



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL PETITION NO. 1 OF 2018

GEOFFREY KIBET KEMOI.....PETITIONER

-VERSUS-

STATE.....1ST RESPONDENT

ATTORNEY GENERAL2ND RESPONDENT

COMMISSIONER GENERAL OF PRISONS3RD RESPONDENT

JUDGMENT

INTRODUCTION

1. The petitioner filed this petition dated 19th January 2018 supported by his affidavit sworn on even date. The petition was amended on 6th August 2018. The amended petition was supported by the annexed affidavit sworn by the applicant on an even date. A further amendment to the petition was made on 15th January 2019 supported by applicant's affidavit sworn on the even date.

2. No reply was filed by the respondent. The petition was canvassed by way of written submissions. Both parties filed written submissions.

THE PETITIONER'S CASE

3. The petitioner averred that while in the custody of the 3rd respondent, the 3rd respondent breached his fundamental rights and freedoms guaranteed by the constitution and as a result of the alleged violations, the petitioner seeks the following reliefs: -

a. A declaration and finding that petitioner was entitled to fundamental rights and freedom including protection from any form of torture, harassment and was also entitled to be guaranteed safety of life and health.

b. A declaration on that the 3rd respondent failed in its duty to guarantee the petitioner his rights and fundamental freedom as above claimed.

c. A declaration that the petitioner is entitled to damages arising from torture in custody as above claimed.

d. An order of compensation in terms of exemplary and/or aggravated damages arising from the above.

e. Costs of the petition be borne by the respondents.

4. The petitioner averred that while in custody, since he was arrested in the year 2004, he sustained serious injuries that were occasioned by the 3rd respondent. He averred that he was physically beaten and confined to a solitary cold cell for hours by the 3rd respondent's officer, **Cheruiyot** and as a result, he suffered serious injuries occasioning difficulties in eating and was disoriented for a period of over 5 days.

5. The petitioner averred that he informed the court of his ailing health on 28th January 2005 and the court issued an order for him to be taken to hospital but the 3rd respondent's officer declined to heed the orders and he subsequently made a second request to the court on 28th January 2005 to be taken to hospital. He stated that orders were not adhered to and the petitioner sought the court intervention for the 3rd time but he was not taken to the hospital until the case was heard and determined.

6. The petitioner further stated that on 15th February 2010, he informed the court the torture meted on him while in custody and the court ordered an inquiry to be conducted but on 16th February 2010, 3rd respondent's officer did not give a clear picture of what had transpired.

7. The petitioner contends that as a consequence of the violent torture by the officer of the 3rd respondent and the failure to take him to hospital, the petitioner became lame and confined to a wheelchair.

8. In his supplementary affidavit dated 30th September 2021, he averred that the replying affidavits by the respondents contains mere denials. He asserts that the 3rd respondent was aware of the court orders that directed that he be taken to hospital more specifically the court orders of 28th January 2005, and 11th February 2005 but the 3rd respondent's officials failed to adhere to the orders; and further the 3rd respondent has failed to provide evidence to show it acted in accordance with the orders.

9. He further stated the various medical reports adduced in court bare evidence that he sustained serious injuries that culminated in his disability while in custody and the respondent has not adduced any evidence to the contrary.

10. He averred that while in custody, he was assaulted by **P C. Cheruiyot** and the said P.C **Cheruiyot** has not contested or denied the averments. He prayed that this petition be allowed and he be compensated.

PETITIONER'S SUBMISSION

11. Counsel for the petitioner restated the petitioner's averments. He submitted that the petitioner entered the custody of the 3rd respondent in good health but was confined to a wheelchair before leaving the institution and no action has been taken by the officers of the 3rd respondent to bring to book the person who tortured the petitioner; that the petitioner is now dependent on other people and cannot work to earn a living.

12. He further submitted that the petitioner was under the custody of the 3rd respondent as he was arrested on 17th October 2004 for the offense of robbery with violence and he was convicted to life imprisonment on 8th July 2005. His appeal to the High Court was dismissed; the lower court decision was upheld on 30th July 2010. He filed for a resentence and he was committed to 25 years in prison from the year 2004.

13. Counsel for the petitioner submitted that the petitioner produced the following medical reports,

i. Documents from Jaramogi Oginga Odinga Teaching and Referral Hospital,

ii. Documents from Kericho District Hospital,

iii. Documents from Nakuru Provincial General Hospital,

iv. Treatment from AIC Cure International Children Hospital,

v. The Ministry of Health PWD's Medical Assessment Report

14. He submitted that the injuries sustained were contributed by the 3rd respondent who deliberately violated the court orders to take

the petitioner to hospital on various instances and failed to open an inquiry file vide the direction made on 16th February 2011 and investigate the matter; and failed to report to the court on the inquiries of the injuries sustained by the petitioner.

15. The petitioner's counsel submitted that the petitioner's fundamental rights were breached and more particularly **Article 27 (1), Article 28, Article 51(1) (3) of the constitution of Kenya** and **Article 2, 3 and 5 of the Universal Declaration of Human Rights**.

16. And further submitted that the **constitution under Article 2(2)** obligates persons to respect and uphold rights and fundamental freedoms and the only remedy available is compensation.

RESPONDENT'S SUBMISSIONS

17. State counsel filed written submissions on behalf of the 2nd and 3rd respondent and discussed for issues as hereunder: -

a. Whether the Petitioner suffered the injury while under the custody of the Respondent"

b. Whether the Petitioner reported alleged torture to the 3rd Respondent"

c. Whether the Respondent infringed the Petitioner's constitutional rights"

d. Whether the Petitioner is entitled to the relief sought"

18. On the issue of whether the injuries were sustained while in custody, the state counsel submitted that the petitioner was in the custody of the 3rd respondent from 29th January 2009 and denied that the injuries were sustained while in the custody of the 3rd respondent. He submitted that the medical report from Jaramogi Oginga Technical Referral Hospital dated 8th January 2015 shows head injury trauma. It was noted he had a head injury in 2009.

19. He further submitted that the medical report from the hospital fails to point out the cause of the alleged head injury and the petitioner had the burden of proving the allegations as the burden lies on him to prove the commission by the 3rd respondent beyond a reasonable doubt, as per **Section 107 of the Evidence Act**.

20. He further submitted that the petitioner is on a fishing expedition as his evidence is inconsistent in that, the petitioner states in Paragraph 3j that on 8th January 2009 to 2nd March 2009, the 3rd respondent officer beat him occasioning injuries, in paragraph 3k he avers it was the 1st time he informed the court of his illness on 28th January 2005, paragraph 3L the situation persisted till 26th May 2015 when the prosecution closed its case, a clear discrepancy of the facts alleged by the Petitioner.

21. The state counsel submitted that no report was made to the 3rd respondent on illness by the petitioner neither was any incident reported to the 3rd respondent by inmates. Further that no report that was launched by the petitioner to the relevant authorities as per **Section 144 of the Prison Act Cap 90 Laws of Kenya**; that the prison records does not show any complaint received on the alleged allegation.

22. He further submitted that **Section 157 of the Prisons Act** ensures that every prisoner is well catered for and is in good health while in custody; that the petitioner attended hospital while still in custody as per the medical reports produced and he cannot allege that he was denied medical attention.

23. On the issue of the infringed petitioner's constitutional rights, the state counsel submitted that the petitioner failed to prove beyond reasonable doubt how the respondent violated his constitutional right. There is no evidence to show the petitioner was assaulted and tortured and he therefore failed to establish the threshold as stated in the case of **IANARITA KARIMI NJERU vs REPUBLIC NO. 1(1979) I KLR 54** which was echoed in the case of **MUMO MATEMO vs TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE CIVIL APP. 290/2012 (2013) eKLR**.

24. In conclusion, the state counsel submitted that the petitioner has failed to meet the threshold to establish any violation. He added that the petitioner is in the custody of the 3rd respondent and thus not in any formal employment and every basic need including medical attention is catered for by the 3rd respondent. He urged this court to find the prayers are unmerited and dismiss the

petitioner's claim.

ANALYSIS SN DETERMINATION

25. I have perused and considered averments herein, submissions filed and annexures to the supporting affidavits and find the following as issues for determination: -

a. Whether the Petitioner rights were violated by the 3rd Respondent"

b. Whether the Petitioner is entitled to damages"

26. From the lower court pleadings, I note the accused was arrested on 17th October 2004 for the offense of robbery with violence, charges were read to him on 8th November 2004 and after trial, Judgment was delivered on 8th July 2005.

27. It is not disputed that indeed the petitioner was under the custody of the 3rd respondent during the time he was confined into a wheelchair.

28. The petitioner asserts that he was assaulted by **P.C Cheruiyot**. From record, no inquiry was done to confirm whether the petitioner's allegation of assault by the said officer were true. From the petitioner's averments, he first made request to be taken to hospital on 14th January 2005. On the other hand, the respondents assert that there was no claim of ill health by the petitioner made to their facility.

29. I have looked at the lower court proceedings and note that the petitioner applied to be taken to hospital and the court issued an order for him to be taken to the hospital. He averred that his condition worsened to the extent of being confined to a wheelchair due to 3rd defendant's failure to take him to hospital for treatment. The state counsel argued that the medical reports fail to indicate how the head injury was inflicted.

30. The state is to ensure the rights enshrined in the constitution are fully protected. The state has the duty to ensure that in conducting an arrest, detention, prosecution, sentencing, and imprisonment, the rights and fundamental freedoms of the persons involved are secured as it was stated in the case of **Coalition on Violence Against Women & 11 others v Attorney General of the Republic of Kenya & 5 others; Kenya Human Rights Commission (Interested Party); Kenya National Commission on Human Rights & 3 others (Amicus Curiae) [2020] eKLR**, the court observed as follows:

"110. According to the Human Rights Committee's General Comment No. 31 on the ICCPR at paragraph 8: "The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However, the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities."

111. From the above excerpt, it is clear that the State does indeed have an obligation to prevent violations by State actors and non-State actors. In other words, the State must protect citizens from threats to their rights. I, therefore, find myself in agreement with the holding in Florence Amunga Omukanda & another v Attorney General & 2 others [2016] eKLR that: "60... the State has a legal duty and a positive obligation to protect each of its citizen's rights to security of their person and their property by securing peace through the maintenance of law and order..."

112. The Human Rights Committee has expounded on the right to life in its General Comment No. 36 on Article 6 of the ICCPR. In paragraph 6 the Committee states that the deprivation of the right to life includes the "intentional or otherwise foreseeable and preventable life-terminating harm or injury, caused by an act or omission." Therefore, the State must respect the right to life by refraining to engage in conduct which would arbitrarily deprive the right, and as determined

above it must also protect the citizens from the deprivation of the rights by non-State actors.”

31. The three medical reports adduced by the petitioner indicate that he has suffered head injuries and as a result a blood clot has left him confined to a wheelchair. The 3rd respondent failed to adduce evidence to rebut the petitioner’s allegations of assault or reason why inquiry was not conducted to establish whether indeed the petitioner was assaulted.

32. From the foregoing, I am convinced that the petitioner has proved that he sustained injuries leading to confinement to a wheelchair while in prison. The medical report indicated the petitioner has suffered a permanent disability and as a result of the same confined to a wheelchair and not able to cater for himself.

33. From the foregoing, I find that the petitioner’s fundamental rights were infringed and the petitioner is entitled to compensation on general and aggravated damages. He will be confined to a wheelchair for the rest of his life. I find an award of one million five hundred shillings only (KShs 1,500,000.00).

34. FINAL ORDERS

1) I hereby declare that the 3rd respondent failed to offer the petitioner protection from any form of torture, harassment and guaranty safety of his life and health.

2) Petitioner is awarded damages of KShs 1,500,000.

3) Costs to the petitioner.

JUDGMENT dated, signed and delivered virtually at **Nakuru**

This **30th** day of **March**, 2022

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RACHEL NGETICH

JUDGE

In the presence of:

Francis Lepikas - Court Assistant

Petitioner Absent

Mr. Maragia for petitioner absent



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