



Mburu v Attorney General & another (Civil Appeal 380 of 2019)
[2025] KECA 769 (KLR) (9 May 2025) (Judgment) (with dissent - W Karanja, JA)

Neutral citation: [2025] KECA 769 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 380 OF 2019
W KARANJA, SG KAIRU & WK KORIR, JJA
MAY 9, 2025

BETWEEN

STEPHEN NJOROGE MBURU APPELLANT

AND

THE HON ATTORNEY GENERAL 1ST RESPONDENT

**THE PRINCIPAL SECRETARY MINISTRY OF INTERIOR AND CO-
ORDINATION OF NATIONAL GOVERNMENT 2ND RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at Nairobi
(E.C. Mwita, J.) dated 18th January 2019 in HC. Petition No. 602 of 2017)*

JUDGMENT

Judgment of Gatembu, JA

1. In this appeal, the appellant Stephen Njoroge Mburu is challenging the judgment of the High Court (Mwita, J.) delivered on 18th January 2019 dismissing his petition dated 17th November 2017. In that petition, the appellant sought declarations: that his fundamental rights and freedoms were contravened and grossly violated by the respondents' plainclothes police officers who held him incommunicado at various police stations and thereafter at Nyayo House torture chambers for 13 days from the 10th of May 1991; and that he is entitled to payment of damages and compensation for the violation and contravention of his fundamental rights and freedoms. He also prayed for general damages exemplary damages and punitive damages under section 84 of *the Constitution* of Kenya 1969 for the unconstitutional conduct by the Kenyan Government police officers.
2. Based on the petition and the evidence presented before the High Court, the appellant's case is that at the material time, he was an Assistant Manager in charge of operations at the National Bank of Kenya, Harambee Avenue Branch, Nairobi. He narrated how after a mysterious call was made to his house



on 8th May 1991 requiring him to meet “Kennedy Vietnam from Ulinzi” at a hotel the following day, which he did not honour, the two police officers showed up at his place of work On 10th May 1991 and arrested him, in the presence of his Branch Manager, one Mr. A. E. Mureithi, and escorted him under heavy security to Nairobi Traffic Headquarters. He was then taken and detained at Kilimani Police Station for about four hours after which he was blind folded, taken round in circles in a motor vehicle before being taken to ‘Nyayo Torture Chambers’ where he was detained, and interrogated. He explained:

“...I was brought inside a small dark room with no lights. They were using a battery torch when giving me orders. They ordered me to hand over to them my jacket (holding the Bank’s keys), tie, belt, watch, shoes, socks, even my wedding ring. They threw to me a small, thin, old, mattress as my bed. Left alone in a small dark, cold room, I kept wondering whether what I was experiencing this day was real...”

3. The appellant went on to explain how he was made to go without food or water; how he was from time to time shuttled, blind folded, to upper floors of the building and subjected to interrogation; how upon being returned to the

basement dark room he was stripped naked, his clothes taken away as well as the mattress he had previously been given. In his words:

“... They told me they would return and pour cold water six inches on the floor. They left and locked their strong door behind them. I was left there, absolutely naked, the way I came out of my mother’s womb, standing on a cold floor, in total darkness, and the air conditioner appeared to be exacerbating the bad situation by pumping cold air into the small room. Hungry and thirsty, I kept standing there wondering just what was going on. Tired of standing on feet, I stood on my knees then on both my knees and hands; and finally I had no choice but to lie down on the cold floor. The cold penetrated deep into my bones. Although they did not pour water as they had stated, the extreme cold and hunger caused severe discomfort.”

4. He testified further that after about two weeks of the routine of torture and interrogations, his clothes were eventually returned to him, he was placed in a vehicle and dropped off at a bus stop along Jogoo Road, Nairobi, given five shillings and told that he was free. He thereafter proceeded to his workplace and informed his boss what had transpired.
5. He stated that a week later, one of the police officers who had interrogated him at Nyayo House approached him at his place of work and warned him about revealing what had happened to him which filled him with “renewed fear of the police and therefore kept silent on the matter.” He testified that because of the experience, he suffered physical and psychological harm and had suffered ill health as a result.
6. The appellant’s wife Joyce Wangui Mburu, in her testimony corroborated his testimony. She testified about the efforts she made moving from one police station to another in search of her husband and the agony the family experienced.
7. The respondents did not adduce any evidence at all to rebut the appellant’s case but relied entirely on grounds of opposition denying the claim asserting, among other things that Kenya Police is a professional service and custodian of the rule of law; that no report or record of the appellant’s confinement was made at Kilimani Police Station; that the appellant was abusing the constitutional



protection of rights with the sole aim of enrichment since the delay of more than 20 years in making the claim was not justifiable.

8. Having considered the claim, and reviewed the evidence, and submissions the learned Judge of the High Court found as a fact that the appellant's rights were violated. In reaching that conclusion, the learned Judge rejected the contention by the respondents that the appellant did not prove that he had been arrested by the police, tortured and his rights violated and in doing so, the Judge stated in his judgment:

“The [appellant] testified on oath and called a witness both of whom narrated how the [appellant] was arrested and what he was subjected to. The respondents only filed grounds of opposition without an affidavit to controvert the [appellant's] averments and what he and his witness stated an oath. This leaves evidence on an oath vis a vis a general statement in the form of grounds opposition thus leaving the court with no option but to accept the [appellant's] evidence.”

9. Regarding the contention by the respondent that there was no record of the appellant having been held at a police station or at Nyayo House, the learned judge, again in rejecting that contention, took judicial notice that “during the height of the crackdown on dissent in the 1980s and 1990's the police would arrest and keep one in any police station and release him without record. It was therefore not uncommon to find people arrested at whims with no record of their whereabouts.”
10. The upshot is that the High Court found that the respondents violated the appellant's fundamental rights and freedoms. That finding has not been challenged in this appeal as the respondents did not cross appeal. What has been challenged by the appellant is the holding by the learned Judge that his claim was defeated on account of his delay in filing his petition. In that regard, the Judge relied on the decision of this Court in Wellington Nzioka Kioko vs.

Attorney General [2018] eKLR for the proposition that one must explain the delay in bringing a claim and that in this case, the appellant did not explain the delay. Had the appellant “explained the delay”, the Judge stated, the decision of the court “would perhaps have been different.” For that reason, the petition was dismissed.

11. The issue for determination therefore is whether the Judge erred in dismissing the appellant's claim on the grounds that the appellant did not explain the delay in lodging the claim.
12. In his written and oral submissions before us, learned counsel for the appellant Mr. Museve submitted that the Constitutional rights are never extinguished by time; that the delay in filing the Petition in 2017 concerning events that took place in 1991 is explained by the threats and fear the appellant lived under for 26 years following his detention and torture at Nyayo House; that the appellant was threatened with murder and dire consequences if he disclosed the events, and as a result lived in fear and threats for the entire period. Counsel urged that the appellant adequately discharged this burden by giving oral evidence under oath which evidence remains uncontroverted.
13. Counsel concluded by urging the Court to find in the appellant's favor, set aside or vary the judgment of the High Court, and award him the prayers sought in his Petition, including damages for the violation of his fundamental rights. In support of the appeal, counsel cited the decisions in Peter M. Kariuki vs. The Hon. Attorney General, Civil Appeal No. 79 of 2012 and Koigi Wamwere vs. The Hon. Attorney General C.A. Sup No. 4 of 2015 in support of his arguments regarding the impact of torture and the issue of delay in filing claims.



14. Learned counsel for the respondents Mr. Thande Kuria on the other hand submitted that the appeal is not merited; that the alleged cause of action arose more than 26 years ago, and the appellant failed to provide a plausible reason for the inordinate delay in lodging the claim. While acknowledging that there is no time limit for filing proceedings to enforce fundamental rights, counsel cited the decisions in Wellington Nzioka Kioko vs. Attorney-General [2018] eKLR and Monica Wangu Wamwere vs. Attorney General (2019) eKLR, to support the High Court's decision that a petition can be rejected where there is no plausible explanation for an inordinate delay that is likely to prejudice the trial.
15. It was submitted that the appellant's explanation of living in fear was unsatisfactory given that he filed the suit after 26 years, implying the alleged threats still existed. Also cited were decisions in Wamahi Kihoro Wambugu vs. Attorney General (2016) eKLR and Lt. Col. Peter Ngari Kagume vs. Attorney General to buttress the respondents' argument on the impact of delay on the availability of evidence and the fairness of the trial; that the delay in this case militates against the spirit of a fair trial and amounts to an abuse of court process, contrary to Article 159 of *the Constitution* which requires justice to be administered without delay.
16. It was submitted further that the appellant's uncontroverted evidence is not automatic proof of his claim which according to counsel was not corroborated by any documentary or witness statements, except for his wife who did not witness the alleged events. It was urged that the Branch Manager of the National Bank of Kenya, Abel Mureithi, who was allegedly present during his arrest, should have been called by the appellant as a witness, and that there was also no evidence to show the appellant was employed at that bank and neither was a medical report of the doctor who allegedly attended to the appellant produced.
17. On the claim for damages, counsel submitted that the award of the same and of costs involves the exercise of judicial discretion, and on the authority of the decision in Mbogo & Another vs. Shah E.A. 93, this Court should not interfere with the trial court's discretion unless it was exercised injudiciously or on wrong principles. With that, counsel urged the Court to dismiss the appeal.
18. As already stated, the respondents have not, by cross appeal, challenged the finding of the High Court that appellant's constitutional rights were violated. Hence, the question whether the appellant discharged his burden of proof in that regard is foregone and is not a matter before us. What we have to determine, it bears repeating, is whether the learned Judge erred in concluding that the appellant did not explain the delay.
19. In the case of Wamwere & 5 Others vs. *Attorney General (Petition 26, 34 & 35 of 2019)* (Consolidated) [2023] KESC 3 (KLR) one of the issues the Supreme Court of Kenya addressed was whether there was a limitation of time in matters relating to violation of rights under *the Constitution*. The Supreme Court stated that while there is no limitation of time in matters relating to violation of rights under *the Constitution*, a court is nonetheless entitled to consider whether there has been inordinate delay in lodging a claim of violation of rights, and that this is a matter for decision on a case by case basis. In doing so, the Supreme Court endorsed a decision of this Court to that effect, namely the case of Safepak Limited vs. Henry Wambega & 11 Others, Civil Appeal No. 8 of 2019; [2019] eKLR
20. The Supreme Court stated that claims of violation of human rights must be filed in court within reasonable time and that, where there is delay, a petitioner ought to explain the reasons for the delay to



the satisfaction of the court. In that regard and in reference to the specific circumstances in that case the Supreme Court stated:

“In considering whether the delay of twenty (20) years was inordinate, we are of the considered opinion that transitional justice claims are context sensitive. It follows that courts ought to be particularly sensitive to the reasons adduced for the delay. At the same time, courts should balance the reasons for delay with the likely prejudice a respondent may face in defending the claim in line with the right to fair trial.”

21. In *Safepak Limited vs. Henry Wambega & 11 Others* (above), this Court had expressed thus:

“The question therefore is whether the Judge was right in rejecting the contention that petitioners claim was not time barred. As the Judge correctly stated, Article 67 of *the Constitution* does not place a time limit within which redress under that provision may be sought. But does that mean that time for seeking redress for constitutional violation is forever at large? It does not. In *Wellington Nzioka Kioko vs. Attorney General* [2018] eKLR, this Court, in an appeal arising from a decision of the High Court on a petition for a declaration that the fundamental rights and freedoms of the petitioner therein had been violated, upheld the High Court that institution of a claim over 30 years after the cause of action had arisen constituted inordinate delay. The Court expressed that whereas there is no time limitation in respect of constitutional petitions, the delay must not be inordinate and there must be plausible explanation for the delay.”

22. More recently, the Supreme Court of Kenya in the case of *Janmohammed (SC) (Suing as the Executrix of the Estate of the Late H.E. Daniel Toroitich Arap Moi) & Another vs. District Land Registrar Uasin Gishu & 4 Others (Petition 17 (E021) of 2023 & 24 (E027) of 2022 (Consolidated))* [2024] KESC 39 (KLR) in paragraph 93 of its judgment re-affirmed that:

“... as a general principle, petitions founded on claims of violation of fundamental rights and freedoms are not subject to limitation of actions. However, having so affirmed, it is to be noted that this principle is not absolute. It is to be applied by a court of law on a case by case basis taking into account factors such as the nature of the right, the time taken to ventilate the alleged violation, and whether the claimant may be riding on a mischief.”

23. With those principles in mind, was the learned Judge of the High Court in error in concluding that the appellant did not explain the delay? In that regard, in paragraph 43 of the impugned judgment, the learned Judge stated:

“I have perused the petition and the supporting affidavit. They do not explain why the petition was filed in 2017 when infringements took place in 1991, about 26 years later.”

24. However, in his petition, and in his statement in support the appellant averred that in the course of his interrogation at Nyayo House, his interviewers threatened him with death; that after his release, one of the officers who had interrogated him at Nyayo House called on him at his place of work and threatened him with consequences should he disclose to anyone what he had gone through. Moreover, the record of proceedings before the trial court shows that on 14th February 2018, the Judge directed the parties to file and serve witness statements. The appellant’s witness statement dated 29th March 2018, was presumably filed pursuant to those directions and contains minute details of the harrowing experience



the appellant went through in the hands of his captors. In addition, he explained in paragraph 28 of that statement:

“A week later one of the Officers who had interrogated me in Detention came to the Bank at Harambee Avenue Branch and requested to talk to me briefly in the Banking Hall. He told me that he had been sent as the Representative of the entire Group who detained me. He did not disclose to me the reasons for arresting me, or what they were trying to forcibly extract from me. He told me not to tell anybody what I went through because they were still investigating and would come for me again. This filled me with renewed fear of the Police and therefore I kept silent on the matter. Since then I have lived in fear of the police and as ordered by them I have kept silent on the matter to avoid another nasty experience of arrest and torture. In view of the political environment prevailing in the country at that time, I would not have dared to disclose the matter, otherwise my situation would obviously have become much worse.”

25. He explained further that the agony and stress he experiences during the torture “and the years thereafter” adversely affected him but was happy that he could open up to the court and tell the truth of the injustices.
26. When the trial began on 22nd May 2018, counsel for the appellant indicated that the court’s directions had been complied with and the appellant took the stand. During cross examination by Miss. Robi counsel for the respondents, the appellant was not challenged at all on the reasons he gave in his evidence regarding the cause of delay in filing the petition. It appears therefore that in his judgment the learned Judge overlooked the explanation given by the appellant more particularly in the said witness statement. Based on the foregoing, the statement by the learned Judge that the appellant did not explain why the petition was filed in 2017 is not entirely accurate. For had the Judge referred to the witness statement, he would no doubt have reached a different conclusion on the question of delay. Unlike in the circumstances in the case of *Wamwere & 5 Others vs. Attorney General* where no explanation at all had been provided for the delay of about 31 years, in this case there was an explanation which the learned Judge did not at all consider. It is not apparent, that the appellant was in this case “riding on a mischief” to borrow the words of the Supreme Court.
27. I echo the sentiments expressed by the Supreme Court in *Wamwere & 5 Others vs. Attorney General* that:

“The idea of transitional justice connoted the broad range of mechanisms, means or modes through which a society confronted the wrongdoings from its past. Its objective being to obtain truth and justice regarding the past so as to ensure the promotion and protection of the rule of law and durable peace going into the future. The need to confront and silence the ghosts of past wrongs or historical injustices was relevant in the Kenyan context. That was in light of Kenya’s history which was littered with incidences of gross violations of human rights

and other atrocities that occurred during the colonial era and continued in the post-independence era. Further, victims of such abuses were never granted an opportunity to obtain redress and justice during that period.”

28. In as far as the question of prejudice is concerned, it was incumbent upon the respondents to demonstrate the prejudice, if any, they suffered in relation to fair trial, on account of the delay in the institution of the petition. The record shows that upon the close of the appellant’s case before the trial court on 31st May 2018, counsel for the respondents Miss. Robi informed the court that “we



will not call evidence on behalf of the respondent.” There was no suggestion that the respondents were prevented from doing so on account of passage of time. No prejudice in relation to fair trial was demonstrated.

29. As this Court stated in *Peter M Kariuki vs. Attorney General* [2014] KECA713(KLR):

“We have already adverted to the fact that the appellant filed his constitutional petition some twenty three [23] years after his conviction by the court martial. We agree with the trial court that his claim was not time barred. However, the consequence of the appellant’s delay in lodging his claim was some level of prejudice to the respondent who contended that the matters complained of by the appellant had taken place a while back and many of the actors were no longer available as witnesses. We have already emphasized that the right to a fair trial must be accorded to both the appellant and the respondent.

30. In that case and so as not to prejudice the respondent, the court ordered that interest on the award of damages would only be awarded from the date of the decree.

31. All in all, I am persuaded that the learned Judge in failing, all together, to consider the explanation for the delay furnished by the appellant, particularly in his witness statement, misdirected himself. In my view, the Court is therefore entitled to interfere with his decision. Accordingly, I would allow the appeal and set aside the decision of the High Court dismissing the appellant’s petition. As the learned trial Judge did not, as he should have, indicate the quantum of award he would have given had he found in favour of the appellant, I would remit the matter back to the High Court, before a Judge other than Mwita, J, for the purpose only of assessing damages payable to the appellant. I would award the costs of the appeal to the appellant.

Judgment of Korir, JA

1. I have had the advantage of reading the judgment of S Gatembu Kairu, FCI Arb., J.A in draft and I wholly agree with the reasoning and conclusion therein.
2. I therefore have nothing useful to add.

Dissenting Judgment Of W. Karanja, JA

1. I have read in draft the judgment of my brother Gatembu Kairu, JA. which has my brother Weldon’s Korir JA’s concurrence. As correctly noted by my two brothers, there is no cross-appeal by the respondents in this matter, and so the finding on liability is not challenged. The judgment analyses very explicitly the facts as to what happened to the appellant and also sets out the proceedings before the trial court and I do not need to repeat that history for purposes of this brief dissenting judgment. I agree with the findings by my two brothers save for one point which I will now deal with.
2. My point of departure is on whether the learned Judge erred in finding that the appellant had failed to give an explanation as to why he did not move the court to seek redress for twenty-six (26) years. Was this delay sufficiently explained? From the cases that were cited before us, there is no doubt that a claim for compensation following violation of somebody’s constitutional rights is not fettered by statutory limitation of time. However, that right is not absolute and it comes with some conditions. This Court has had occasions to deal with several cases on this subject, some of which were cited to us by learned counsel for both parties. The common thread running through the tapestry of these cases is that a party must give a reasonable, plausible explanation for the delay that is involved between the alleged violation of his rights and the time the aggrieved party moves to court for redress.



3. For instance, this Court in *Wellington Nzioka Kioko -vs- Attorney General* [2018] eKLR succinctly expressed itself on the subject as follows:-

“On the issue of delay, the learned Judge found that the petitioner was filing his claim 33 years after the cause of action relied on. She considered several persuasive decisions of the High Court for instance, *Wamahiu Kihoro Wambugu vs A.G.* Petition No. 468 of 2014; *Mugo Theuri vs. A.G, Ochieng’ Kenneth Kogutu vs Kenyatta University and 2 others*, High Court Petition No. 306 of 2012, and several others. The common thread running through those decisions is that whereas there is no time limitation in respect of constitutional petitions, the delay must not be inordinate and there must be plausible explanation for the delay. The learned Judge found that no justification for the delay of over 3 decades had been given in this matter... When a person suffers a wrong at the hands of another and feels the need to redress the wrong, it is reasonable to expect that redress will be sought before the claim gets stale. This enables a person to preserve and adduce the evidence that is necessary to support the claim. It also accords the purported wrong doer an opportunity to address the grievance and if possible, remedy it. That way both parties are spared the agony of losing important evidence, or even witnesses...

If a wrong is committed and then the person wronged waits for time on end before even notifying the other party, then a travesty of justice occurs because the claim might be made at a time when the offending party has forgotten about the incident and is no longer in a position to defend himself. There is of course a rebuttable presumption that if you don’t seek redress within a reasonable time, there is a possibility that you have not suffered any loss from the act complained of. That would explain the maxim that equity does not aid the indolent. (Emphasis added).

The appeal before us falls on all fours with the above case. The court expects not just an explanation, but one that is plausible, believable and, thus, satisfactory.

4. I have carefully gone through the proceedings before the trial court including the petition itself, and I note that there is no deposition in the supporting affidavit explaining why the petition was not filed earlier. I have also gone through the witness statement dated 29th March 2018 signed by the appellant, which statement he adopted in his viva voce evidence in court. I need to state at this point that during his testimony in court, the appellant did not give any reason for the delay in moving the court for compensation and instead he adopted the contents of his witness statement.
5. I have tried to decipher from the statement the reasons proffered for the for failure to move the court for all those years, but what I have seen is, in my view, short of what can be deemed as plausible explanation. This is the explanation provided by the appellant at paragraph 28 of the witness statement, the appellant states as follows:

“A week later one of the officers who had interrogated me in detention came to the bank at Harambee Avenue branch and requested to talk to me briefly in the banking hall. He told me that he had been sent as the representative of the entire group who detained me. He did not disclose to me the reasons for arresting me, or what they were trying to forcibly extract from me. He told me not to tell anybody what I went through because they were still investigating and would come back for me again. This filled me with renewed fear of the police and therefore I kept silent on the matter. Since then I have lived in fear of the police and, as ordered by them, I have kept silent on the matter to avoid another nasty experience of arrest and torture. And in view of the political environment prevailing in the country at that



time I would not have dared disclose the matter, otherwise my situation would obviously have become much worse. (Emphasis added)

The appellant continues to say in the last paragraph of his statement as follows:

“As an innocent Kenyan citizen and responsible manager of a government owned bank, I suffered cruel, inhuman, and degrading treatment in the hands of trusted Kenyan government officers... I was arrested and tortured for nearly two weeks and the agony and stress I experienced during the torture and the years thereafter adversely affected the previously good health of both myself and my wife. I am happy and grateful to open up to the honourable court until the truth of the injustice. I request the court kindly to consider the facts carefully and order payment for damages and compensation for the violation of fundamental human rights.”

6. I am not persuaded that the above “explanation” is plausible let alone sufficient to explain the delay of 26 years. Even though liability is not challenged, from the reading of the appellant’s statement and the petition itself and from his evidence in court, the reasons for his detention for the 13 days does not come out clearly. He said that he was warned not to disclose what information they were trying to extract from him but he did not say whether this evidence was political or work related as stated by his wife who said that the appellant was being investigated for alleged fraud in the bank. That being so, it is not clear why the political environment prevailing in Kenya between 1991 to 2017 when he filed his petition would deter him from moving to court to file the petition.
7. I note that although he said that he suffered some health issues out of the detention, there was no medical evidence in court to support a claim that he suffered from those conditions through those years. In my view it is not sufficient for one to sleep on his rights and wake up one day and say he did not come to court because he was afraid and does not clearly say what he was afraid of, what he was threatened about, what political situation there was particularly noting that the claim was filed in 2018 which was eight years after the new constitutional dispensation.
8. I am unable to fault the learned Judge of the High Court for his finding that no reasons for the delay were given and like the learned Judge, I reiterate that indeed, equity does not favor the indolent. For the foregoing reasons I would dismiss the appeal, but as my two brother Judges are of a different opinion, the judgment of Gatembo Kairu, JA. with the concurrence of W. Korir, JA. will be the judgment of the Court.

DATED AND DELIVERED AT NAIROBI, THIS 9TH DAY OF MAY, 2025.

S. GATEMBU KAIRU, FCIARB

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.



Signed

DEPUTY REGISTRAR

