



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 28 OF 2013

(Originally Nairobi High Court Petition No. 239 of 2011)

IN THE MATTER OF ARTICLES 27(4), 28, 29, 39(1), 49(1)(a) AND (f), 50(1) and 51(1) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS SECURED AND GUARANTEED UNDER ARTICLES 27(4), 28,29,39(1),49(1)(a) and (f), 50(1) AND 51(1) OF THE CONSTITUTION OF KENYA 2010

BETWEEN

FRANCIS MARANGA MATU.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

1. Francis Maranga Matu (Petitioner) was enlisted in the Kenya Air Force in August 1969 and was commissioned as a Second Lieutenant in 1970 service number 027071 (changed to 20772). In 1978 the Petitioner rose to the rank of Major.
2. On 8 November 2011, the Petitioner commenced legal proceedings against the Attorney General (Respondent) in the High Court alleging violation of his constitutional/human rights (torture, cruel, inhuman and degrading treatment).
3. On 16 January 2013, Majanja J directed that the Petition be transferred to this Court because of jurisdictional concerns (that it involved/was anchored on an employer/employee relationship).
4. When the Petition was placed before the Court on 26 November 2014, the Respondent indicated that the Petition had not been served upon it and the Court directed the Petitioner to serve it within 3 days, and further that the Respondent file a response within 21 days of service.
5. The Response was not filed and on 7 February 2017, the Court gave the Respondent another 21 days to file a Response with an order that the period would not be extended further. The Respondent did not comply.
6. When the Petition came up for hearing on 23 January 2018, the Court directed the Respondent to file and serve a Response before 26 January 2018. Again the Respondent did not comply.
7. The Petition next came up for hearing on 17 April 2018 and after the Court satisfied itself that a hearing notice had been served, allowed the hearing to proceed. The Respondent was not in attendance.
8. The Court notes that after the Petitioner had concluded his examination in chief, an advocate who had been sitting in Court indicated that he was a state counsel with the Ministry of Defence and applied that he be granted leave to cross examine the Petitioner.
9. The Court directed the advocate to file a *Notice of Appointment of Advocate* before he could cross-examine the Petitioner and his witness and further proceedings were adjourned to 7 May 2018.

10. A Memorandum of Appearance was filed on 4 May 2018 and when proceedings resumed on 7 May 2018, the Respondent participated by cross examining the Petitioner and his first witness.
11. The Respondent also cross examined the Petitioner's second witness when hearing resumed on 20 June 2018.
12. An attempt by the Respondent on the same day to secure an adjournment and leave to file a Response was declined by the Court and parties were directed to file and exchange submissions.
13. The Petitioner filed his submissions on 9 July 2018 while the Respondent filed its submissions on 19 July 2018 (it is regrettable that the Respondent referred to authorities in the submissions without filing them in Court considering that in more than one instance the citations were not complete or correct).

Petitioner's case

14. It is in the public domain that there was a coup attempt on 1 August 1982.
15. On the circumstances surrounding the events of the coup, the Petitioner's case was that on 31 July 1982 he travelled to Nyeri to attend a wedding of a brother in law. At the time he was serving as a Staff Officer in the Department of Logistics at Kenya Air Force Headquarters.
16. Upon hearing the announcement of the coup, the Petitioner stated that he decided to travel to Nairobi and was advised after making inquiries to report to Kiambu Police Station where he found other military officers. The next day, the Petitioner and the other officers were escorted to Kenya Air Force headquarters and placed under arrest to wait for questioning by a Board of Officers.
17. After questioning, the Petitioner was taken to Naivasha Maximum Prison and detained in solitary confinement in cell number 13 G Block where he was stripped naked.
18. In the cell, which according to the Petitioner remained his home until 7 February 1983, there were no beddings and the lights were on throughout the day and night. He was allowed only 15 minutes sunlight every day. He stated that the food he was served was rotten.
19. The Petitioner also stated that he was not allowed to communicate with his family and was only interrogated for 15 minutes during the full stay in the prison.
20. The Petitioner also testified that on 7 February 1983 some military officers came for him and took him to Kahawa barracks where he was informed that his services were no longer required.
21. The Petitioner informed the Court that at that he was 36 years old at the time of separation and that the retirement age for an officer in his rank was 44 years.
22. The Petitioner contended that the termination of his service was without due process and that his detention without trial was illegal. He contended that the treatment meted on him was against his human dignity and sought damages.

Respondent's case

23. Although the Respondent did not lead any evidence, its case can be gleaned from the cross examination and submissions.
24. And the case was that the Constitution of Kenya 2010 could not apply to the cause of action advanced by the Petitioner; the Petition was filed about 30 years after the Petitioner's exit from service which amounted to inordinate delay; that the military was not involved in any torture if at all of the Petitioner and that the Petitioner had not proved he was detained at Naivasha Maximum Prison.
25. The Court has given due consideration to the Petition, the evidence on record and the submissions and condensed the Issues for determination as
 - (i) *whether the Constitution 2010 applies to the dispute*
 - (ii) *whether the Petition should be rejected for inordinate delay/limitation*
 - (iii) *whether the Petitioner has demonstrated violation of his rights and*
 - (iv) *appropriate remedies/orders.*

Is Constitution 2010 applicable?

26. From the submissions, it is apparent that the Petitioner has relied wholly on the Constitution of Kenya 2010 while the advanced cause(s) of action on violation of constitutional rights accrued in 1982/1983.
27. In addressing the question of *retroactivity* or applicability of the Constitution of Kenya, 2010, therefore the first port of call for this Court must be the decision of the Supreme Court in *Samuel Kamau Macharia and Another vs Kenya Commercial Bank Ltd & 2 Ors, (2012)*

eKLR when it rendered itself thus:

At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of the Constitution. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the Court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately occurred before the commencement of the Constitution.

28. The Petitioner in the instant case has alleged torture, cruel and inhuman treatment which were prohibited by section 74 of the retired Constitution. The core content of that right is replicated in Article 29 of the Constitution of Kenya, 2010.

29. The Petitioner also alleged *detention without trial* which was prohibited by section 72 of the retired Constitution.

30. The decision of the High Court in *Margaret Wanjiru Ndirangu & 4 others v Attorney General* (2015) eKLR is also instructive.

31. In the considered view of this Court, this ground of challenge to the Petition has no merit and is also moot as the rights alleged to have been violated had constitutional grounding as inherent and inalienable rights under the repealed Constitution as well as under the Constitution of Kenya, 2010.

Was there inordinate delay/limitation

32. The Respondent in further resisting the Petition contended that instituting legal action after more than 30 years amounted to inordinate delay and was an afterthought and that no explanation had been given for the delay.

33. The Respondent drew the attention of the Court to *Peter Ngare Kagume & 7 Ors v Attorney General* (2009) eKLR, *Abraham Kaisha Kanzika alias Moses Savala Keya t/a Kapco Machinery Services and Milano Investments Ltd v Governor Central Bank of Kenya & 2 Ors*, Petition No. 180 of 2011, *James Kanyiti v Attorney General & Ar* to submit that the Court should reject the Petition on account of inordinate delay.

34. Under cross examination, the Petitioner stated that he could not have instituted legal proceedings any earlier because of the then prevailing political environment.

35. It is not lost to this Court and it is in the public domain that a plethora of Petitions by persons who served in the Armed Forces at the time of the coup in 1982 were instituted in several Courts spread over the country after 2010 (*David Gitau Njau v Attorney General* (2013) eKLR was filed in 2012 was cited by the Petitioner and the same question of delay was raised).

36. The *David Gitau Njau* Court was confronted by the same authorities relied on by the Respondent herein and at paragraph 43 it stated

To my mind, I do not know any law or a particular provision of the **Repealed Constitution** that provided that a claim based on fundamental rights and freedoms has a limitation period within which the claims ought to be filed. A claim made under the Constitution is neither a claim in tort nor contract that would necessitate the application of the **Limitation of Actions Act, Cap 22 Laws of Kenya**. Further, a casual reading of the rules contained under the Legal Notice No. 133 of 2001 (Constitution of Kenya (Protection of Fundamental rights and Freedoms of the individual) Practice and Procedure Rules, 2001 would show that they do not place any limitations on the citizens' rights to institute a suit for the redress of violation of fundamental rights and freedoms under **Section 84** of the **Repealed Constitution**. I therefore agree with the reasoning of Hayanga J while determining a preliminary issue in *Dominic Arony Amolo (supra)* that.....

37. The *David Gitau Njau* Court declined to be persuaded by the *Kagume* decision.

38. This Court would endorse the conclusion in the *David Gitau Njau* judgment in respect to inordinate delay preposition and hold find that this Petition ought not to be struck out on the basis of inordinate delay.

Violation of fundamental rights and freedoms

49. Section 74 (1) of the Repealed Constitution provided as follows

No person shall be subject to torture or to inhuman or degrading punishment or other treatment.

39. The Petitioner's testimony that he was put in a cell with lights on throughout, that there was no trial during the duration of detention of about 8 months, he was stripped naked, and that there were no beddings in the cell was not rebutted.

40. In the view of the Court, the actions testified to by the Petitioner would amount to torture and inhuman treatment and the Court so finds.

41. The Court also finds that holding the Petitioner in custody without being charged in a competent Court amounted to a violation of the right to personal liberty as was provided in section 72 of the repealed Constitution (see *Albanus Mwasia Mutua v Republic Criminal Appeal No. 120 of 2004*).

42. All in all the Court finds that the facts, circumstances and law implicated in this Petition mirror those in the case of *David Gitau Njau*.

Appropriate remedies/Orders

43. The Petitioner sought various declarations and damages and all the declarations made reference to Articles of the Constitution of Kenya, 2010.

44. The primary rights and freedoms upon which the Court has determined this Petition were provided for in the retired Constitution but have been retained in the Constitution of Kenya, 2010 albeit with variations in language leaving the core content of the rights.

45. In consideration of the above, the Court is of the view that in lieu of issuing the verbose declarations sought under the Constitution of Kenya, 2010, it should and does issue a declaration that the Respondent violated the Petitioner's right not to be subjected to torture and inhuman treatment and right to personal liberty in violation of sections 74 and 72 of the retired Constitution.

46. And for the violations, the Court awards the Petitioner general damages of Kshs 3,000,000/- (Kenya Shillings Three Million only).

47. Petitioner is also awarded costs and interest from date of judgment.

Delivered, dated and signed in Nairobi on this 22 day of October 2018.

Radido Stephen

Judge

Appearances

For Petitioner Mr. Wawire instructed by Wamae & Allen, Advocates

For Respondent Ms. Ayuma/Mr. Tuitoek, State Counsels, Office of the Attorney General

Court Assistant Lindsey