Wamwere & 2 others v Attorney General (Civil Appeal 102 of 2018) [2024] KECA 487 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KECA 487 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 102 OF 2018

DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA

MAY 9, 2024

BETWEEN

GABRIEL KIARIE WAMWERE ..... 1ST APPELLANT

JOHN NJOROGE WAMWERE ..... 2ND APPELLANT

ALICE WAMBUI WAMWERE ..... 3RD APPELLANT

AND

THE ATTORNEY GENERAL ..... RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Lenaola, J.) delivered on 25th January 2017 in H.C. Petition No. 198 of 2013)

JUDGMENT

Introduction

1. It is indubitable that the agitation for multiparty democracy and a new constitution in this country in the late 1980s and 1990s was a rather tumultuous period that occasioned loss of life and considerable suffering to a number of brave Kenyans who were daring to openly challenge the political situation in the country.

2. The appellants are some of the Kenyans that paid a heavy price for their audacity to challenge the oppressive government of the early 90s that had suppressed the people's fundamental rights and freedoms.

Petition before the High Court

3. On 15th April 2013, the three appellants filed a petition before the High Court stating that, on diverse dates between 3rd March 1992 and January 1993, their fundamental rights and freedoms from torture were contravened and grossly violated by the Kenya Police and General Service Unit (GSU) officers, and

thus sought general and exemplary damages against the Attorney General as the Legal representative of the Government of Kenya.

4. The appellants stated that, on 3rd March 1992, while at Uhuru Park "Freedom Corner" in a peaceful demonstration agitating for the release of their brothers, Koigi wa Wamwere and Charles Kuria Wamwere, they were inhumanly and brutally battered by police and GSU officers.

5. On the night of the same day and place at about 9.45pm, while fasting inside a tent to seek divine intervention for release of their aforesaid brothers and 53 other political prisoners, the appellants were arrested by over 100 Kenya Police and GSU officers and bundled into a police vehicle and taken to their rural homes in Nakuru county. The appellants contended that this was a violation of their fundamental rights and freedom from any form of violence contrary to Article 29(d) of the *Constitution*.

6. The appellants' spirits were not broken by those acts of violence because, after a few days, they returned to Nairobi and, this time, the venue of their peaceful campaign and hunger strike was the All Saints' Cathedral (Church), where they joined many other men and women who were on the same campaign. But, while in the church, the police sustained their unwarranted assaults on them as well as their mothers and others who were congregating there. Eventually, all the political prisoners were released between 24th June 1992 and 19th January 1993.

7. The petition was supported by the affidavits sworn by each of the petitioners detailing how the police attacks on them were carried out.

The Respondent's Defence

8. The respondent entered appearance on 17th May 2013, but did not file any defence or replying affidavit. The respondent only filed grounds of opposition stating:

    i. That the petition has been brought after inordinate delay. Over thirty years after the alleged violation was committed.

    ii. That no reasons whatsoever have been advanced to explain the long and inordinate delay.

    iii. That the petitioner has not shown by way of evidence that the alleged acts of violation were committed and further that if they were indeed committed, that government was involved.

    iv. That the petition filed herein is imprecise, it is based on generalities; and therefore fatally defective.

    v. That the petition, as filed herein is an abuse of the court process."

High Court determination

9. All the appellants testified and were cross-examined by the respondent's counsel. The respondent did not call any witness. Thereafter, both parties filed written submissions.

10. The High Court (Lenaola, J.) (as he then was), rendered its judgment on 25th January 2017. On the issue of inordinate delay in filing the petition, the court held that the law does not impose limitations for filing proceedings to enforce fundamental rights and freedoms. On the issue of violation of the appellants' fundamental rights, the court held that the appellants "failed to adduce any tangible evidence to prove any of the said allegations"; and that even if the appellants were brutally battered as claimed, that did not amount to torture and/or cruel, degrading and inhuman treatment under both the *repealed Constitution* and the 2010 *Constitution*. The trial court dismissed the petition and ordered that each party bears their own costs.

Appeal to this Court

11. Dissatisfied with the aforesaid decision, the appellants filed this appeal. The memorandum of appeal, which by all standards is prolix, raises 17 odd grounds of appeal. However, in their written submissions, the appellants' advocates covered all the grounds under four broad issues as hereunder:

    a. Whether the affidavit and oral evidence of brutal attack on unarmed appellants by the Kenyan Government Police Officers and GSU officers at the freedom corner on 3rd March 1991 and at All Saints Cathedral between 5th and 19th January 1993 was torture or not.

    b. Whether the learned judge ought to have been guided by similar precedents which decided that there was torture and violations of human rights of eight mothers of freedom corner supporters.

    c. Whether there was any constitutional or statutory limitation to the filing of petitions founded on human rights violations or fundamental rights.

    d. Whether the appellants were entitled to the five prayers in the petition.

12. When this appeal came up for hearing, Mr. Mwara appeared for the appellants while Ms. Mwasao appeared for the respondent. Mr. Mwara sought to rely on the appellants' submissions dated 6th April 2018 that addressed the above four main issues. Counsel relied heavily on the Supreme Court decision in *Wamwere & 5 Others vs. Attorney General* (Petition 26, 34 & 35 of 2019 Consolidated [2023] KESC 3 (KLR). The facts that gave rise to that appeal are in all fours with the facts that obtain in this appeal because the appellants in both matters alleged that they were together on the same dates and venues, engaged on a common cause, when they were all brutally attacked and assaulted by over 100 police and GSU officers. It is therefore important that we consider in some detail the Supreme Court decision.

13. The three appellants in the afore-cited Supreme Court petition, as well as the three appellants in this appeal, (who are all members of the same family), filed petitions dated 15th April 2013 in the High Court seeking exactly the same reliefs as the appellants herein. The petitions were disposed of by way of affidavit and oral evidence, and submissions on the part of the appellants. The Attorney General did not adduce any evidence to controvert that of the appellants. Instead, the Attorney General raised the same grounds of opposition as in the petitions that gave rise to this appeal. All the petitions were heard by Lenaola, J. (as he then was), who determined them on 15th April 2016.

14. The learned judge dismissed the petitions, holding, inter alia, that none of the appellants gave any reasonable explanation or justification for the delay in filing their petitions; that none of the appellants adduced sufficient evidence in proof of their allegations of torture; that newspaper articles that the appellants partially sought to rely upon were inadmissible by virtue of the provisions of section 35 of the *Evidence Act*; and that there were no medical records or treatment notes that supported the appellants' allegations of torture. The trial court, therefore, dismissed the petitions.

15. The appellants moved to this Court on appeal. This Court (Warsame, Kiage & Murgor, JJA) affirmed the High Court decision and dismissed the three appeals.

16. Undeterred, the appellants challenged this Court's decisions before the Supreme Court. For reasons that we shall shortly highlight, the Supreme Court overturned the decisions of the two lower courts. It held, inter alia, that the appellants' petitions in the High Court were lodged without inordinate delay due to the historical context under which the violations of their constitutional rights occurred, and that the appellants' rights and freedom from inhuman treatment as protected under section 74(1)

of the *repealed Constitution* were violated. Each of the appellants was awarded damages assessed at Kshs.2,500,000/= as well as costs of all the proceedings in the three courts.

17. The appeal now before us raises exactly the same issues that were canvassed before the Supreme Court in *Wamwere & 5 Others vs. Attorney General* (*supra*). Given the striking similarities between this appeal and those aforesaid, and considering that they arise from the same facts and circumstances, by and large, the Supreme Court decision has substantively determined the main issues that were raised by the parties herein. We say so because Article 163(7) of *the Constitution* stipulates that

> " All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court."

18. Having said so, we shall still proceed to determine, albeit briefly, the four main issues that were addressed by the parties in this appeal. We shall begin with the question of time limitation in filing petitions founded on violation of fundamental rights. The appellants herein misconstrued the learned judge's holding as to whether there was inordinate delay in filing the petition. In ground 4 of the memorandum of appeal, the appellants state that the learned judge

> " erred in law and in fact in finding that the appellants had no right to institute their petitions for violation of their fundamental right from torture, inhuman and degrading treatment after 20 to 22 years..."

No where did the learned judge so state.

19. The following three paragraphs of the impugned judgment are clear beyond any peradventure

> " 23. I do not know any law or a particular provision of the *Repealed Constitution* that provided for a limitation of period within which a claim for enforcement of the Bill of Rights could be filed. Indeed in *Dominic Arony Amolo v Attorney General* Misc Applic No. 494 of 2003 the learned judge expressed himself thus;
>
> > 'I therefore think, and I so hold, that section 3 of the *Constitution* excludes the operation of Cap 22 with regards to claims under fundamental rights and further that fundamental rights provisions cannot be interpreted to be subject to the legal heads of legal wrongs or causes of action enunciated under the *Limitation Act*, Cap 22.'
>
> 24. This and other Courts have followed the above decision faithfully over the years and to my mind therefore, the law does not impose limitation for filing of proceedings to enforce fundamental rights and freedoms as enshrined under the Bill of Rights. However, I also understand that there must be a justification as to why a petition had not been filed as early as the alleged breach occurs. That is why in the case of *Charles Gachathi Mboko v Attorney Genera*l (2014) eKLR, I opined that the Court's indulgence may be abused by parties seeking redress for violation of their fundamental rights without explaining long delays in instituting such claims. I restate that opinion in this case.
>
> 25. In stating so, I note that the facts relied upon and giving rise to the claims in the petition before me occurred between 3rd March 1992 and 19th January 1993. When asked why it took close to over twenty years to file their claim, the petitioners claimed that justice is currently being done for those who suffered

in the past regimes which fact was not true in yester years but while it is true that there is no limitation of time in the filing of constitutional law cases and while it is also true that the judiciary has over the last few years been robust in providing redress for human rights atrocities that occurred in previous regimes, I am of the view that courts ought to examine each of the claims made, keenly, and only those that have been substantiated should be addressed the delay notwithstanding."

20. What is the Supreme Court's position on the issue of limitation of time for filing claims of human rights violations? In *Wamwere & 5 Others vs Attorney General* (*supra*), the Court held:

> " 37. Perhaps, the starting point under this issue should be a consideration of whether the two superior courts below in their impugned decisions imposed limitation of time as alleged by the appellants. Having perused the decisions in question, we are satisfied that the two courts did not impose the limitation alluded to. In point of fact, the two superior courts affirmed the position that the *Limitation of Actions Act*, Cap 22 Laws of Kenya does not apply to causes founded on violation of rights and freedoms. We concur and hold that there is no limitation of time in matters relating to violation of rights under the *Constitution* which are evaluated and decided on a case by case basis.
>
> 38. Nonetheless, it is well settled that a court is entitled to consider whether there has been inordinate delay in lodging a claim of violation of rights. See the persuasive decision of the Court of Appeal *Safepak Limited v Henry Wambega & 11 others*, Civil Appeal No. 8 of 2019 [2019] eKLR. It is on that basis that the two superior courts held that claims of violation of human rights must be filed in court within reasonable time. Where there is delay, a petitioner ought to explain the reasons for the delay to the satisfaction of the court. This takes us to the consideration of the next issue."

21. The Supreme Court, upon a careful analysis of the country's history with regard to observance of human rights, concluded that

> " the appellants' explanation for the delay to the extent that it was attributed to lack of faith in pre-2010 Judiciary (is) plausible."

22. Turning to the substantive issue, that is, whether the appellants proved their allegations of violation of their fundamental rights and protection from torture, inhuman and degrading treatment, the learned judge set out the relevant constitutional provisions that speak to the aforesaid rights as well as several international human rights instruments. He then rendered himself as hereunder:

> " 29. Having stated the law as above, it was the petitioners' claim that they were tortured by officers of the Kenya Police and General Service Unit and that they were beaten all over their bodies with batons, rubber whips and they were also tear gased.
>
> 30. However, despite all the claims made against the State, the petitioners failed to adduce any tangible evidence to prove any of the said allegations. At the hearing, the 1st and 2nd petitioners who testified as PW1 and PW2 alleged that

after they were beaten, they went to hospital but admitted that they did not have any documents to prove that fact."

23. He concluded by stating that the appellants had failed to adduce evidence to bolster their allegations; that their reliance on an article published in "Society Magazine Issue No. 4 of 23rd March 1992" was not enough; and that they had not discharged their burden of proof.

24. Mr. Mwara's contention was that the appellants in their affidavits had set out in great details the happenings at freedom corner and at the All Saints' Cathedral that constituted violation of their fundamental and constitutional rights; that they were also cross examined on the same before the trial court; and that the Attorney General did not call any witness to controvert the appellants' evidence.

25. On the other hand, the respondent's counsel's submission was that there was no satisfactory evidence that the appellants were ever at the said places; and that, even if they were, there is no evidence that they were subjected to any inhuman treatment as alleged.

26. In *Wamwere & 5 others vs Attorney General* (*supra*), the Supreme Court took judicial notice of the historical facts relating to the Freedom Corner as chronicled by several renown authors and reputable journals. The following excerpts of the Court's findings are apt and conclusive:

> "75. Based on the foregoing historical accounts, there is no doubt that the freedom corner incident took place. A fact which in no way was disputed by the two superior courts. Nonetheless, the burden of proof still lay with the appellants to prove on a balance of probabilities that they were not only at freedom corner but were also subjected to torture, inhuman and degrading treatment during the demonstrations.
>
> 76. Looking at the evidence before the trial court, the record shows that the 1st appellant adopted her affidavit as her evidence in chief. During cross-examination by learned counsel, Mr Moimbo, she maintained that she was at freedom corner on the material day. It is noteworthy that the Attorney General closed his case without calling any witness. Indeed, the trial court in its judgment found that "there is no doubt from the evidence before me that she was at freedom corner on that day".
>
> 77. Similarly, the 2nd, 3rd and 4th appellants adopted the contents of their affidavits as their evidence in chief. What stands out from their cross- examination is that it focused on three concerns: whether they had permission to hold the subject protest/assembly; whether they had records of their arrest; and whether they had medical records for their alleged injuries. In all these areas of focus, the appellants conceded that they did not have permission to hold the subject meeting; they did not have records of their arrest (the 2nd appellant indicated that she was not arrested); and they did not have medical records proving the injuries they allegedly sustained. Yet again, the Attorney General did not call any witness and proceeded to close his case.
>
> 76. Lastly, the 5th and 6th appellants on cross- examination by learned counsel, Mr Obura, were adamant that they participated in the demonstrations at freedom corner. Despite alleging, they had suffered injuries they conceded that they did not have any medical documents to that effect. Like in the other matters, the Attorney General did not call any witness.

76. Having painstakingly gone through the record of the proceedings before the trial court, we note that the appellants' evidence of having been at freedom corner was not displaced during cross-examination. In addition, the Attorney General did not call any witness(es) to challenge the evidence of their participation in the subject protest/assembly. Consequently, weighing the evidence adduced before the trial court, we come to the conclusion that the appellants proved their participation in the subject protest/assembly at freedom corner to the requisite standard. See *Miller v Minister of Pensions* (*supra*)."

27. The appellants' evidence as contained in their respective affidavits was not contested. They were cross examined on the same by Mr. Moimbi, learned State Counsel. This is what Gabriel Kiarie Wamwere, the 1st appellant, stated in response to Mr. Moimbi's cross examination.

> " I was beaten on 3.3.1992 at Uhuru Park by police officers. I was demanding the release of my brothers, Koigi and Kuria. We were many people; almost 200. I was injured. I was treated. I have no documents as they were all lost. I was not locked up but I was forcefully taken home. A land- rover was used to ferry me home together with 19 others. I was with my brother, John Njoroge Wamwere as well as Maina Wamwere and my mother, Monica Wamwere. Prior to the demonstrations we had gone to see Amos Wako. We had no license to hold such a meeting/demonstration."

28. The second appellant was equally cross examined, and like the first appellant, he asserted that he was assaulted and manhandled by the police when they were on a peaceful demonstration and hunger strike, urging the government to release their brothers and other political prisoners. The respondent chose not to cross examine the third appellant, but her affidavit was admitted as evidence.

29. In the circumstances, we are satisfied that, on a balance of probabilities, the appellants proved their case. The fact that they did not produce any medical report or treatment chits did not fundamentally weaken their case, considering that this was an incident that had occurred more than twenty (20) years before they filed their petition.

30. Consequently, we hereby allow the appeal and set aside the trial court's findings that the appellants did not prove violation of their fundamental rights and freedoms.

31. Turning to the issue of award of damages, we shall adopt the assessment by the Supreme Court in *Wamwere & 5 Others vs Attorney General* (*supra*). The Court rendered itself as follows:

> " 93. In awarding damages, courts exercise a very broad, open-ended remedial discretion taking into account what is just, fair and reasonable in the circumstances of the case. In the present case, we are of the view that the damages we award should not only serve to enhance the dignity of the appellants but also be a public recognition of the wrong done to them given the historical context of this case. We have considered comparable awards previously awarded in the cases we cited in the opening paragraphs of this judgment involving other persons who were at the freedom corner, which awards were made several years ago ranging from Kshs 750,000 to 3,000,000. We have also taken into account the circumstances of each case bearing in mind the violations that were proven in those cases and our findings in this matter and the fact that counsel for the appellant urged us to award Kshs 3,000,000/=

to each of the appellants. In our considered view, we assess damages of Kenya shillings two million, five hundred thousand (Kshs 2,500,000/-) payable to each of the appellants as an appropriate remedy."

32. We hereby award each appellant damages of Kshs.2,500,000/= for violation of their right to freedom from torture and inhuman treatment.

33. The respondent shall bear the costs of this appeal as well as the costs of the proceedings before the trial court.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY 2024.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR