



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURT

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 429 OF 2012

BETWEEN

**RICHARD WASILWA WAFULA
PETITIONER**

AND

THE COMMISSIONER OF POLICE 1ST RESPONDENT

THE MINISTER FOR JUSTICE,

NATIONAL COHESION

AND CONSTITUTIONAL AFFAIRS 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

Petitioner's Case

1. The petitioner filed the petition on 24th September 2012 supported by his own affidavit sworn on 18th September 2012. He also filed a witness statement which he adopted during the hearing. He alleges that his constitutional rights were violated following his arrest and detention in police custody.
2. The petitioner testified that on 5th February 1995 he was arrested in Kibabii. He was accused of being a member of February Eighteen Resistance Army ('*FERA*'), an offshoot of February Eighteen Movement ('*FEM*'), a clandestine and subversive group. At about 1.00 am., anti-stock theft, administration and regular police raided his home claiming that they were looking for arms. They cut the fence in order to gain entry and destroyed everything in sight. They also took Kshs 4,000/= which was school fees for one of his children. The officers who arrested the petitioner told his wife that they were taking him for a stroll. He was handcuffed and taken to Sirisia till morning. At Sirisia, he met officers from the Special Branch and Criminal Investigations Department who transferred him to Kimilili Police Station then to Webuye Police Station. The following day he was taken to Kakamega then ferried to Naivasha at night. At Naivasha, he met the 'disciplinary

committee' and told to decipher FERA.

3. The petitioner states that prior to his arraignment in court, he was held in police custody incommunicado for about a month during which period he was tortured. He was stripped and forced to walk naked in the prison compound at night and beaten viciously. He was denied food for three days. He states that he was hit hard when he resisted exposure of his private parts. He avers that he was put in a cell full of mosquitoes and punished to suffer solitude and stress without due process.
4. Later on the petitioner was blindfolded and thrown into a truck and brought to Nairobi. He was given some documents to sign at the CID headquarters but he declined. He was then moved to Nyati House from the CID headquarters. At around 3.00 pm he was handed over to regular police who arraigned him in court on 21st February 1995. He was charged at the Nairobi Chief Magistrates Court for the offence of being a member of an unlawful society contrary to **section 6 of the Societies Act (Chapter 108 of the Laws of Kenya)** in **Nairobi Criminal Case No. 794 of 1995**. He avers that he was moved to Kamiti Maximum Prison when his advocate made an application to the court for him to be given medical attention due to his deteriorating health. On his second appearance in court on 2nd March 1995, he was released on a bond of Kshs 100,000/= with two sureties of the same amount. His freedom was however short lived as he was arrested immediately and taken to Kasarani Police Station where he was detained for three days without food.
5. The petitioner was then moved to Kakamega where he was charged with murder of 13 people in Machakha and Bungoma. He was arraigned at the Kakamega Senior Principals Magistrates Court for committal proceedings, **Committal Proceeding No. 13 of 1995**. He was held in Kodiaga Prison. His health condition continued to deteriorate. He was released on 7th September 1995 after the prosecution withdrew the murder charge under **section 233(2) of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**.

The Respondents' Case

6. The respondents only filed grounds of opposition dated 26th April, 2013 terming the petition as misconceived, incompetent and bad in law. They contend that the petitioner's claim was time barred under the express provisions of **section 3 of the Public Authorities Limitation Act (Chapter 39 of the Laws of Kenya)** which requires that claims against public authorities be brought within a year of the acts complained of. They further contend that the petitioner has not identified the perpetrators of the alleged acts complained of and as such the petition should be dismissed.

Determination

7. The petitioner has grounded his case on the provisions of the Constitution which was not in force in 1995 when the events giving rise to the petition occurred. The Constitution is not retrospective and as such this matter must be resolved using the equivalent provisions of the former Constitution hence the reference to Constitution in this judgment is reference to the former Constitution
8. The issue of limitation of time in claims for enforcement and protection of constitutional rights has been dealt with in several decisions in which the Courts held the provisions of the **Public Authorities Limitation Act** cannot defeat the right to seek relief for constitutional violations. However, the grant of relief would be defeated by inordinate delay and laches particularly where the rights of the respondent are prejudiced (See **James Kanyिता Nderitu v Attorney General and Another, Nairobi Petition No. 180 of 2011 (Unreported)**, **Peter Kagume & others v Attorney General Petition No. 128 of 2006 (Unreported)** and **Durity v Attorney General (2002) UKPC 20, Wachira Waheire v Attorney General Nairobi HC Misc. Appl. No. 1184 of 2003 (2010) eKLR**). In this case the respondent did not raise delay or laches expressly by providing a factual basis to enable the court investigate whether the respondents would be prejudiced. Issues of

limitation, laches or undue delay must be pleaded (*Town Council of Awendo v Nelson Oduor Onyango and Others KSM CA Civil Appeal No. 161 of 2010 [2013]eKLR*). I therefore find that the petitioner's claim is not defeated for this reason.

9. The other issue raised by the respondents is that the petitioner has not identified the perpetrators of the acts complained of by name. I take judicial notice that members of the public are not privy to such information. It is unreasonable to expect the petitioner to know the names the officers involved given the situation he found himself in. In this case though, the respondents have not denied the facts pleaded by the petitioner which show that State agents perpetrated the violations. The State cannot deny involvement when the whole chain of events culminated in the petitioner being brought before a court of law.
10. The averments of facts set out by the petitioner constitute evidence on oath and the same have not been controverted by the respondent. In the circumstances, the court takes the position that the facts are as presented and admits them as the truth (See *Harun Thungu Wakaba & Others v Attorney General, (2010) eKLR, Rumba Kinuthia and Others v The Attorney General Nairobi HCCC No. 1408 of 2004 (Unreported)* and the *Wachira Waheire case (Supra)*). The duty of the court in these circumstances is to assess the facts and decide whether or not they disclose a violation of the petitioner's fundamental rights and freedoms.
11. The petition, depositions and documents are not the model of good pleading and presentation of evidence. The petition does not state the precise date on which he was first charged in court. The petitioner was arrested on 5th February 1995 and was not charged until 21st February 1995 with an offence that did not carry death penalty. He ought to have been charged in court within 24 hours of his arrest as was provided for under **section 72(3)** of the Constitution. The respondent has not furnished any explanation why the petitioner was held beyond the prescribed time. I therefore find and hold that the petitioner's right under **section 72(3)** of the Constitution was violated when he was detained from 5th February 1995 to 25th March 1995 in various police stations and at Nyati House.
12. The petitioner alleges that while in the respondent's custody, he was subjected to mental and physical torture and inhuman and degrading treatment. He petitioner narrated how he was subjected to beatings and other conditions of treatment in police custody. I find and hold that the acts the petitioner was subjected to between the periods of 5th February 1995 to 21st February 1995 amounted to cruel and inhuman treatment contrary to **section 74(1)** of the Constitution.
13. As a result of the violations, the petitioner testified that he suffered injuries. He produced a medical report dated 1st May 2013 prepared by Dr. Peter W. Marumbu. Dr Marumbu examined the petitioner immediately after his discharge from prison. He confirmed that the petitioner suffered amoebic diarrhea, allergic skin rash and bilateral conjunctivitis to which he healed and lack of libido which had not recovered by the time of preparation of the medical report. In his testimony before the court, the petitioner informed the court that his ordeal affected his eyesight and hearing. During the proceedings, I noted that he was hard of hearing. He also stated that his libido has not recovered.
14. I find that the petitioner is entitled to damages for the pain and suffering he was subjected to. Although the petitioner did call in aid authorities to assist the court to assess damages for similar injuries, I think an award of Kshs. 1,500,000.00 would be appropriate in the circumstances based on *Harun Thungu Wakaba v Attorney General (Supra)* and *Benedict Munene Kariuki and 14 Others v Attorney General, Nairobi HC Petition No. 722 of 2009 [2011]eKLR*. Such an award is but recognition of the suffering he underwent.

Disposition

15. As a result of my findings I make the following orders:

- a. **I hereby declare that the fundamental rights and freedoms of the petitioner guaranteed under sections 72(3) and 79(1) of the former Constitution were violated when he was arrested, detained in police custody and subjected to cruel and inhuman treatment in 1995 by the 1st respondents agents.**
- b. **The petitioner is awarded a sum of Kshs 1,500,000/= as general damages**
- c. **Interest on (b) above shall accrue at court rates from the date of this judgment.**
- d. **The respondents shall bear the costs of this petition.**

DATED and DELIVERED at NAIROBI this 14th April 2014.

D.S. MAJANJA

JUDGE

Dr Khaminwa instructed by Khaminwa and Khaminwa Advocates for the petitioner.

Mr Motende, Litigation Counsel, instructed by the State Law Office for the respondents.