only unlawful but was also cruel and inhuman, and amounted to torture. His rights to due process were wholly compromised. His right to personal liberty was violated. To say that he was treated in the most unfair manner is an understatement.

28. For the violations, the trial court awarded Kshs.3,000,000/= in general damages. The court acknowledged that the respondent had sought various declarations and damages. But the award was in respect of right to personal liberty and right not to be subjected to torture and inhuman treatment.

29. The trial court did not, however, mention that the respondent had sought to be compensated for unlawful termination of his service and for having lost eight (8) years of service and loss of career. He was detained for along time without being charged.

30. In awarding damages, courts exercise a very broad and open- ended remedial discretion taking into account what is just, fair and reasonable in the circumstances, but also minding that the award has to reasonably compare with awards in similar cases. In a case like this one, the damages should serve to enhance the dignity of the respondent.

31. We have considered comparable awards of Samwel Chege Gitao & Others -vs- A.G. [2016]eKLR and Peter M. Kariuki - vs- A.G. [2014]eKLR. The respondent admitted that he is benefiting from his pension save that it was paid less the 8 years given his unlawful termination. We have observed that the trial court failed to consider the issue of the unlawful and early termination of the respondent's service in computing the damages, and therefore we have to interfere with the court's discretion. In our considered view, the award of Kshs.3,000,000/= was inordinately low. We set it aside and, in its place, there shall be an award of Kshs.20,000,000/= plus costs and interest.

32. In the result, the appeal is dismissed with costs and the cross- appeal succeeds with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF FEBRUARY 2025.

F. TUIYOTT

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR