Kibuti v Attorney General (Constitutional Petition 4 of 2014)
[2025] KEELRC 2051 (KLR) (10 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 2051 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CONSTITUTIONAL PETITION 4 OF 2014

B ONGAYA, J

JULY 10, 2025

BETWEEN

MICHAEL MBOGO KIBUTI .... PETITIONER

AND

THE HON ATTORNEY GENERAL .... RESPONDENT

JUDGMENT

1. The petitioner filed the Petition on 04.09.2012 through Gitobu Imanyara & Co Advocates. The petitioner prayed for:

    a. A declaration that the petitioner's right to freedom from torture and cruel, inhuman or degrading treatment or punishment under article 27(1) and *the constitution* has been violated.

    b. A declaration that the petitioner's right not to be treated in an inhuman and degrading manner under Article 29(f) has been violated.

    c. A declaration that the petitioner's right to expeditious, efficient, lawful and procedurally fair hearing and determination of her complaint pursuant to Article 50(1) has been violated.

    d. A declaration that the petitioner's right to administrative action that is expeditious, efficient, lawfully reasonable and procedurally fair under article 47(1) has been violated.

    e. A declaration that the failure, refusal and neglect of the arresting officers to inform the applicant as soon as is reasonable practicable, in a language he understood, the reasons of his arrest amounted to or has contributed to breaches of the applicant's fundamental rights as guaranteed under Articles 27(1), 29(f), 47(1) and 50(1) as particularized above.

    f. A declaration that the petitioner is entitled to compensation for breaches of his fundamental rights as particularized above.

g. An order consequential to the above declaration in paragraph *(g)* quantifying the amount of compensation, and by whom payable.

h. Costs of this petition with interest.

i. Interest on (h) and (j) above

j. Further or other orders as the honourable court shall deem just.

2. The petition was based upon the petitioner's supporting affidavit and exhibits thereto filed together with the petition. The petitioner's case was as follows:

a. The petitioner was enlisted as a Private in the armed forces on 02.09.1977 and was discharged from the Kenya air force the wing in which he was serving in Rank III as a Senior Private on 08.02.1984.

b. On 01.08.1982 at around 0500 Hrs the petitioner was sleeping when he was woken up by some people wearing officers bunches, specifically a captain and a lieutenant whom he did not recognize.

c. They asked him to join other soldiers and proceeded in the armoury where they were ordered to arm themselves, the order having been made by people who were his superiors.

d. The petitioner remained sequestered in his room until the following day 02.08.1982 at about 1230 hours where he went to the armoury to return his weapon and found other soldiers doing the same and he surrendered and gave them his weapon.

e. On the same day, after surrendering his weapon, the petitioner was arrested alongside others and taken to Kamiti maximum prison where he stayed for a whole month.

f. During his incarceration at Kamiti Maximum Prison, he was interrogated on his alleged role in the attempted mutiny to which he denied any knowledge of.

g. The petitioner was then transferred to Naivasha for further interrogation where during the interrogation he was tortured by being left submerged in water for 7 days as a method of getting information from him to which he continuously denied involvement in the failed mutiny. He remained incarcerated in Naivasha for the next two months.

h. The petitioner was later charged with participating in the attempted mutiny and on 29.12.1982 he was arraigned in a court martial sitting at Langata barracks. Thereafter he was sentenced to a jail term of one year.

i. The petitioner appealed to the tribunal after serving 6 months and he was released.

j. It is the petitioner's case that nowhere in the Armed Forces Act cap 199 is torture, solitary confinement, submerging accused persons in water for seven days recommended as a punishment for any offence.

k. Thereafter the petitioner was discharged from the air force on 08.02.1984.

l. It is the petitioner's case that his right to protection from torture and cruel inhumane or degrading treatment or punishment under Article 25(a) was violated.

m. The petitioner's 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. That during his incarceration

at Naivasha Maximum prison he was denied contact to any other person and neither was food or water provided.

3. The Respondent filed the Replying Affidavit of Major W Kiplangat, a Commissioned Officer employed as Staff Officer One at Kenya Defence Headquarters sworn on 12.05.2025 and filed through the office of the Attorney General. It was stated and urged as follows:

   a. The petition was filed after at least 32 years since the cause of action accrued, without demonstrating the reasons for the delay.

   b. The petitioner participated in an illegal coup passively or actively by obeying illegal orders to his subordinates and by arming himself up without lawful authority against a constitutional and legitimate government authority.

   c. The petitioner was arrested and charged with the offence of mutiny contrary to section 22(1) of the armed forces act, cap 199(now repealed). He was convicted and sentenced to 1 year imprisonment and dismissed from service by court martial. His sentence was later reviewed to 6 months imprisonment.

   d. The respondent denied that the petitioner was wrongfully arrested and incarcerated as alleged.

   e. Any interrogation against the petitioner and subsequent dismissal from the military service was due to his involvement in the 1982 aborted coup and the action taken against him was within the law.

   f. The petitioner did not appeal the decision of the court martial as was provided for by section 115 of the Armed Forces Act, Cap 199 (now repealed) but only sought a review of the sentence and which was reviewed in his favour.

   g. His trial by the court martial was expeditious, fair and within the law.

   h. The petitioner is not entitled to any terminal benefits since under the armed forces (officers and servicemen's) pension regulations of 1980, service personnel dismissed for involvement in subversive activities like the petitioner did by participating in the failed coup are not entitled to service benefits.

   i. *The Constitution* of Kenya 1969 was specific on how the fundamental rights and freedoms would apply to members of the armed forces by making an exception under section 86(4).

   j. The respondent maintains that the rights claimed by the petitioner have been limited by *the constitution* and their enjoyment is not absolute.

   k. The respondent denied that the fundamental rights and freedoms of the petitioner under article 22(1), 23(1), 25(a), 27(1), 29(c) and (d), 47(d) 49(1)(a) and (d) and 50(1) of *the Constitution* of Kenya 2010 were violated as alleged.

   l. The respondent stated that if the petitioner was arrested and detained as alleged, then the same was lawfully done by the state security organs whose responsibility was to deal with the petitioner for his involvement in the failed coup of 01.08.1982.

   m. The respondent stated that it had nothing to do with the alleged tribulations, suffering that were allegedly visited upon the petitioner whilst allegedly in civil prison.

   n. The respondent denied that the petitioner was confined in isolation or exposed to adverse artificial conditions as alleged.

o. The respondent denied the petitioner's claims at paragraphs 7 to 15 of his supporting affidavit since they are not supported by any medical document to show evidence of the torture allegedly meted on him.

4. Final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows.

5. To answer the 1st issue the Court returns that the petition cannot fail on account that it was filed belatedly 32 years after the cause of action accrued. The parties appear to rely on conflicting positions in several decisions by the High Court. However the Supreme Court settled the issue in the case of Wamwere & 5 others v *Attorney General (Petition 26, 34 & 35 of 2019* (Consolidated)) [2023] KESC 3 (KLR) (27 January 2023) (Judgment) (MK Koome, CJ, PM Mwilu, CJ & P, SC Wanjala, NS Ndungu & W Ouko, SCJJ) . The Supreme Court held,

"49. With respect to the consolidated appeal, the decisions of the two superior courts largely turned on the failure by the appellants to file their claims immediately after two critical transitional moments in Kenya's recent democratization history. This being after the 2002 transition when President Moi left office or immediately after the 2010 transition to a new constitutional dispensation. The two superior courts observed that as a matter of fact many other similarly situate victims of past abuses filed their claims in court immediately after these transitional moments. This leads us to pose the question; given the nature of transitional justice claims, was it fatal for the appellants to have filed their claims in 2013?

50. It has been recognized that transitional moments can be long-drawn and there are no clear-cut dates when a transition can be said to have run its full course. Especially, taking into account the tendency for re-irruptions in the form of renewed quests for justice. This is poignantly brought out in Cath Collins, 'Post-Transitional Justice: Human Rights Trials in Chile and El Salvador', (The Pennsylvania State University Press, 2010) at pages 21 and 22 as follows:"... the persistence of the justice question into the post- transitional period, or periodic "re-irruptions" of it in the form of renewed accountability pressure, can be viewed as positive signs of democratic institutional health rather than as crises or breakdowns of transition. It is not only conceivable but logical to expect that private actors and even future democratic governments might pursue accountability more vigorously than transitional administrations ... certain dimensions of post-transition polities can be expected to particularly affect the emergence of post-transitional justice activity. One is the quality and depth of subsequent democratization, particularly progress toward rule of law. The health and vigour of civil society organization in general and its ability to access the justice system, in particular, will also be relevant... The passage of time is a factor that can have varied and sometimes counter-intuitive effects. It may seem set to eventually consign the memory of victims and the concerns of survivors to irrelevance or even oblivion, but a look at the currently observable cases of post- transitional justice change suggests that other outcomes are also possible. The passage of time can serve to make the addressing of accountability more possible, perhaps

less politically costly, even as it sometimes reduces both the personal (victim/ survivor) and institutional (social) benefits." [Emphasis added]

51. What we deduce from the above is that late or recurring pursuit for justice are a distinctive motif of the quest for justice in transitional contexts. In other words, renewed or late quest for accountability and justice after the initial burst of efforts for justice is a phenomenon that is inherent in transitions. It follows that the persistence of the appellants and other litigants to get justice after other claimants had lodged similar claims is not something that is unique to the appellants herein as it is a universal phenomenon that is evident in the quest for transitional justice and accountability.

52. The appellants claim that they did not have faith in the pre-2010 judiciary, ought to be interrogated from the overarching context of the transition from the repressive to the post-2010 era. It is important to take into account the fact that courts during the repressive era were generally notorious for their abject failure to provide protection to victims of human rights violations. Though the process of judicial reforms and making the Kenyan state human rights friendly began in 2003, this process was not concluded until the constitutional reforms in 2010. This included the process of vetting of Judges and Magistrates which was a transitional justice mechanism to make the Judiciary fit as a custodian of the rule of law, democracy and human rights. Indeed, this partly explains why the clamour for judicial reforms was part of the larger constitutional reform package."

6. The Supreme Court in the cited case further held,

" 56. In our view, there is also a public interest element in allowing victims of alleged past gross human rights violations to access courts; that is, serving justice is the most effective insurance against future repression. To us, a judicial trial serves to send strong expression of formal disapproval of gross abuse of human rights. It also functions to re-commit state institutions and persuade the general citizenry of the importance of human rights in a polity. On the other hand, failure to ensure access to justice could send the wrong signal that judicial imprimatur has been given to these historical wrongs. Such a stance will encourage not deter potential violators of rights. It would also send the signal to the public that they can be complicit in violation of rights without consequences attaching to the perpetration of such atrocities. This is informed by the reality that failure of enforcement of freedoms and rights vitiates their authority, sapping their power to deter proscribed conduct."

7. The Court is guided accordingly. Within the framework of enforcement of rights in transitional justice, the Court finds that the petitioner was entitled to file and prosecute the petition and it was not time barred. As submitted for the petitioner, the Court should not turn a blind eye but must uphold transitional justice. The Court upholds the petitioner's explanation that the repressive regime made it impossible for the victims to approach court out of fear after their experiences. Further, it was after the promulgation and adoption of the new Constitution of Kenya 2010 that doors to pursue justice opened and it made it possible for the petitioner to file the petition on 26.08.2012.

8. The 2nd issue is whether failure by the petitioner to appeal against his conviction and sentence as envisaged in section 84 (1) of the former Constitution of Kenya barred him from filling a constitutional petition alleging violation of rights as urged for the respondent.

9. As submitted for the petitioner, in Peter M. Kariuki v Attorney General [2014] KECA 713 (KLR) the Court of Appeal (Kiage, M'inoti & Mohammed JJ.A) it was held thus "In light of the above consistent decisions, we are, with respect, unable to agree with the learned judge that because the appellant had the right of appeal available to him, which he had not utilized, he was precluded from alleging that the court martial had violated his constitutional rights. The issues raised by the appellant were not issues reserved only for consideration in an appeal; they could legitimately and legally be raised and addressed in a petition for redress of violated constitutional rights, such as was before the learned judge, independent of any other remedy that the appellant had." The Court is bound accordingly.

10. The 3rd issue is whether the petitioner has established violation of rights as was alleged. Section 70(a) of the former constitution provided thus, "Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely - (a) life, liberty, security of the person and the protection of the law;" Further, section 74 (1) thereof provided thus, "No person shall be subject to torture or to inhuman or degrading punishment or other treatment."

11. The Court finds that there is nothing on record to occasion doubts in the petitioner's affidavit evidence that while held at Naivasha Maximum Prison he was locked in a cell full of water for a period of seven days; he was denied contact to any other person; the room was dark as he lost sense of time; and, he was not provided food. The Court finds that such amounted to torture and cruel, inhuman or degrading treatment or punishment. The respondent's case that it had nothing to do with the said suffering of the petitioner is found not rebut the petitioner's case that whatever he was subjected to amounted to violation of his right as found. The respondent submitted that section 86(3) of the former Constitution provided thus, "(3) In relation to a person who is a member of a disciplined forceraised otherwise than as aforesaid and lawfully present 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." However, the respondent has not shown that the manner the petitioner was subjected to torture and cruel, inhuman or degrading treatment or punishment was contained in or done under the authority of the disciplinary law of the force. The suffering is found to have been unjustified.

12. In Wamwere & 5 others v *Attorney General (Petition 26, 34 & 35 of 2019* (Consolidated)) [2023] KESC 3 (KLR) the Supreme Court held, "85.The European Court of Human Rights (ECHR) has in the Ireland v United Kingdom, judgment of January 18, 1978, Ser A, No 25 held that the intensity of the pain or suffering inflicted upon the victim is the decisive criterion in distinguishing torture from cruel, inhumane, and degrading treatment. It was that court's opinion that cruel, inhuman or degrading treatment or punishment requires a lower threshold than severe pain or suffering." And further, "86.We find that "inhuman or degrading punishment or treatment" refers to ill- treatment which does not have to be inflicted for a specific purpose. However, an intention to expose individuals to conditions which amount to or result in the ill- treatment has to exist. Exposing a person to conditions reasonably believed to constitute ill-treatment will entail responsibility for its infliction. Further, degrading treatment may involve less severe pain or suffering than torture; and will usually involve humiliation and debasement of the victim. The essential elements which constitute ill-treatment not amounting to torture would therefore be reduced to the intentional exposure to significant mental or

physical pain or suffering." Taking into account those definitions, the petitioner has established that he was violated as urged for him and the respondent's case that medical evidence to corroborate the incidents of the violation is found irredeemably remote from the content of the violation. Essentially, the Court returns that the violation amounting to torture and cruel, inhuman or degrading treatment or punishment is not necessarily a medical existence requiring medical evidence.

13. As relates to the rights of an arrested person and the right to fair trial the Court finds the unrebutted account and submissions for the petitioner to be as follows. He was arrested on 02.08.1982 at the Armory when he went to return the firearm. He was not given a reason for the arrest and was denied the right to communicate to a person that could render assistance as necessary. He was not informed about the right to remain silent. He was taken to Kamiti Maximum Prison and interrogated by officers from the Air Force about the mutiny. He failed to confess. He was taken to Naivasha Maximum Prison for further interrogation and detained incommunicado for 4 months and 27 days before being arraigned at Lang'ata Barracks on 29.12.1982. The Court finds that the respondent's case and submission that section 86(3) of the former Constitution limited the right has not been established at all.

14. The Court finds that as such, the respondent violated the petitioner's right in section 77 of the former Constitution thus, . "(1) If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

    (2) Every person who is charged with a criminal offence –

        (a) shall be presumed to be innocent until he is proved or has pleaded guilty;

        (b) shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged;

        (c) shall be given adequate time and facilities for the preparation of his defence;"

15. Further the Court finds that the petitioner's right of an arrested person per sections 72(2) and 72(3) of the former Constitution were violated. The sections provided as follows,

    (2) A person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.

    (3) A person who is arrested or detained –

        (a) for the purpose of bringing him before a court in execution of the order of a court; or

        (b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with."

16. The 4th issues is on remedies. The petitioner has established that his rights and fundamental freedoms were violated as found in the instant judgment with respect to the provisions of the former Constitution and per the equivalent constitutional provisions as provided in *the Constitution* of Kenya 2010. A declaration will issue accordingly.

17. As submitted for the petitioner an award of damages for violation of rights and freedoms is based upon exercise of judicial discretion upon reason and principle. The courts exercise a very broad, open-ended remedial discretion taking into account what is just, fair and reasonable in the circumstances of the case and as was held by the Supreme Court in the earlier cited case. In that case the Supreme Court awarded Kshs. 2, 500,000.00 having considered awards for petitioners in cases similar to the one that was before the Supreme Court.

18. It was submitted for the petitioner that in Peter Mauki Kaijenja & 9 others v Chief of the Defence Forces & another [2019] KEHC 7530 (KLR) in a case similar to violations herein, the Court awarded averagely about Kshs.5, 000,000.00 after considering the period each was detained and the torture. In that case, Mativo J (presently JA) held thus, "103. I am persuaded that the Petitioners proved to the required standard that they were physically, mentally and physiologically tortured. I am persuaded that the torture was unconstitutional and that it violated their fundamental rights and freedoms. They suffered both psychological and physical harm. No amount of money can adequately compensate such suffering. However, considering the nature of the violations of their constitutional rights, the psychological and physical suffering visited on each one of them, and considering the applicable legal principles and bearing in mind the fact that it may not be easy to quantify denial of fundamental rights and freedoms, I find that the Petitioners are entitled to compensation. In assessing the damages, I have considered the torture and the period they were each detained." The 10th petitioner in that case was awarded Kshs.4, 000,000.00 for violation of his rights and detention for a period of 4 months and 15 days. That appears closed to the instant case.

19. For the respondent it was submitted that if the Court found the petitioner's rights and freedoms had been violated, the respondent invoked the precedent set by the Judges of Appeal in Daniel Kibet Mutai & 9 others v Attorney General [2019] KECA 125 (KLR) thus, "Much as we do not doubt that the appellants suffered the alleged treatment, the appellants had the obligation to avail evidence in proving the extent of the injury they suffered from the physical and mental torture that each of them experienced. This was necessary for purposes of helping the court in assessing the damages that should be awarded. In the absence of such evidence the Court could only award a nominal amount, and we would agree with the learned Judge that a global amount of Kshs.2 million would have sufficed as damages to each appellant for violation of their fundamental rights in regard to human dignity, protection against torture, cruel, inhuman and or degrading punishment during their arrest and pre-arraignment detention following the attempted coup."

20. The Court finds that in the instant case the petitioner has shown that he was detained for 4 months and 27 days before being arraigned at Lang'ata Barracks on 29.12.1982. The suffering in the detention after arrest and prior to arraignment has been shown. The extent to which he was denied the rights of an arrested person is as well shown. He is awarded Kshs. 4,000,000.00 for the violation of the cited provisions of the Bill of Rights as found in this judgment.

21. The petitioner has succeeded and is awarded costs of the petition.

    In conclusion judgment is hereby entered for the petitioner against the respondent for:

    1. The declaration that the petitioner has established that his rights and fundamental freedoms in the Bill of Rights were violated as found in the instant judgment with respect to the provisions of the former Constitution and per the equivalent constitutional provisions as provided in *the Constitution* of Kenya 2010.

    2. The respondent to pay the petitioner Kshs. 4,000,000.00 being damages for the violation of the rights and fundamental freedoms in the Bill of Rights violated as found in the instant judgment

with respect to the provisions of the former Constitution and per the equivalent constitutional provisions as provided in *the Constitution* of Kenya 2010.

3. The damages in order 2 above be paid by 01.10.2025 failing interest to run thereon at Court rates from the date of this judgment until full payment.

4. The respondent to pay the petitioner's costs of the petition.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 10TH JULY, 2025.

BYRAM ONGAYA

PRINCIPAL JUDGE