IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, G.B.M. KARIUKI, AZANGALALA, JJ.A.)

CIVIL APPEAL NO. 255 OF 2012

BETWEEN

LT. COL. PETER NGARI KAGUME..... 1ST APPELLANT

LT. COL. DAVID KANAGI THAN.GATE..... 2ND APPELLANT

CAPTAIN JOSEPH MWANGI MBUGWA .....3RD APPELLANT

LT. GAD KAMAU NDEGWA .....4TH APPELLANT

S./SGT JOSEPH GAICHURU CHEGE ..... 5TH APPELLANT

S./SGT REUBEN KARANGI KIRIMI .....6TH APPELLANT

CPL. PETER NASHON WAMBULWA ..... 7TB APPELLANT

AND

THE ATTORNEY GENERAL ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya, Nairobi (Nyamu, J) delivered on 31st day of January 2009

in

H.C.MISC APPLICATION NO.128 of 2006)

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JUDGMENT OF THE COURT

1. The appellants were, before the 1982 coup d'etat, officers in the Kenya Armed Forces. After the coup d'etat, the 1st and 2nd appellants were court-martialled and handed sentences of 6 months and 4 years respectively but on appeal, the 2nd appellant's sentence was cut down by half.

2. The other appellants were not court martialled. They were held in various places in Kenya and subsequently released and discharged from service. Twenty four (24) years later, they filed a

constitutional application in the High Court titled "petition" seeking a surfeit of declarations numbering 38 which included payment of retirement dues. The reliefs sought also included declarations that the Armed Forces Act contradicted the repealed constitution and the Bill of Rights in it; that the disbanding in 1982 of the Kenya Airforce was unconstitutional; that the discharge and dismissal of the appellants from Kenya Airforce was unlawful; that the arrest and incarceration of the appellants was unlawful and unconstitutional; that the appellants were not afforded facilities to defend themselves and were inhumanely treated; that their convictions and sentences were unlawful and unconstitutional; that they were rendered impecunious; that they are entitled to honourable discharge with "above average conduct"; and that an order be made for payment of their dues computed in the manner reflected in their claim in the plaint. These dues ranged from Shs.21 million to Shs.99 million per appellant.

3. After considering the petition the High Court found, firstly, that the appellants *qua* petitioners went to court too late, and secondly, that they failed to offer "concrete evidence" in support of the allegations they made. The court found that there was inordinate delay in bringing the suit. The court further observed that the 1st and 2nd appellants were convicted and dismissed under section 102 (6) of the Armed Forces Act. As regards the remaining appellants, the High Court observed that they would have been entitled to their dues save for the inordinate delay in bringing their claims.

4. As regards the alleged infringement of fundamental rights, the court found that there was no credible evidence and this coupled with the inordinate delay spelt doom to their claim.

5. The learned Judge delivered himself as follows in rejecting the petition

> ***"I have gone through the petitioners' (appellants') affidavits which have horrifying allegations. The respondent had denied all those allegations. The allegations of violations could be true but the court is enjoined by law to go by the evidence on record. The petitioners' allegations ought to have been supported by further tangible evidence such as medical records, witnesses or other oral evidence capable of being subjected to cross examination to test its veracity. The petitioners did not provide such evidence except the averments of what transpired to them. It is most probable that in the prevailing circumstances then, the petitioners were subjected to physical beating, torture, detention without trial among other violations but the court is deaf to speculation and imaginations and must be guided by evidence of probative value. When the court is faced by a scenario where one side alleges and the rival side disputes and denies, the one alleging assumes the burden of proving the allegations. I have gone through the entire court record and there is absolutely nothing to support the allegations made by the petitioners."***

6. On damages, the learned Judge stated –

> ***"In my view the petitioners have come to court too late and have in addition not offered any concrete evidence in support of their allegations and they cannot succeed for this reason as well. Apart from the Petitioners being guilty of inordinate delay, the 1st and 2nd petitioners were convicted and dismissed as per section 102(6) of the Armed Forces Act that makes it mandatory that where an officer is sentenced to imprisonment, he shall also be sentenced to dismissal. Since the law is clear that upon imprisonment the 1st and 2nd Petitioners stood lawfully dismissed, I do not see any reason why they would be entitled to their dues. For the 3rd to 8th petitioners in my view they would have been entitled to some benefits save that they are barred by the inordinate delay. On the issue of violation of the constitutional rights of the Petitioners, had they proved by tendering credible evidence that their fundamental rights and freedoms were infringed, and had come to court within a reasonable time the court would not have failed to redress their violation."***

7. The memorandum of appeal contains 29 grounds of appeal. Most of them overlap. The appellants contend in the memorandum of appeal that the learned Judge erred in law and fact in holding that there was no tangible evidence to prove the allegations; that the claims were time barred; that the dismissal of the appellants from service was not unlawful; that the court martial trials were not unconstitutional; that there was no evidence of torture; that the charge relating to the constitutionality of the court martial did

not hold good; and in failing to assess damages, and in expressing prejudicial sentiments against the appellants which went against the evidence in court the learned Judge erred; and that the learned Judge further erred in disregarding the peculiar circumstances under which the first two appellants were arraignedbefore the court martial.

The appellants pray that the impugned judgment be set aside and damages and dues payable to them be assessed and/or in the alternative directions be given on assessment of such damages and dues.

9. We have carefully perused the record of appeal and given due consideration to the submissions made by counsel for the parties. Learned counsel **Mrs. Madahana,** for the appellants, urged that the fundamental rights of the 1st, 2nd and 3rd appellants were violated and that the High Court was in agreement on this but it opined that the appellants should have litigated the matter in the Labour Relations and Employment Court. Mrs Madahana contended that the High Court was under a duty to consider the evidence but it failed to do so. It was her submission that delay cannot work against the appellants because the latter did not know that the Armed Forces had been disbanded, nor did they know to whom or when to lay claim for damages on account of their torture, incarceration, or for recovery of their dues. MrsMadahana invited us to find that the delay in filing suit was explained. It was her contention that the appellants could not institute suit when the government that had arrested, detained and court martialed two of them was still in office. It is common knowledge that the government referred to was of President Moi who left office at the end of 2002 when a new government led by President Kibaki, now retired, was elected. Mrs. Madahana did not explain the further delay spanning the period from 2002 to 2006.

10. In reply, learned counsel **Mr. Kaumba** for the respondent, pointed out that the evidence by the appellants in support of their petition was refuted by the respondent in the replying affidavit sworn on 26th September 2006 signed by Lieutenant Colonel Elvis Karue Kiriaku, on behalf of Chief of General Staff and the Minister in the Ministry of Defence. He was the Staff and Records Officer in the Ministry of Defence who kept records relating to Kenya Armed Forces Service Personnel and was conversant with issues in the appellants' petition.

11. Mr. Kaumba contended that the replying affidavit rebutted the allegations made by the appellants. In his view, the burden of proof reposed on the appellants to prove the allegations contained in the petition. Such burden, he said, was not discharged. Our attention was drawn to Section 106 of **The Evidence Act**, Chapter 80 of the Laws of Kenya, to show that the burden lain on the appellants to prove the allegations in the petition. Allegations of torture and constitutional breaches, he said, were not proved. The documents relied on in the petition including newspaper cuttings, he said, did not establish proof of the allegations of torture.

12. It was further Mr. Kaumba's submission that the appellants submitted themselves to the court martial and for trial and two of them served sentences without raising any objection to the process on constitutional grounds or otherwise. Mr. Kaumba contended that the appellants must be deemed to have waived their right to raise in this appeal the issues of constitutionality or otherwise of the court martial trials.

13. Counsel further submitted that the relief sought on the unconstitutionality of the Armed Forces Act Cap 119 was a non-issue as the Act has been repealed. It would be pointless, he said, to examine and/or make a declaration on the constitutionality or otherwise of the Act which is not in force. It was counsel's further contention that the delay in filing suit in 2006 for actions that took place in 1982 was inordinate. In his view, the claims made were defeated by laches. Moreover, counsel questioned the merits of invoking the constitutional provisions and seeking declarations which were not the most appropriate remedies in the circumstances. At any rate, said counsel, the appeal has been overtaken by events and it is now moot. Counsel urged us to dismiss it with costs.

14.We have perused the record of appeal and given due consideration to the submissions of both counsel.

15. This is a first appeal. We are enjoined to re-examine and re-evaluate the evidence adduced at the trial in the High Court to ensure that the court arrived at the correct decision. Sir Clement De Lestang V-P of

the forerunner to this court put it aptly in **Selle v. Associated Boat Co.** [1968] EA 123 when he stated –

> ***"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 demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v. Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)."***

16. The issues for the determination in this appeal appear to us to be

1. Whether there was proof of violation of constitutional rights of the appellants as alleged in the petition; and

2. Whether the appellants are entitled to the reliefs they seek; and

3. Whether the appellants' claims are defeated by laches.

17. The appellants alleged violations of their constitutional rights. They cited inhumane and degrading treatment after their arrest and incarceration following the coup d'etat. The evidence they tendered was through affidavits.

> The 1st appellant alleged torture and averred that he pleaded guilty willy nilly on account of torture. Custodial sentences were meted out to the 1st and 2nd appellants both of whom alleged that they served sentences in very humiliating circumstances. The other 6 appellants (Nos 3 to 8) were never court martialled. They were held in custody and ultimately released and dismissed from service without benefits. They contend, as do the 1st and 2nd appellants, that their careers were wasted and their lives were wreaked and destroyed. In their view, compensation by way of general damages might go towards amelioration and restoration of their lives.

18. The respondent opined that the appellants are not entitled to damages on account of violation of fundamental rights and relied on section 86 (2) & (3) of the repealed constitution by dint of which members of a disciplined Force such as the appellants are not entitled to invoke Chapter V of the repealed constitution on the alleged rights.

19The record shows that the 1st appellant pleaded guilty in the court martial to two offences, namely, *"negligent performance of duty contrary toSection 19 of the Armed Forces Act, Chapter 199 of the Laws of Kenya"* and *"negligently performing a duty imposed on him contrary to Section 19 of the Armed Forces Act, Chapter 199 of the Laws of Kenya."* He was sentenced to six months and 3 months on 1st and 2nd offences respectively.

20. The 2nd appellant was charged in the court martial with the offence of *"failing to suppress a mutiny contrary to Section 26 of the "Armed Forces Act"* aforesaid to which he pleaded guilty and was sentenced to four (4) years in jail which was reduced to 2 years on appeal to the High Court.

21. The 3rd to the 8th appellants though never charged with any offence were held after arrest and kept in deplorable conditions in various places for varying periods during which they were mistreated and subsequently dismissed. The precise details in this regard were examined by the trial Judge (Nyamu J). In their complaints, the appellants allege torture and detention and contend that their rights under the constitution were violated by the respondent.

22. The record shows that the detention of the appellants Nos. 3 to 8 occurred before they were dismissed from the Armed Forces. While still in service, they were subject to the provisions of the Armed Forces Act which limited their enjoyment *qua* military men of the fundamental rights in Chapter V of the repealed constitution. There is no allegation by the appellants that the provisions of the Armed Forces Act were breached. Rather, they allege that the said Act was unconstitutional and should be declared to be so.

23. As regards the 1st and 2nd appellants, they contend that they were in service and were court martialed for the aforesaid offences to which they pleaded guilty. They cannot be heard to allege that their conviction and incarceration was a violation of the Constitution because being members of the Armed Forces they were subject to the Armed Forces Act which governed them and which, in section 86(2)(b), limited their rights under sections 71, 73 and 74 of the Constitution (Chapter V).

24. As regards appellants Nos. 3 to 8, the allegations of detention and torture, if proved, were not justifiable as the provisions of the Armed Forces Act did not justify torture or inhumane and degrading treatment. Was there proof of the alleged violations? The record shows that all that the appellants Nos. 3 to 8 furnished as evidence was the affidavit evidence. Affidavit evidence is good evidence and is admissible. In this appeal, the High Court was presented with allegations in affidavits which were controverted by denials in affidavits. The annextures to the affidavits of the appellants were newspaper cuttings and documents not admissible as evidence and whose authors were not called to testify. The Court did not have before it material on the basis of which the veracity of the allegations could be established. An allegation in an affidavit which is denied in a replying affidavit should be buttressed either by admissible documents that show on the balance of probabilities that the allegation is true or alternatively by oral evidence where cross-examination ensuing thereon offers the court an opportunity to evaluate the veracity of the evidence in support of allegation in question.

25. In the instant appeal, the appellants did not offer oral evidence which they could have done, nor did they annexe documents that would have established the veracity of their allegations and whose authors could be cross-examined if required to do so. At the end of the day, the learned judge was left with allegations in affidavits by the appellants which were denied in affidavits by the respondents. In that stalemate, the court lacked a basis in preferring one version over the other.

26. In view of the fact that the law requires the party making the allegations in support of his claim to assume the burden of proving his claim, the court was entitled to make a finding that the allegations were not proved because the appellants failed to buttress them either with admissible documents or oral testimony.

27. The learned trial judge went to great lengths in this appeal to find out whether the allegations were supported by other evidence as they had been denied by the respondent. He did not find the allegations proved. He delivered himself thus –

> ***"I have gone through the petitioners' affidavits which have horrifying allegations.***
>
> ***The respondent has denied all those allegations. The allegations of violations could be true but the court is enjoined by law to go by the evidence on record. The petitioners' allegations ought to have been supported by further tangible evidence such as medical records, witnesses or rather oral evidence capable of being subjected to cross examination to test its veracity. The Petitioners did not provide such evidence except the averments of what transpired to them. It is most probable that in the prevailing circumstances then, the petitioners were subjected to physical beating, torture, detention without trial among other violations but the court is deaf to speculation and imaginations and must be guided by evidence of probative value. When the court is faced by a scenario where one side alleges and the rival side disputes and denies, the one alleging assumes the burden to prove the allegation. I have gone through the entire court record and there is absolutely nothing to support the allegations made by the petitioners."***

28. That answers the 1st issue and as the 2nd issue has clearly been answered, the remaining issues relate to delays; the learned trial judge correctly observed that none of the appellants proffered any explanation

for the delay of 24 years in coming to court. Whichever way one looks at it in the circumstances of this appeal, the delay spanning 24 years was inordinate. The appellants slept on their rights. We are unable to find fault in the findingsmade by the learned judge that in absence of a plausible explanation for delay, the suit amounted to abuse of the court process. On this ground also, the appeal would fail.

In our view, this appeal has no merit. We dismiss it with costs to the respondent.

Dated and delivered at Nairobi this *17th day of June 2016*

H. M. OKWENGU

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JUDGE OF APPEAL

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR