



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**PETITION NO. 62 OF 2018**

*(Before Hon. Justice Mathews N. Nduma)*

**CHARLES OTOK OLIECH.....PETITIONER**

**VERSUS**

**ATTORNEY GENERAL.....RESPONDENT**

**JUDGMENT**

1. The petition was filed on 11<sup>th</sup> December 2015. The cause of action arose from the attempted coup of 1982. The petition is brought pursuant to Article 21, 22 and 23 of the constitution of Kenya 2010.
2. The petitioner alleges violation of Article 27 and 28 of the constitution of Kenya 2010 and the petitioner seeks the following reliefs *inter alia*:
  - (i) That this honourable court declares that the petitioner's freedom from discrimination and equality as enshrined in article 27 of the constitution and the right to dignity as provided under Article 28 has been infringed and/or violated by the /respondent. The petitioner prays the court to declare that the petitioner was unlawfully terminated as a service sergeant of the Kenya Armed forces by an alleged entity known as 82 Air force which was non -existent in law then.
3. The petition is supported by the Petitioner's Affidavit sworn on 9<sup>th</sup> December 2015.
4. The Petitioner deposes that he was employed by the Kenya Air force on 30<sup>th</sup> June 1978. That he successfully underwent six months basic military training at Armed Forces Training Academy in Lanet Nakuru and was posted to Nanyuki Air force base as an education instructor running the education center within the air force base. This was informed by the fact that the petitioner was a trained teacher and was employed by Teachers Service Commission (TSC) for a period of seven (7) years prior to his recruitment by the military.
5. That on 1<sup>st</sup> August 1982, he was woken up by sounds of gun fire and upon peeping through the window he saw armed soldiers in uniform running up and about shouting for everybody to come out. That himself and others including senior non-commissioned officers were ordered to go to armory and await further instructions. That they were further ordered to go to their mess and await further instructions.
6. That while at the mess they learnt junior officers within the air force rank had staged a coup and were attempting to overthrow the government of the day.
7. That they stayed in the mess the whole day and at 4 p.m., they realized that they had been surrounded by the Army and were ordered to kneel down and move on their knees for a distance of about one (1) kilometer on tarmac with heavy artillery and guns directed at them.
8. They were directed to the Air Force Apron and kept there the whole night despite heavy down pour with no food and soaked clothes.
9. That on 2<sup>nd</sup> August 1982, they were separated according to ranks and detained in the cold at the supply savadron for two days after which they were taken to Nanyuki prison.
10. At the Nanyuki prison they were ordered to move on their knees on sharp pebble stones and hit with gumboots and other crude weapons all over the body as they were moved to the prison cell. At the prison cells, they were about 15 of them and were kept for 15 days in cold cells. They were fed on salted water; no bathing; used bucket toilet and were subjected to various physical and mental torture by the Army

Soldiers. They were transferred to Nairobi, in trucks lying flat on their belly and taken to Eastleigh Air force base. They were physically assaulted and kept in the guard room until 3.00 a.m. when they were taken to Kamiti medium prison. The petitioner was kept at Kamiti for four months, mainly indoors with 10 minutes outside daily. The petitioner was later transferred to Naivasha Maximum prison. At Naivasha maximum prison, the petitioner was ordered to remove his clothes and was hurled in a dark water logged knee deep cell. The water had urine and defecation from others who were there before and was infested with mosquitoes. No food or water was provided for days and they brought every morning ice cold water and poured over the petitioner. The petitioner was kept incommunicado for three days and a warder asked him if he was ready to go for interrogation. Petitioner was taken to a room with blood all over. He was kept half naked and frog matched while on his knees and hands on the ears.

11. The petitioner was interrogated on the attempted coup and asked if he had any dealing with Raila Odinga and Jaramogi Oginga Odinga. Petitioner denied any knowledge of the two. Petitioner was thoroughly tortured physically by over six people led by Mr. Opiyo. The petitioner suffered unbearable pain in an attempt to extract a non-existent confession.

12. Petitioner was locked up in the cold-room for three days. Petitioner was cold, weak, weary and hungry and decided to lie to the interrogators on everything they asked him to save himself. After that the petitioner was taken to a normal cell free from water.

13. That several colleagues did not survive the experience. The petitioner and others were kept in segregation block and eventually were served with detention orders signed by then Minister of State Mr. Justus Ole Tipis. The petitioner and others were ordered to acknowledge receipt of the order with guns aimed at their heads. The petitioner and others were then transferred to the punishment block where they were confined daily with only 10 minutes out of the cell to bathe and wash clothes. Petitioner was exposed to high voltage lights which had a devastating effect on their eye sight.

14. The petitioner was detained until 1<sup>st</sup> June 1983 when an officer came and called out 22 names and they were all taken to an office where they found Army Special Branch Officers who informed them that they had been pardoned and given clemency by the president. The petitioner was given transport requisition of OTC NO. 723573 to transport the petitioner to his home in Nyakach. This was produced as exhibit 2.

15. That on 16<sup>th</sup> August 1982, petitioner received a certificate of dismissal from the disciplined forces stating that his services were no longer required signed by commander 82 Air force. This was produced as exhibit '003'.

16. The petitioner stated that after release from prison he was called to DOD to collect his discharge certificate meaning he has two such certificates one of dismissal and another of discharge.

17. The petitioner denied having prior knowledge and/or participated in the attempted coup. The petitioner was not subjected to any hearing and/or court martial. That the petitioner has suffered stigma and was black listed. That he has suffered a permanent scar on his life. That the petitioner lost any legitimate expectation of a decent social life and or work. The petitioner claims lost monthly salary and all allowances he earned as a sergeant. That petitioner earned a basic salary of Kshs 13,140 then and was to serve until the year 2005. The petitioner claims general, aggravated and special damages as prayed.

18. The respondent filed a replying affidavit to the petition sworn to by Lieutenant Colonel Joseph Karbuali Koseu on 27<sup>th</sup> June 2010. The officer denies generally the allegations made by the petitioner in paragraph 7 to 11 of the petition. The officer deposes further that the petitioner was discharged from service without benefits due to his involvement in the attempted coup of 1982. That the armed Forces relied on *Section 176(g) of the Armed forces Act Cap 199 (now repealed)*.

19. The officer denies that the petitioner's fundamental human rights to dignity were violated. Officer states that the petitioner was not subjected to torture nor were his rights to a fair trial and fair administrative action violated.

20. Officer states that the fact that the petitioner was not court martialed is not evidence of his innocence. Officer says Armed Forces had the option to summarily discharge a soldier from service for services no longer required under *Section 176(g) of the repealed Armed Force Act*.

21. That the petitioner was put in jails that were available in the country and all offenders were kept there.

22. That the petitioner speculates that he would have been promoted but that was not a guarantee.

23. The officer states that the petitioner participated in the coup. He armed himself from the armory and does not disclose who ordered him to go there.

24. That the constitution of Kenya 1969 is applicable to this case which curtailed rights and fundamental freedoms of soldiers under *Section 86(4)*.

25. That the petition is time barred having been field after 33 years yet the petitioner was released in 1983.

26. That the petition be dismissed with cost.

### **Determination**

27. The issues for determination are as follows:

(a) Whether the petition is time barred.

(b) Whether the petition discloses violation of the relevant provisions of constitution of Kenya 1969 that was in place at the time the cause of action arose.

(c) Whether the petitioner is entitled to the reliefs sought.

**Issue (i)**

28. This court has determined the matter of limitation of action in respect of the officers who faced violation of their human rights and especially torture and detention by the government of the day following the failed coup in 1982.

29. The court adopts the reasoning in **Joan Akinyi Kabesallah and others vs Attorney General, petition No. 417 of 2014**, as follows:

*“Nonetheless I take into account the view of the courts with regard to limitation in respect of claims for enforcement of fundamental rights in a line of cases such as Dominic Arony Amolo vs Attorney General (Nairobi HCC Misc. Civil case No. 1184 of 2003 (2010) eKLR, Otieno Mark Onyango vs Attorney General and another Nairobi HCC 845 of 2003 (unreported) courts have consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights.*

30. I followed this decision in **Samuel Chege Gitaru and 282 others vs the Attorney General citing decision of Peter M. Kariuki vs Attorney General. Court of Appeal Civil Appeal NO. 79 of 2012** which case arose from the 1982 Attempted coup and the decision of Okwengu J. in **Harun Thuku Wekesa vs Attorney General Misc. Application No. 1411 cited by Lenaola J. in HCC Petition No. 587 of 2012, General Juma Gicholi and 9 others vs the Attorney General**. These cited cases were filed not far apart from the present one which was filed in 2015. The petitioners faced different hardships depending on where they came from and were literally restricted by the then Authorities from movement and/or employment without authority.

31. The court shall not depart from these authorities regarding limitation on matters of transitional justice, which ghosts are still being dispelled to date.

32. I find therefore that this suit is not time barred.

**Issue (ii)**

33. The petitioner in the petition and the supporting affidavit vividly narrated the inhuman and degrading violations he suffered at the hands of his jailers. The beatings; torture; detention without trial; denial of food and water for prolonged periods; being kept in filthy water logged cells for days; being subjected to walking on knees on tarmac for long distances; being subjected to prolonged periods to very bright light affecting his eye sight and also being kept incommunicado without any access to family of legal representative among others.

34. All these facts have not been responded to at all by the respondent. The respondent made generalized, bare denial in the replying affidavit.

35. The claimant has effectively proved the specific violation of his human dignity; torture; denial of a fair trial; unlawful dismissal on a balance of probabilities.

36. This petition was erroneously grounded on the current constitution but that in the court’s view does not derogate from the core cause of action which was gross violation of human rights and fundamental freedoms protected under *Sections 71, 72, 73, 74 and 77 of the constitution of Kenya 1969*.(now repealed)

37. In view of Article 159 of the present constitution of Kenya 2010, which demands that the court leans more in favour of substantive justice as opposed to technicalities as follows:

*“159(2) in exercising judicial authority, the courts and tribunals shall be guided by the following principles:*

*“(d) Justice shall be administered without undue regard to procedural technicalities”*

38. It is the court’s considered finding that this constitutional command protects a litigant who brings out his/her case clearly in the body of a petition and supporting affidavit without referring to the specific provision under which the right to human dignity not to be tortured; to be given fair hearing and fair administration action not to be detained without trial is provided.

39. That the petitioner has proved that he was tortured; detained without trial; treated in inhuman and degrading manner and unlawfully and unfairly dismissed from service is patently clear.

40. Accordingly, I find that the petition has merit and is allowed.

**Issue (iii)**

41. The next issue for determination is what remedies the petitioner is entitled to.

42. In **Peter M. Kariuki vs Attorney General, Civil Appeal No. 79 of 2012**, the court of Appeal stated:

*“It bears repeating that assessment of award of damages is a matter for the discretion of the trial judge which must be exercised judicially and with regard to the general conditions prevailing in the County and to prior relevant decisions”.*

43. In the case of **Major retired Ezra Imanyara Labito vs Attorney General and 4 others**, the court awarded the officer general damages in the sum of Kshs. 7 Million in November 2013.

44. In **Peter Kariuki case** supra, which arose from the same cause of action as this one, the court awarded the petitioner general damages in the sum of Kshs. 15 Million and Kshs. 22,965,460 salary arrears after quashing his conviction by court martial.

45. In **Samuel Chege Gitau and 283 others**, the court awarded the claimants damages equivalent to the present salary of the soldiers in their various ranks calculated from the date of their last payment to the date they were due to retire. In addition the court awarded the claimants aggravated damages in the sum of Kshs. 100,000 each.

46. The petitioner in this case was in the rank of senior sergeant and was a training officer at the Air force base in Nanyuki. The petitioner earned Kshs. 13,140 a month at the time of discharge and was due to retire in the year 2005. The petitioner prays he be paid salary plus all increments he would have received to date of retirement. In the alternative, the petitioner prays for general, special and aggregated damages arising from the violations of human rights and fundamental freedoms he suffered at the hands of his employer.

47. Considering all the circumstances of the case and previous awards of courts in similar matters, the court finds it prudent and just to make a global award of general damages in the sum of Kshs. Six Million (6,000,000) to the petitioner.

48. In the final analysis judgment is entered in favour of the petitioner against the respondent as follows:

(a) The court declares that the petitioner’s human right and fundamental freedoms protected under *Sections 72(1), 3 74(1), 77(1) and 2 of the constitution of Kenya 1969 (now repealed)* were violated by the Armed forces employer of the respondent.

(b) The petitioner is awarded general damages in the sum of Kshs. Six Million (6,000,000) for the violations of his human rights and violation of fundamental freedoms which violations included torture; detention without trial; denial of food and water for prolonged periods; degrading and inhuman treatment by being kept in filthy water logged cells and being beaten severely to extract confessions from him; being made to walk on his knees on tarmac and grounds with stone pebbles for long distances and being kept incommunicado and denied access to family and legal assistance amongst other violations proved by the petitioner in this case.

(c) The petitioner’s rank, benefits, honours and decorations are hereby restored.

(d) The petitioner is also to be paid the costs of the suit.

**Judgment Dated, Signed and delivered this 9<sup>th</sup> day of October, 2019**

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Olel for Petitioner

Mr. Bagadi holding brief for M/S Aliongo for the A.G

Chrispo – Court Clerk