IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, KIAGE & MURGOR JJ, A)

CIVIL APPEAL NO. 189 OF 2017

BETWEEN

MICHAEL MAINA KAMAMI.....1ST APPELLANT

KOIGI WAINAINA.....2NDAPPELLANT

AND

HON. ATTORNEY GENERAL.....RESPONDENT

(Appeal from the judgment/decree of the High Court of Kenya,

Lenaola, J) dated 15th April 2016

in

Nairobi Petition No. 209 of 2013)

****

JUDGMENT OF THE COURT

Michael Maina Kamami and ***Koigi Wainaina***, the ***appellants***, claim that on 3rd March 1992 while they were peacefully demonstrating for the release of their friend Hon. Koigi wa Wamwere and 53 other political prisoners, officers from the Kenya Police and General Service Unit (GSU) descended upon them with boots, batons, rubber whips, slaps kicks and blows which caused them to sustain injuries. They contended that this was a violation of their rights not to be arbitrarily deprived of their freedom without just cause, their right to freedom from any form of violence from either public or private sources under *Article 29 (c)* of the *Constitution*, freedom from torture in any manner whether physical or psychological under *Article 29 (d)* and freedom from being treated or punished in a cruel, inhuman or degrading manner under *Article 29 (f)* of the ***Constitution, 2010***, *formerly* ***section 74*** of the repealed Constitution.

They claimed that on the same day at 9.45 p.m whilst in a tent at Uhuru Park's 'Freedom Corner' fasting for the release of the Political Prisoners, they were arrested by over 100 Kenya Police and GSU officers, bundled into a Black Maria and transported to their rural homes in Nakuru County which was a further violation of their fundamental rights of freedom from torture or inhuman and degrading treatment, freedom from any form of violence, freedom from torture and freedom from being treated or punished in a cruel, inhuman or degrading manner.

They complained that the brutality and atrocities they were subjected to were unwarranted because on 28th February 1992, they had presented the then Attorney General, Amos Wako with a Petition seeking the release of the Political Prisoners who had been jailed for the political offences of treason, sedition, or belonging to unlawful organizations and that whilst at Freedom Corner they had no weapons, their only possessions being their clothes, blankets, water for drinking and washing their faces, Bibles and hymnbooks to keep themselves busy.

They further claimed that the sudden and intense brutality that was unleashed on them on 3rd March, 1992 under cover of darkness between 4 p.m and 9.45 p.m, left the campaigners, including the late Prof. Wangari Maathai and themselves, badly injured. The appellants claimed that about five (5) days later, they returned to Nairobi to continue the campaign, only this time they camped at the All Saints Cathedral Church from 4th March 1992 to 19th January 1993 until all the Political Prisoners were released, but they allege that they continued to be attacked and their rights violated.

As a result of the violence, they claimed that their physical, psychological, economic and political life was disrupted and that even today, they continue to suffer the effects of torture, trauma, loss of earnings and damages.

Finally the appellants contended that at the hearings they would rely on the comprehensive coverage by The Society Magazine of 23rd March 1992, various international human rights instruments, covenants and conventions, and decided cases to support their claim for compensation in general damages, exemplary damages, aggravated damages and moral damages.

Consequently, the appellants prayed for;

1. A declaration that their fundamental rights and freedom from torture were contravened and grossly violated by the respondent's Kenya Police and G.S.U officers who were Kenya Government servants, agents, employees and in its institutions on diverse dates and time on 3rd March, 1992 up to 19th January, 1993.

2. A declaration that the appellants are entitled to the payment of General damages, exemplary and moral damages and compensation for the violations and contraventions of their fundamental rights and freedoms from torture under ***section 23***

(3) of The Constitution of Kenya, 2010.

3. General damages, exemplary and moral damages for Torture for each appellant.

4. Any further orders, writs, directions, as this Honourable Court may consider appropriate.

5. Costs of the suit, and interest.

The petition was supported by affidavits sworn by the two appellants on 15th April 2013 which to a large extent reiterated the contestations outlined in the petition.

In a replying affidavit in opposition to the petition sworn on 21st July 2014 by Philip Ndolo the Deputy Director of Operations in the Kenya Police Service, the respondent denied the contents of the petition and the averments in the appellants' affidavits. It was deposed that pursuant to ***Articles 263*** and ***264*** of the ***Constitution of Kenya 2010***, the provisions of the Constitution took effect on the date of promulgation, and therefore it did not apply retrogressively; that the appellants could only rely on rights provided under the former Constitution and not the current one.

It was further averred that the appellants were not held in police custody and therefore the Kenya Police was a stranger to the averments; that since the appellants failed to disclose the names and identity of the plain clothed police officers who allegedly arrested and brutalized them, and did not produce any medical reports to demonstrate that they were tortured and had suffered police brutality, they had failed to prove the allegations on a balance of probabilities.

It was finally contended that the respondent would be highly prejudiced as the alleged cause of action occurred over twenty three (23) years prior to the institution of those proceedings.

After considering the parties affidavit and oral evidence as well as the submissions, the High Court, (Lenaola, J, as he then was) dismissed the petition for reasons that no evidence had been produced to support the appellants' claims that they were tortured. In this regard the court stated;

> ***"… the petitioners are under an obligation to prove their case on a balance of probability. In this regard, whereas the Petitioners made various assertions that they were tortured, i.e that they were subjected to*** *"inhuman and brutal battery with boots, batons, slaps, rubber whips, kick and blows all over their bodies; attacks by over 100 Kenya Police officers and General Service Unit officers"* ***which they further alleged occurred continuously from 3rd March, 1992 to 19th January, 1993 no material evidence was placed before this Court to corroborate their averments. Perhaps medical records would have sufficed in that regard but none was produced. The length of the alleged torture would certainly also have had catastrophic effects on their physical well-being but that allegation was very casually made."***

Aggrieved by the High Court's judgment, the appellants have filed this appeal on 16 grounds, which in summary are that the learned judge was wrong to ignore the decision in the torture case of ***Harun Thungu Wakaba & 20 Others vs Attorney General [2010] eKLR*** where the court observed that treatment cards and medical reports of injuries sustained long ago are not important as torture is a combination of physical and psychological pain, exposure to dangers, mental anguish which only the victim can bring out in an eye witness account; in finding that the appellants had no right to institute their petitions for violation of their fundamental right to freedom from torture, inhuman degrading treatment after 20 to 22 years whereas violations of fundamental rights have no time limitations under the repealed Constitution and the Constitution of Kenya, 2010 or under the local and international Human Rights Law; in shifting the cause of action from brutal torture at Freedom Corner on 3rd March 1992, to between 4th March 1992 and 19th January 1993 at the All Saints Cathedral where the appellants were holed up; in disregarding the uncontested affidavit which provided sufficient particulars of the torture, physical and psychological injuries sustained; in failing to find the respondent did not call the maker of its replying affidavit to contradict the appellants' affidavit and oral evidence which comprised factual and eye witness accounts on the brutalities; in limiting proof of torture to the production of treatment cards or medical reports while in all the decided torture cases, treatment cards or medical reports were dispensed with as torture, inhuman or degrading treatment was broadly defined as infliction of physical pain at the time of torture, and the danger, mental and psychological suffering can only be recounted by the victim's eye witness and personal account; that lack of treatment cards was not crucial to prove the ingredient of torture; in failing to award general damages for torture, inhuman and degrading treatment as pleaded in the

uncontested petition, the supporting affidavits and oral evidence; in failing to award general damages for physical and psychological torture as pleaded; and in failing to find that since the factual and historical record in the Society Magazine of 23rd March 1992 was not challenged, controverted or rebutted, on the basis of the uncontested facts the court should have entered judgment in favour of the appellants, instead of engaging in argumentative reasoning and research on behalf of the respondent.

Submitting on behalf of the appellants, learned counsel ***Mr. G. Mwaura*** collapsed the 16 grounds into four issues which were; whether the affidavit and oral evidence of the brutal attacks on the unarmed appellants by the Kenyan Government Police Officers and GSU Officers at the Freedom Corner on 3rd March 1992 and at the All Saints Cathedral between 5th March to 19th January1993 amounted to torture; whether the learned judge ought to have been guided by similar precedents which decided that there was torture and violations of Human Rights of 8 mothers at Freedom Corner and their supporters including the two appellants; whether there was any constitutional limitation or statutory limitation to filing petitions founded on human rights violations or denial of fundamental rights; and whether the appellants were entitled to the prayers sought in the petition.

Addressing the first issue, as to whether the attacks of 3rd March, 1992 and between 5th March to 19th January 1993 were torture or not, counsel submitted that the appellants' affidavit and oral evidence, together with the failure by the State Counsel to cross-examine them on the contents of their affidavits, and which evidence was not rebutted therefore rendering the appellants evidence uncontroverted. It was argued that the circumstances of the appellants' case were similar to those found in ***Nairobi Petition Nos. 281 of 2011, 282 of 2011, 337 of 2011 and 338 of 2011 Milka Wanjiku Kinuthia & 2 Others vs Attorney,*** where the High Court (Lenaola, J.) having found that the petitioners' fundamental rights and freedoms were violated by the Government of Kenya through the actions of its agents awarded Kshs. 2.25 Million to the petitioners; that in the same case, the trial court determined the suit on the basis of the unchallenged petitions and the oral evidence of each of the petitioners since the respondent had not produced any evidence to rebut the petitioners' oral or affidavit evidence. Counsel faulted the judge for failing to address the issue of torture of the appellants, and for exhibiting bias against victims of past historical injustices.

On the issue of the statutory limitation period to petitions founded on human or fundamental rights violations, it was asserted that as this claim was in respect of transitional justice which concerned judicial processes instituted subsequent to a constitutional transition to assist victims of past human rights violations to access reparation, redress and compensation, the issue of limitation did not arise.

The respondent also filed written submissions where it was submitted that contrary to the appellants' assertions that the learned judge had stated that the appellants had no right to institute the petition 22 years after the cause of action arose, the learned judge merely queried whether the delay in bringing a rights violation case was inordinate, and that in any event, each case should be considered on its own merits.

It was further argued that the appellants wrongly claimed that the learned judge shifted the cause of action from brutal torture at Freedom Corner on 3rd March 1992 to brutal torture on diverse dates between 3rd March 1992 to 19th January 1993; that the learned judge rightly addressed each of the complaints as set out in the petition.

It was submitted that the learned judge was right in concluding that torture was not proved; that for there to be a finding of torture it must be demonstrated that there was severity of pain and suffering as set out in ***Article 1*** of the ***Convention against Torture***; that there must also be reckless indifference to the possibility of causing pain and suffering and the act of torture must involve a public official. It was asserted that in this case, no evidence was produced to prove the allegations of torture and brutality at Uhuru Park and neither was evidence produced to show that the appellants were indeed tortured at Freedom Corner; that nothing showed that the appellants were tortured, not even medical evidence pointing to injuries sustained; and no torturous incidences during the ten months period were identified to prove that they were tortured. Furthermore, regarding the article in the Society Magazine, the respondent submitted that the learned judge rightly found that newspaper articles were inadmissible since the newspaper articles were not considered to be authoritative sources of evidence.

We have considered the pleadings, the oral evidence and the parties' submissions, and this being first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. As stated in ***Selle vs Associated Motor Boat Co. [1968] EA 123;***

> ***"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270).***

In our view the questions that fall for determination are;

> *i) Whether there was a limitation period that the appellants were required to adhere to;*
>
> *ii) Whether it was proved on a balance of probabilities that the appellants were tortured and subjected to inhuman and degrading treatment following brutal attacks by Kenya Police and GSU Officers; and*
>
> *iii) Whether the learned judge erred in failing to apply decisions from recent cases on violation of the rights of the 8 mothers of Freedom Corner and their supporters.*

We will begin by considering the question of whether there was a limitation period that the appellants were required to adhere to. This being an issue questioning whether or not we have jurisdiction to determine this appeal, we will proceed to determine it as a preliminary issue. In addressing this issue the learned judge observed that although there is no limitation period for instituting petitions to enforce fundamental rights and freedoms, a court must ascertain whether there has been an inordinate delay in instituting such proceedings and a petitioner must

provide justification for instituting the proceedings when the delay is inordinate.

The court concluded thus;

> ***"… I must state that the length of delay is not per se (sic). Acceptability of the explanation proffered by a party should be one of the criterion which may warrant a Court to condone such delay. Is there any such explanation in this Petition? I submit that no explanation has been given by the Petitioners to warrant a favourable finding but like this case has done in previous cases of this kind, it will proceed and examine the evidence tendered and determine whether despite the obvious delay, the alleged violations were such that in addressing historical injustices, this Court none the less has to give a remedy."***

In other words, the court was categorical that there is no limitation period for matters concerning violations of fundamental rights and freedoms, but observed that the petitioner should be in a position to explain the cause of the delay in instituting the petition.

We do not agree with the appellants that the learned judge, found that, *"…the 2 Appellants had no right to institute their Petitions for violation for the fundamental Right from torture, human and degrading treatment after 20 to 22 Years…"* as alleged in ground 2 of the Memorandum of Appeal. It is clear that the learned judge found that though there is no limitation period for instituting petitions for the enforcement of fundamental rights and freedoms on the basis of decided cases he concluded that it was necessary for a petitioner to explain the reason for such delay, so as to ascertain whether the interests of justice would be served in respect of both parties. We consider that the learned judge was overly magnanimous to appellants having regard to the circumstances of the case as, despite reaching a finding that the appellants had not provided any explanation for the delay of 22 years, the judge still went ahead to determine whether the appellants had proved their case on merit. Accordingly, the learned judge cannot be faulted for having been bias or prejudice, and we so find.

The next issue is concerned with the appellants' complaint that the learned judge erred when he failed to apply decided cases to the circumstances of this case, in particular ***Milka Wanjiku Kinuthia & 2 Others vs The Attorney General (supra)*** on violation of the rights of the 8 mothers of Freedom Corner and their supporters to the circumstances of this case. It was submitted that in that case the same trial judge determined the case on the basis of unchallenged petitions and oral evidence, and that though it was appreciated that a party who has alleged certain facts has an obligation to prove them to the required standard, the defending party must also rebut the allegations made; that where a party fails to contest or file a response to the allegations, then a court is required to accept those facts as uncontroverted, true and correct.

The appellants argue that in this case, they provided sworn affidavits and oral evidence that showed that they were subjected to torture and inhuman and degrading treatment, and that since the respondents did not rebut this evidence in any way their evidence remained uncontroverted and the court as a consequence ought to have found in their favour.

Indeed, the record shows that though Philip Ndolo swore an affidavit rebutting the allegations, he did not testify or provide oral evidence to support such rebuttal.

While we agree that a court may rely on uncontroverted evidence to find in favour of the petitioners, it is trite that in order for a court to so find, a petitioner must prove the facts alleged to the required standard. As pointed out by the learned judge, ***section 107*** of the ***Evidence Act*** is explicit, any person requiring a court to give judgment on the basis of certain facts must prove that those facts exist, and the burden of proof lies on the person alleging them.

In the case of ***Haji Asuman Mutekanga vs Equator Growers (U) Limited, Civil Appeal No 7 of 1995*** this Court emphasized;

> ***"This rule applies where a suit proceeds interpartes or exparte. It follows that even where as in the instant case, the defendant neither enters appearance not files a defence, the plaintiff bears the burden to prove his case to the required standard. The burden and standard of proof does not become any less."***

The case of ***Milka Wanjiku Kinuthia & 2 Others vs Attorney (supra)*** notwithstanding, the petition had to be determined on the basis of the proven facts that were placed before the court. The non-filing of a defence or response does not divest a petitioner of his duty to prove his case. Therefore, the question still remains whether the appellants discharged the burden of proof on a balance of probabilities that they were tortured or subjected to inhuman or degrading treatment, and that as a consequence they suffered both physically and psychologically. This leads us into the next issue of whether the violations alleged were proved.

In this regard, the learned judge concluded that whereas the appellants had made various assertions that they were tortured and subjected to *"inhuman and brutal battery with boots, batons, slaps, rubber whips, kick and blows all over their bodies from over 100 Kenya Police and General Service Unit officers"* which they further alleged occurred continuously from 3rd March, 1992 to 19th January, 1993 no material, including medical reports was produced to support the allegations.

Before we re-evaluate the evidence that was before the trial court and arrive at our own independent conclusion that the claims of torture and of inhuman and degrading treatment were proved, it is essential to define what is meant by the terms torture and inhuman or degrading treatment.

In the Kenyan context, the applicable law against torture at the time was enshrined in ***section 74 (1)*** of the repealed **Constitution** as follows:

> ***"No person shall be subject to torture or to inhuman or degrading punishment or other treatment." Black's Law Dictionary, 10th edition,*** defines ***"torture"*** as

> ***"The infliction of intense pain to the body or mind to punish, to extract a confession or information, or to obtain sadistic***

pleasure".

At ***Article 1*** of the ***Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, "torture"*** is defined as;

> "***any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions".***

The European Court of Human Rights has defined torture and inhuman treatment in the ***Greek Case 1969 Y.B. Eur. Conv. on H.R. 186 (Eur. Comm'n on H.R*** in the following terms;

> ***"The notion of inhuman treatment covers at least such treatment as deliberately causes suffering, mental or physical, which, in the particular situation is unjustifiable. The word 'torture' is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be de-grading if it grossly humiliates him before others, or drives him to an act against his will or conscience."***

In the case of ***Suresh vs Canada (Minister of Citizenship and Immigration) 2002 SCC 1***, the Canadian Supreme Court stated;

> ***"Torture is defined Article 1 on the United Nations Convention against torture as including the unlawful use of psychological or physical techniques to intentionally inflict severe pain and suffering on another, when such pain or suffering is inflicted by or with the consent of public officials."***

And finally, in finding itself facing circumstances similar to the instant case prevalent in the case of ***Frankline Kithinji Murithii vs Loyford Riungu***

Murithii & 4 others, [2014] eKLR this Court concluded thus;

> ***"From annextures FK1 and FK2, the appellant made complaints to the Police and there is no evidence on record to indicate that the veracity of the complaints was established. There is no evidence on record to illustrate that there was psychological or physical abuse of the appellant by the respondent. There is no evidence on record that intense pain or punishment was meted to the appellant by the respondent. Inhuman treatment is defined to include physical or mental cruelty so severe that it endangers life or health. There is no evidence on record that the respondents have endangered the life or health of the appellant."***

When the appellants' evidence is considered in terms of the definitions of torture outlined above, to begin with, nothing shows that they were present either at the Freedom Corner or at the All Saints Cathedral. Nothing shows that they were tortured. No particulars or instances of torture or inhuman or degrading treatment were provided which demonstrated that they were subjected to physical or mental pain and suffering for the purposes of obtaining information or confessions from them or to punish them. In fact, the court was not even told of the nature of suffering sustained or the resultant injuries. The appellants admitted that they did not have any documents to show that they were injured or were treated for physical pain and suffering. And without medical reports or evidence of medical treatment to prove the injuries or trauma suffered, it could not be demonstrated that they suffered physical, psychological or mental distress. It was not enough to present the allegations, and expect a court to conclude that violations were proved. We are not prepared to find that the allegations were proved merely by reason of their having been uncontroverted. Like the learned judge, we are unable to find on a balance of probabilities that the allegations were founded on fact, and in our view, they remained just that- mere allegations.

On the contestation that the Society Magazine provided sufficient evidence to prove the occurrence of the events on the material dates, the learned judge considered the provisions of the Evidence Act and various authorities on the inadmissibility of newspaper articles and cuttings, and concluded that the article referred to in the Society Magazine was inadmissible. We would agree with the learned judge's findings, and would add that, in so far as the appellants were not the makers of the article, and no reference was made to them, no relationship or nexus was established between the appellants and the events described in the article, hence its inadmissibility.

To conclude, without any factual particulars being produced to support the allegations of violence or police brutality resulting in torture or inhuman treatment, like the learned judge, we are not satisfied that the evidential threshold to support the rights violations alleged was met. Given the aforegoing, this ground is unmerited.

In sum, we find that there is no basis for interfering with the decision of the High Court. The appeal is unmerited and is dismissed. In view of the nature of the case we order each party to bear their own costs.

It is so ordered.

Dated and delivered at Nairobi this 6th day of August, 2019.

M. WARSAME

.....

JUDGE OF APPEAL

P.O. KIAGE

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR