IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KOOME & WARSAME, JJ.A)

CIVIL APPEAL NO. 82 OF 2017

BETWEEN

MICHAEL MBOGO KIBUTI.....APPELLANT

AND

THE ATTORNEY GENERAL.....RESPONDENT

(Being an Appeal from the judgment and decree of the Employment and Labour Relations Court

at Nairobi (Nduma, J.) dated 10th *June, 2014*

in

NRB. ELRC PET. No. 4 of 2014)

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JUDGMENT OF THE COURT

1. The gravamen in this appeal is the question of whether a party who claims violation of rights that occurred under the retired Constitution of Kenya (1969) can ground a claim under the Constitution of Kenya 2010. It will bring into consideration the import and interpretation of the provisions of ***Schedule 6*** of the Constitution of Kenya 2010, ***section 6*** thereto which provides that;

> **"Except to the extent that this Constitution expressly provides to the contrary, all rights and obligations, however arising, of the Government or the Republic and subsisting immediately before the effective date shall continue as rights and obligations of the national government or the Republic under this Constitution"**

2. A brief factual background of the dispute that has spiralled to this appeal is that ***Michael Mbogo Kibuti*** (appellant) filed a petition before the **Employment and Labour Relations Court** (ELRC) in Nairobi. He claimed that prior to the events of 1st August, 1982, he was enlisted as a Private in the Armed Forces attached to Kenya Air Force Wing. However, the appellant was discharged on 8th February, 1984. In the petition, he alleged that his enjoyment of fundamental rights enshrined in the Constitution of Kenya in particular ***Articles 22 (1), 23 (1), 25 (a), 27 (1), 27 (1) 29 (c), d, 47(1), 49(1) (a) (i), (iii), (d)*** and ***50 (1)*** were violated. In the said petition the appellant particularised the manner in which his rights and freedoms were violated. He claimed that his right to protection from torture and cruel, inhuman or degrading treatment or punishment under ***Article 25(a)*** was violated in that after arrest he was taken through interrogation at Kamiti Maximum Prison; thereafter he was transferred to Naivasha Maximum Prison where he was left submerged in water for seven days. This subjected him to the most harrowing, inhuman and degrading treatment; that his right not to be treated in an inhuman and degrading manner under ***Article 29(c), (d)*** and ***(f)*** was infringed as he was treated like an animal.

3. During his incarceration at Naivasha Maximum Prison he was denied contact with any other person and neither was food or water provided in a dark room where he knew not the time of day nor whether it was day or night and he had no access to sanitation. The appellant further alleged that his right to expeditious, efficient, lawful and procedurally fair hearing and determination of his trial under ***Article 47(1)*** of the Constitution was violated, in that he was denied representation by an advocate; that his right as an arrested person to be informed promptly in a language he understood of the reasons for his arrest, the right to remain silent and the consequences of not remaining silent as provided for under ***Article 49(1), (a), (i)-(iii), (c)*** to communicate with an advocate and others whose assistance is necessary. Furthermore by failing to inform him the reason for his arrest his rights as guaranteed under ***Article 47(1)*** of the Constitution was

violated.

4. The appellant cited the right not to be compelled to make any confession or admission that could be used in evidence against the person as provided under ***Article 49(1) (d)***; the right to have the offence investigated and resolved by application of law and decided in a fair hearing under ***Article 50(1)*** in that the court martial sitting at Langata Barracks on the 29th December, 1982 breached the above provisions by failing to accord him a fair hearing in line with the Rules of natural justice; that the Court Martial and investigating officers did not follow due process which occasioned him injustice that was unconstitutional. The said petition was supported by the appellant's affidavit that was sworn on 26th August, 2012 and it more or less reiterated what was stated in the petition.

5. The petition was opposed vide a replying affidavit sworn on 8h December, 2014 by ***Lieutenant Colonel Joseph Kosen Karbauli***. The matters deposed thereto vehemently denied that the appellant was wrongfully arrested and incarcerated as alleged or at all; that he was confined in isolation or exposed to adverse artificial conditions and degrading treatment as alleged or at all; that his rights and fundamental freedoms were violated under ***Article 22(1), 23(1), 25(e), 27***(1), ***29(c)*** and ***47 (1), 49(1) (e)*** and ***(d)*** and ***50 (1)*** of the Constitution of Kenya 2010 or at all. All the particulars of alleged violation of fundamental rights and freedoms were denied in total.

6. The respondent further contended that the appellant was lawfully arrested, detained and tried by a Court Martial for the role he played in the failed coup of 1st August, 1982; that he had indeed participated in the failed coup of August, 1982 and upon arrest and trial was convicted and sentenced to one (1) year imprisonment and dismissed from service by Court Martial. He was charged with the offence of mutiny contrary to ***section 22(1)*** of the **Armed Forces Act, cap 199** (now repealed). His sentence was later reviewed to six (6) months imprisonment as per the extract produced and marked "PMK1". The respondent also pointed out the fact that the appellant had admitted having armed himself with a G3 rifle and ammunition. That this happened in unlawful circumstances and for that reason he was expeditiously tried in a fair manner in accordance with the law. The appellant failed to appeal the outcome of the Court Martial but only applied for review of sentence and the same was reviewed in his favour.

7. It was the respondent's case that the appellant was not entitled to any terminal benefits under the **Armed Forces (officer and service men's) Pension Regulations** of 1980 having been found guilty and convicted of participating in a mutiny. Further the Constitution of Kenya 1969, was specific on how human rights and fundamental freedoms would apply to members of the Armed Forces by making an exception under ***section 86 (4)*** which provided that;

> **"In relation to a person who is a member of a disciplined force raised under any law in force in Kenya, nothing contained in or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in Contravention of any of the provisions of this chapter other than Section 71, 73 and 74."**

Thus, the rights claimed by the appellant were limited by the Constitution and their enjoyment was not absolute. Moreover, the petition was filed after 32 years, an inordinately long period and the same amounts to abuse of the process of the Court.

8. The matter fell for hearing before Nduma, J. and it was canvassed by way of written submissions. The appellant filed his written submissions but apparently the respondent did not; upon considering the pleadings and submissions filed by counsel for the appellant, the learned Judge identified two issues for determination that is: -

> **"a) Did the respondent violate the human rights and fundamental freedoms set out in the petition dated 26*th August, 2012?***
>
> **a. If the answer to (a) above is in the affirmative, what remedies if any are available to the petitioner"**

In his judgment, the learned Judge held that the allegations made by the appellant occurred under the former Constitution in particular ***section 84 (1)***. To the extent that the appellant relied on the provisions of the law that was non-existent at the time the cause of action arose, the Judge found that his hands were tied in that the allegations cannot be founded on the new Constitution but the appellant should have relied on the Constitution of Kenya, 1969 (repealed). The appellant's petition was dismissed with costs for being incompetent.

9. This is what has triggered the instant appeal that is predicated on some five grounds of appeal to wit that the learned Judge erred in law and fact by failing to consider the evidence that was tendered by the appellant; failing to offer any pecuniary compensation for the suffering endured by the appellant as a result of blatant violation of his fundamental rights and freedoms; failing to hold that the appellant's freedom from torture, cruel, inhuman and degrading treatment and for holding that the petition was incompetent to the extent that the violations complained of occurred during the life of the former Constitution. The appellant prayed that we allow the appeal and issue declarations that the appellant was subjected to inhuman treatment in violation of ***Article 27(1), 29 (f)***; that he was denied fair hearing and fair administrative in violation of ***Articles 50(1)*** and ***47 (1)*** of the Constitution.

10. During the plenary hearing of this appeal ***Mr. Imanyara*** learned counsel appeared for the appellant. He made some oral submissions stressing that the Judge erred by holding that the appellant had failed to plead that his rights were violated under the old constitution and that the allegations were not particularised when indeed they were. Further the respondent did not file any submissions therefore the issue of old and new Constitution was not addressed by any party and the Judge did not seek to be addressed on it. The Judge also failed to find that torture and inhuman treatment are not condoned in the **Armed Forces Act**. Also, the Bill of Rights that was in the old Constitution and the **Human Rights Charter** have been maintained in the current Constitution. Human rights are recognized and ***Schedule 6*** of the Constitution of Kenya 2010 is explicit that all rights and obligations are to continue except where there is a contrary provision in force.

11. Counsel for the appellant went on to state that there is no bar in filing a suit seeking enforcement of fundamental rights after many years. Counsel cited the decision of this Court in the case of; **Peter M. Kariuki vs. Attorney General Civil Appeal No 19 of 2012** where this

Court confirmed violations of the petitioner's pre- trial and post- trial detention in prison and increased the award of damages of Ksh. 7million to 15 million and awarded him arrears of salary. Thus, counsel submitted that the Judge erred by failing to consider the averment by the appellant especially paragraph 18 of his supporting affidavit where he stated that upon the promulgation of the Constitution of Kenya 2010, he became aware of the provisions in ***Article 22(1)*** that says: -

> **"Every person has the right to institute proceedings claiming that a right in the Bill of Rights has been denied, violated, infringed or threatened".**

That article read with **Article 23(1)** permits a court to hear and determine a petition notwithstanding the time lapse since the cause of action arose. Part of the reasons why the petition was filed late was because the prevailing political and judicial environment did not permit the filing of such cases, counsel urged us to allow the appeal.

12. This appeal was opposed by ***Mr. Joseph Kipkoech Biomdo*** learned counsel for the Attorney General. Counsel submitted that a party seeking remedies for violation of rights has a duty to specifically plead the rights that were violated. The cause of action arose in 1982 during the attempted coup, therefore the petition should have been anchored under the repealed Constitution. The appellant invoked the new Constitution to claim rights under the old and he was therefore bound by his own pleadings. Counsel cited the case of **Pius Moseti Nyamora and 2 Others vs. Attorney General (2015) eKLR** where the petitioner claimed violation of fundamental rights by police, CID, prison warders between 1992 to 1994. Lenaola, J. (as he then was) held that parties must specifically plead and prove the constitutional rights and provisions that they allege have been violated.

13. According to counsel for the respondent, what constitutes torture under the old Constitution could be at variance with that provided for in the new Constitution. Counsel also made reference to ***Rule 10*** of the **Constitutional Practice Rules** which prescribes the form of a constitutional petition and it is imperative that a party should cite the provisions of the constitution that were alleged to have been violated. To reinforce this argument counsel cited the case of **Pharmaceutical Society of Kenya & Another vs. The Nairobi City County & Others (2017) eKLR** where Mativo, J. held that the petitioners who had moved the court to make a determination that they were being discriminated against by the respondents by subjecting them to taxation under the Finance Act, should specifically plead the constitutional rights and provisions that supported such an allegation. On delay counsel urged that the petition was filed after events complained of had happened 34 years ago which was highly prejudicial to the respondent and that the appellant did not explain the delay. Counsel therefore urged us to dismiss the appeal.

14. This is a first appeal and this Court is enjoined to approach the dispute as if it is conducting a fresh hearing, save for the fact that such a hearing is based on the recorded proceedings. In this case no party adduced oral evidence as the matter was canvassed through the pleadings and the written submissions by the appellant. The respondent did not file any submission. That notwithstanding, Rule ***29(1) (a)*** provides that, on first appeal the court has the power to re-appraise the evidence in order to draw thereon its own independent inferences of fact. ***Sub-section (2)*** provides;

> **"(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein."**

See also **Sumaria & Another vs. Allied Industries Ltd [2007] 2 KLR 1**.

In the circumstances of this appeal we exercise caution in view of the decision we are bound to reach so as not to prejudice the trial of the matter in the court below, bearing in mind that the petition was kind of struck out for being incompetent.

15. Upon considering the entire record of appeal, submissions and list of authorities cited, we have been able to extract two issues for our determination. Firstly, is the question of whether the petition is incompetent for failing to state the acts of the alleged violations of fundamental rights under the old Constitution? Secondly, whether the provisions of ***Schedule 6***, ***section 6*** of the 2010 Constitution allowed parties to seek remedies of acts of violations of rights which occurred during the old Constitution under the new one. It is common ground that the appellant's claim of violations of rights occurred during the old Constitution. It is also common ground that the violations cited are grounded under the Articles of the new Constitution.

16. We are aware of the principle that a party is bound by their own pleadings as so ably articulated in ***Stephen Mutinda Mule's case*** (Supra) cited by counsel for the respondent and which quoted with approval the decision of the Malawi Supreme Court of Appeal in **Malawi Railways Ltd vs. Nyasulu [1998] MWSC 3**, in which the learned Judges also quoted with approval from an article by Sir Jack Jacob entitled **"The Present Importance of Pleadings."** The same was published in [1960] Current Legal problems, at P174 whereof the author had stated: -

> **"As the parties are adversaries, it is left to each one of them to formulate his case in *his own way, subject to the basic rules of* pleadings…for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice….**
>
> **In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their**

pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

17. That said, we find with respect that the appellant clearly stated the period when the violations took place was from 1st August, 1982 to 1984 when he was discharged from the Air Force. He complained of torture, degrading and inhuman treatment among others. Apart from the fair administrative action which can be said to encompass a fair hearing, all those rights exist in both Constitutions. We think the learned trial Judge fell into error when he framed the question for determination as he did. We are of the opinion that the question ought to have been whether those rights that were alleged to have been violated when the cause of action arose are covered by the new Constitution. A cursory look shows that the rights the appellant was complaining of as having been violated were guaranteed under ***sections 72(5), 74(1) (c)*** and ***(d)***; ***77(a)*** and ***82(2)*** of the old Constitution. All the learned Judge needed to check was whether those rights existed as rights in the old Constitution and the appellant had customized them as falling under the new Constitution before dismissing the petition as casually as he did terming it incompetent.

18. That is one way of looking at the matter because also there is the Transitional and Consequential Provisions of ***Schedule 6*** of the Constitution of Kenya 2010 which provides as follows: -

"7. (1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

Also ***Article 259(1)*** the Constitution lays down the rule of interpretation as follows: -

"This Constitution shall be interpreted in a manner that – (a) promotes its purposes, values and principles; (b) advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance."

Further, ***Article 20*** requires the courts, in interpreting the Bill of Rights, to promote: (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights.

19. We do not wish to say more as we think the order that commends itself in the absence of a determination by the trial Judge of the appellant's claims stated in the petition is one remitting the matter for re-trial. The matter was dismissed as incompetent on the basis of form and not substance. Accordingly, we find the appeal has merit and we allow it by setting aside the impugned judgement and reinstating the petition for hearing before another Judge other than Nduma, J.

20. Due to the passage of time we direct that **Petition No 372 of 2012** be mentioned within thirty (30) days after issuance of this judgment before ELRC for purposes of taking priority hearing dates. No order as to costs.

Dated and delivered at Nairobi this 7th day of February, 2020.

R. N. NAMBUYE

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR