IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 268 OF 2016

BETWEEN

WELLINGTON NZIOKA KIOKO..............................APPELLANT

AND

ATTORNEY GENERAL...RESPONDENT

(An appeal arising from the Judgment and Decree (Mumbi Ngugi, J.) delivered on 18th day of November, 2015 in Petition No. 517 of 2013)

****

JUDGMENT OF THE COURT

Wellington Nzioka Kioko (the appellant) moved the High Court at Nairobi by way of a petition dated 29th October, 2013 for orders *inter alia*, as hereunder:-

> **"a) A declaration that the petitioner's fundamental rights and freedom were contravened and grossly violated by the respondent's Kenya Army and Prisons Officers for 8 months with effect from 1st August 1982 up to March 1983 at Kamiti Maximum Prison and Kahawa Garrison.**
>
> **b. A declaration that the Petitioner is entitled to payment of damages and compensation for the violations and contravention of his Fundamental Rights and Freedoms.**
>
> **c. General damages, Exemplary Damages and Aggravated damages under Section 84 (2) of the Constitution of Kenya (1969) be awarded.**
>
> **d. A declaration that the Petitioner merits payment of withheld salary, emoluments, terminal benefits and pension.**
>
> **e. Costs of this petition.**
>
> **f. Interest on items (c), (d) and (e) above.**
>
> **g. Any further orders, writs and directions as this Honorable Court may deem just and fit to grant."**

In his affidavits worn on 29th October, 2013, the appellant deposed that he was employed by the Kenya Air Force on 9th February, 1979 where he worked until the 1st of August, 1982 when there was an attempt by the Kenya Airforce to overthrow the lawful Government of Kenya then in place. Following the said incident, the Kenya Air Force was disbanded; some servicemen were sacked, others were hauled to court facing various criminal charges, while yet others were subjected to court martial proceedings. The appellant was one of those who fell in the category of dismissal. He deposed that he was unlawfully terminated from service and was also incarcerated at the Naivasha Maximum Prison, Kahawa Garrison and Kamiti Maximum Prison for a period of 8 months. He claimed that during those 8 months, he was subjected to physical and mental torture in total disregard of his human rights. He said that as a result of the torture, he developed some form of physical deformity on his left lower jaw.

He was ultimately released from prison and given Kshs. 1,400 to travel to his home in Machakos. He was also given a certificate of discharge from the department of Defence. It is his view that the said discharge was unlawful, he has also been unable to secure alternative employment elsewhere, hence his prayers as outlined earlier.

The petition was opposed by the respondent vide the replying affidavit of Lieutenant Colonel Paul Mwangemi Kindochimo, who described himself as *"staff officer 1 at the Kenya Defence Headquarters in charge of personnel records"*.

According to Mr. Mwangemi, the appellant's fundamental rights and freedoms were not contravened; that the appellant was never wrongly arrested, and that if he was arrested, then it was on account of his involvement in the unlawful attempt to overthrow the Government. He further deposed that the appellant's discharge from service was lawful and accorded with the Armed Forces Act (repealed). The respondent also deposed that the petition was brought after inordinately long period of time, it having been filed over 31 years later without any justifiable or plausible reason advanced for the delay. It was the respondent's contention that under the retired Constitution, any rights the petitioner may have claimed under **Sections 72 (1), 72 (2)** and **72 (5)** were limited by the said Constitution as far as members of the armed forces were concerned pursuant to **Section 86 (4)** of the repealed Constitution.

The respondent urged the court to dismiss the petition terming it an abuse of the process of the court.

At the plenary hearing of the petition, the appellant adopted the contents of his affidavit and reiterated the same. He stated that during his incarceration, he was locked up in a flooded cell which forced him to remain standing most of the time. He was also subjected to kicks and blows by the prison wardens. As a result, he started having hallucinations and also developed a swelling on his lower jaw. He however clarified that he developed the swelling one year after he was released from custody. He could not however produce any medical notes as proof of treatment before September 2014. He called one witness, Dr. Frederick Owiti, a psychiatrist who testified that he had treated the appellant on 11th October, 2012. According to the witness, the appellant had suffered from post-traumatic stress disorder, and that the swelling he saw on him could occur after "a hit or a thump on the joint".

The respondent did not present any witnesses to court but filed submissions in response to the petitioner's submissions dated 29th September, 2015 on 13th October, 2015.

Having considered the evidence placed before her along with the submissions of both parties and the respondent's list of authorities, the learned Judge **(Mumbi Ngugi, J.)** found that the petitioner's claim was brought after inordinate delay and that no explanation had been given for the delay. The learned Judge rendered herself as follows:

> **"……It is prejudicial to the State, and therefore to the general public, for parties to sleep on their rights and then wake up, decades later, with no explanation for the delay, and allege violation of rights ….in the circumstances, I am constrained to find that not only has the petitioner in this case failed to establish a violation of his constitutional rights, he was also guilty of inordinate delay in lodging his petition".**

The petition was consequently dismissed with no order as to costs. The appellant has challenged that decision by way of this appeal. The learned Judge is faulted for finding that the petition was filed after inordinate delay; that the appellant's constitutional rights were not violated; that arrest, detention and torture had not been proved and finally for failing to consider the judicial authorities submitted by the appellant. The appellant urges this Court to set aside the said judgment, allow his petition and award him Ksh. 10,000,000, or such sum as this court may find reasonable in the circumstances.

This being a first appeal, our role as mandated by **Rule 29 (1) a** of the Rules of this Court is to re-evaluate, re-assess and re-analyze the evidence before the trial court and draw our own conclusions. See **Kenya Ports Authority vs. Kuston (Kenya) Limited [2009] 2 EA 212** where this Court held that:

> **"On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"**

We have recapitulated the evidence adduced before the trial court above. What we need to do now is to reconsider that evidence afresh along with the memorandum of appeal, the submissions of learned counsel and the law and make our independent conclusion as to whether the learned Judge's decision should be upheld or set aside. In our view, only two issues fall for our determination in this appeal. First is the finding by the learned Judge that the petition was filed after inordinate delay and no plausible reason was advanced for the delay; and second whether the evidence on record was sufficient to prove the appellant's claim.

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. Can the Judge be faulted for that? We need to look at the logic behind limitation of actions generally in order to place this issue in proper perspective. 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. Memory is sometimes transient and it is important that a person adduces evidence when the memory of the incident complained of is still intact. There is also this idea of people moving on in life. If somebody wrongs you, you need to seek redress when the offending act still has an impact on your life, and when the evidence necessary to prove the wrong is still available. There is also the converse situation where the alleged wrongdoer should know that there is a claim against him which he needs to remedy. 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.

For instance in a case like the one before us where the appellant was complaining about hallucinations, is it possible that you can hallucinate for over 30 years over the same thing and not find the need to seek redress sooner? It would also be prejudicial to the respondent to drag them back 3 decades in matters they may have presumed were long gone and buried.

In this case we agree with the learned Judge that no plausible reason was given for the inordinate delay.

The reasons given for not filing the petition with promptitude were that he was poor, he did not have parents, and that his family depended on him. Those in our view are not plausible reasons. The appellant could have gone to court and applied to file the claim as a pauper. There is no evidence that he tried to pursue that route. Could it be that the appellant had not suffered and only decided to lodge the claim because others had done so and they had been compensated? We cite with approval the following finding by Majaja J in **James Kanyita Nderitu vs A.G** and Another, Petition No. 180 of 2011.

> "**Although there is no limitation period for filing proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under section 84 of the constitution, is entitled to consider whether there has been inordinate delay in lodging the claim. The Court is obliged to consider whether justice will be served by permitting a respondent, whether an individual or the State in any of it manifestations, should be vexed by an otherwise stale claim. Just as a petitioner is entitled to enforce its fundamental rights and freedoms, a respondent must have a reasonable expectation that such claims are prosecuted within a reasonable time.**"

We agree with the learned Judge that the delay of 30 years was not explained and on that point alone, we hold that the appellants claim was properly dismissed.

On the second issue on failure to prove the claim, we hold the view that there was paucity of evidence in this matter. Other than the appellant's word, there was no record, or other evidence of his arrest, or even torture. In respect of the swelling on his jaw, he admitted that the same developed a year after he was released from custody. According to the doctor, such an injury can occur '*after a hit or a thump on the joint*'. That hit or thump could have occurred anywhere a year after the appellant was released from custody, if he was ever incarcerated. There was no proof that it was occasioned by the respondent or its agents. In the same breath, we note that the appellant had also claimed withheld salary, emoluments, terminal benefits and pension under the guise of a constitutional claim. That was a claim that could only be entertained in the Employment and Labour Relations Court pursuant to **Articles 162(2),** and **165 (5)** of the Constitution.

For the foregoing reasons, we conclude that the learned Judge cannot be faulted for arriving at the impugned decision. We find that the same was sound in law and we have no basis to interfere with the same. We find this appeal lacking in merit and consequently dismiss it with no order as to costs.

Dated and delivered at Nairobi this 19th day of January, 2018

ALNASHIR VISRAM

....

JUDGE OF APPEAL

W. KARANJA

....

JUDGE OF APPEAL

M. K. KOOME

....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR