

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CONSTITUTIONAL PETITION NO. 13 OF 2013

1. DAKAN GABOW HUSSEIN..... 1ST PETITIONER
2. DEROW SALAT ABDI 2ND PETITIONER
3. IBRAHIM ABDULLAHI ELMI 3RD PETITIONER
4. IBRAHIM GEDI ABDILLE 4TH PETITIONER
5. ABDULLAHI DUGOW MOHAMED 5TH PETITIONER
6. ABDIRASHID ALIOW IBRAHIM 6TH PETITIONER
7. GEDI HUSSEIN ISMAIL 7TH PETITIONER
8. MAASH HUSSEIN ABIKAR 8TH PETITIONER
9. BARYARE HUSSEIN ISMAIL 9TH PETITIONER
10. MUHUMED HUSSEIN BULLE 10TH PETITIONER
11. ALINOOR BISHAR HASSAN 11TH PETITIONER
12. HUSSEIN OMAR MARAADE 12TH PETITIONER
13. ISSACK ADEN MOHAMUD 13TH PETITIONER
14. WAJIR PARALEGALS NETWORK(WAP-Net)..... 14TH PETITIONER

VERSUS

1. THE CHIEF OF THE KENYA DEFENCE FORCES..... 1ST RESPONDENT
2. THE HON. ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

The fourteen petitioners herein filed their petition dated 31st December 2013, through their Advocates Mbugua Mureithi and Company.

In the petition, they stated that on 11th December 2011, the 1st to 13th petitioners were peacefully and lawfully going about their daily

activities within Wajir when at about 11.30 am, a convoy of trucks of the 1st respondent the Kenya Defence Forces (KDF) was allegedly attacked by unknown persons using suspected explosive devices along the road leading from Wajir town to Mandera.

They stated that in apparent response to the said attack, officers of the 1st respondent staged a hasty reprisal expedition of communal punishment by wantonly and ruthlessly, and arbitrarily, unreasonably, unlawfully attacking and assaulting them and without any justification whatsoever, brutally arresting everyone in the vicinity including the 1st to the 13th petitioners. They alleged that the said officers of the 1st respondent used slaps, kicks, fists, stones and gun butts to assault the 1st to 13th petitioners after arresting them and frog matched, and dragged them along the ground on the hot, stony, hard marrum/gravel of Wajir-Mandera road and forced them to roll on their bellies and backs for about 50 metres back and forth in the scorching sun with their arms and legs spread out as the officers indiscriminately beat them up for about 3 hours.

Thereafter, the 1st to 13th petitioners herein and others totaling 41 people, were escorted to Wajir Police Station, and that on 12th December 2011, some of the petitioners were escorted by police officers

to Wajir District Hospital for medical treatment of the injuries inflicted on them by the Kenya Defence Forces officers, and were later taken to the police cells but were released on the same day without charges, and without being issued with any written orders, were compelled to return to the police station on subsequent days for alleged investigations. They stated in the petition that the 13 petitioners reported back to Wajir Police Station on three different days and were interrogated, before being released from the said reporting orders.

The petitioners stated also in the petition, that as a consequence of the action of the Kenya Defence Forces (KDF) they incurred loss and damages in medical costs and that they required costly future treatment and medication. They in particular stated under paragraph 17 of the petition that Dakan Gabow Hussein incurred medical expenses of Ksh 255,000/=-, Abdullahi Dugow Mohamed incurred medical expenses of Kshs 12,850/=-, and that Muhumed Hussein Bulle incurred medical expenses of Kshs 7,850/=-, which they claimed as special damages.

The petitioners thus asked for the following orders from this court:-

“1. A declaration that the brutal arrest, the cruel, inhuman and degrading treatment inflicted on the 1st to 13th petitioners upon arrest by officers of the 1st respondent in a bid to extort

confessions from them, the cruelties, violence, brutality and extreme and inhuman and degrading conditions that the said petitioners were subjected to and the resultant bodily injuries that the petitioners suffered constitute breaches of fundamental rights and freedom of the petitioners to life, to human dignity, to equal protection of the law, to prohibition against all forms of violence, cruel, inhuman and/or degrading treatment or punishment guaranteed by Articles 26 (1)(3), 27 (1)(2), 28 and 29 (a),(c),(d), and (f) of the Constitution.

2. A declaration that the arrest and the entire period of two days that the petitioners were unlawfully detained in police custody deprived of basic human needs particularly food, water and medical attention, the three days that they were compelled to report to the police station for alleged investigations on an incident that they were not involved in and the period that their mobile phones were confiscated constituted arbitrary and unlawful arrest, detention, confiscation of private property, invasion of privacy or in violation of the fundamental rights of the petitioners as to human dignity, the protection of the law, personal liberty,

freedom from cruel, inhuman and degrading treatment and or punishment, protection of private property and deprivation of emergency medical treatment, right to privacy guaranteed by Articles 27(1)(2), 28, 29(a),(d),(f) 31(c),(d), 40(3), 43(2), and 49(1)(a) and (i) of the Constitution.

3. Special damages for the costs of medical treatment as per paragraph 17 above.

4. General damages consequential upon declaration of violations of fundamental rights and freedom of the 1st to 13th petitioners in the prayers above as maybe assessed by this honourable court.

5. Exemplary/vindictory, aggravated and or punitive damages for arbitrary, wanton, callous, high handed and oppressive conduct of officers of the Government towards the 1st to 13th petitioners.

6. Costs of the petition.

7. Interest on all monetary awards.”

The petition was filed with supporting affidavits sworn by the petitioners.

In response to the petition, the Attorney General for both the respondents filed grounds of opposition on 31st March 2014 in the following terms:-

- “1. That the petition is not sufficiently grounded in law and is just but a fishing expedition.***
- 2. That the petition suffers from material non disclosure.***
- 3. That the agents of the 1st respondent did what any military officials would have done in the circumstances.***
- 4. That there are no medical records attached to provided sufficient proof of the alleged injuries and the petitioners averment at paragraph 13 of the 1st petitioners affidavit that the medical report and documents exhibiting the costs (would be provided) later in the proceedings violates the respondents Constitutional rights guaranteed under Article 48 and 51.”***

In addition to the above grounds of opposition, the respondents filed a replying affidavit on 23rd April 2015 sworn by Major Anthony Mwiti Imanyara, in which they gave the Kenya Defence Forces (KDF) version on what occurred.

The matter proceeded to hearing through the tendering of oral evidence. Dakan Hussein was PW1, while Derow Salat Abdi was PW2. Ibrahim Gedi Abdille was PW3 and Abdullahi Gudow Mohamed was PW4. Gedi Hussein Ismail was PW5 while Maash Hussein Abikar was PW6. Abdi Rashid Aliow Ibrahim was PW7 while Baryane Hussein Ismail was PW8. Muhumed Hussein Bulle was PW9 and AliNoor Bishal Hassan was PW10. Ibrahim Abdullahi was PW11 and Hussein Omar Maraade was PW12. Issack Aden Mahamud was PW 13 and Mohamed Omar Issac was PW 14. P.C. Alfred Baya was PW15, while PW16 was Dr. Thurania Kaugeria Alex.

When the petitioners closed their case, and after several adjournments, the Attorney General was not able to bring any witness to testify for the defence. Both sides then filed written submissions to the petition raising several issues and relying on several court cases.

This is a Constitutional petition. The petitioners have claimed in the petition that they were tortured and inhumanly treated by the officers of the 1st respondent Kenya Defence Forces (KDF). Their burden was to prove the said violations on the balance of probabilities, as this is not a criminal case but primarily a civil matter. I rely on the case of ***Kirugi & Another -vs- Kabinya & 3 Others (1987) KLR 347***

in which the Court of Appeal reiterated that in civil cases the burden is always on the plaintiff to prove his case on the balance of probabilities.

The respondents through the Attorney General denied the allegations in the petition, through filing of grounds of opposition, as well as filing a replying affidavit sworn by Major Anthony Mwiti Imanyara.

The petitioners tendered oral evidence in support of their allegations, and produced a number of exhibits. The respondents through the State Counsel from the Attorney General's office cross examined the witnesses of the petitioners.

The thread of the petitioners' evidence is that on 11/12/2011 at about 12.30 Pm an explosion occurred on the Wajir town Mandera murram road where a Kenya Defence Forces convoy was passing. As a response to the explosion, the Kenya Defence Forces officers arrested and rounded up everybody in sight, including some people who were in their houses nearby. They took men, women and children, and ordered them to roll on the murram road in the scorching heat of the sun for some two or three hours, while beating them with sticks, stones and gun butts and kicking them. As a consequence, the victims suffered physical injuries.

The petitioners claimed in evidence that the actions of the Kenya Defence Forces (KDF) Officers amounted to torture and inhuman treatment. They gave evidence that the Kenya Defence Forces then took the petitioners and others to Wajir Police Station where they were booked, but women and children were soon released. The male victims were locked up at the police station overnight and next day, after some of them were taken to Wajir District Hospital, they were all released from the police station and ordered to report to the Wajir Police Station for a further three days after which they were told to cease reporting. None of them was charged in court. According to the petitioners, later the military led by Brigadier Wainaina and Major Guled came to Wajir and apologized to them and promised to compensate them, but so far no compensation had been provided.

The 1st to 13th petitioner's evidence, was supported by PW14 MUHAMED OMAR ISAC a human rights defender and coordinator of Wajir Paralegal Network, who assisted them in getting legal redress. In addition, the reports and booking of civilians at the Wajir Police Station on the material day by the Kenya Defence Forces Officers were supported by the evidence of PW15 PC ALFRED BAYA, who produced the relevant OB entries evidencing the booking of about 41 people

brought to Wajir Police Station by Kenya Defence Forces Personnel. Further PW16 Dr. Thuranira Kaugeria Alex of Independent Medico Legal Unit an NGO in Nairobi, confirmed providing medical treatment to DAKAN GABOW HUSSEIN (1st petitioner herein).

The respondents did not bring any witness in court to support their allegations of denial contained in the Grounds of Opposition or in the affidavit filed by Major Anthony Mwitwi Imanyara. Both the grounds of opposition and the affidavit denying the allegations of the petitioners were pleadings. They thus were allegations which had to be supported by evidence if they were to be relied upon by the court, unless they were adopted as evidence, which was not done in the present case. There was thus no evidence on record from the respondents to challenge what the petitioners said in their evidence.

In effect therefore in my view, on the balance of probabilities, the petitioners proved that indeed they were subjected to the torture and inhuman treatment by the Kenya Defence Forces. As such the respondents are liable as claimed by the petitioners as the petitioners proved their case against the respondents on the balance of probabilities. In my view, the complaints of the petitioners actually fit the definition of **"torture"** under Article 1 of the United Nations

Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment which provides as follows.

1. "For the purposes of this convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions".

Having found the respondents, liable to the petitioners I will now deal with the reliefs sought.

The petitioners have asked for the grant of a number of orders from this court. The first is a declaration that the treatment they underwent in the hands of the Kenya Defence Forces Officers constituted breaches

of fundamental rights and freedoms and amounted to torture, cruel and inhuman or degrading treatment.

From the facts and evidence on record herein, I find no basis for denying the petitioners this declaration, since they have proved occurrence of activities that support the same.

The petitioners have also asked for a declaration that the arrest and entire period of two days in which they were deprived of basic human needs, food, water and medical attention and the 3 days of reporting to a police station for the alleged incident, was a violation of their fundamental rights, human dignity, protection of the law, personal liberty, freedom from cruel, inhuman degrading treatment, protection of private property and provision for medical treatment. Again the respondents have failed to bring any witness to challenge the evidence and allegations of the petitioners. As such in my view the petitioners on the balance of probabilities have proved their claim and are entitled to this declaration.

The petitioners have asked for medical costs treatment as per paragraph 17 of the petition. I note that, in the said paragraph of the petition, particulars of special damages were listed in respect of medical treatment for Dakan Gabow Hussein, Abdullahi Dagow Mohamed and

Muhumed Hussen Bulle only.

The legal position is that special damages have to be specifically pleaded and proved. Pleadings can and maybe amended before completion of trial. In our present case there has been no request for amendments of the pleadings to add to the special damages. The special damages claimed under paragraph 17 of the petition were quite specific and there was no request in the petition that the court will consider additional special damages to be proved at the hearing. In my view therefore, though other petitioners have attempted to ask for special damages in their evidence, the special damages that can be awarded are only those specifically pleaded in paragraph 17 of the petition for three petitioners.

The respondents have not brought any contra evidence against the request for special damages. As such I find no reason to deny the petitioners this prayer. The amounts are not in any event exorbitant and in my view, this is a case where special damages have been proved through the evidence of the three petitioners, even if there is no specific documentary evidence. I will grant this prayer.

The next prayer is a prayer that general damages be awarded and assessed by the court for violation of fundamental rights and freedoms

General damages is a monetary assessment of compensation for pain suffering and loss of amenities. The 1st to the 13th petitioners have all shown that on the material day they suffered in the hands of the Kenya Defence Forces officers. They were exposed to the sun, they were made to crawl on their bellies and roll in the hot sun, they were assaulted and kicked, they were taken to the police cells, they lost their freedom for sometime, were denied their right to be free and be with their families for about 2 days, in which they could not do their normal daily activities. In my view they are entitled to an award of general damages.

In assessing general damages, each case has to depend on its own facts. I am aware of the case of **Moses Tengeya Omweno -vs- Commissioner of Police and Attorney General** – Nairobi High Court J/R Application No. 265 of 2001, where the court awarded general damages of Kshs 2,000,000/= for torture and inhuman treatment. However, that was a detention for 51 days. In our present case, the petitioners were detained or restrained for about 3 days. I will thus award each of the petitioners herein general damages of Kshs 300,000/=.

The petitioners have also asked for exemplary, vindictory,

aggravated and punitive damages. Such damages are awardable by courts in special circumstances where the suffering of the petitioners or claimants is of an aggravated nature. In the present case, I find no aggravated suffering. I will decline to grant the petitioners the claim of exemplary or aggravated damages.

The petitioners have also asked for costs of the petition and interest on the monetary awards.

Since the petitioners have successfully prosecuted and won the case, costs as well as interest will follow the events. I thus award costs of the petition to the petitioners against the respondents jointly and severally. I also award interest on the monetary awards. Interest on special damages will run from the date of filing the petition which was 31st December 2013. Interest on all other awards will run from the date on which they are determined.

In summary, the decision of the court is as follows:-

1. I grant the declaration of Constitutional violation in prayer 1 of the petition.
2. I grant the declaration of Constitutional violation in prayer 2 of the petition.
3. I grant special damages of Kshs 255,000/= to Dakan Gabow

3. I grant special damages of Kshs 255,000/= to Dakan Gabow Hussein, Kshs 12,850/= to Abdullahi Dugow Mohamed and Kshs 7,850 to Muhumed Hussein Bulle.
4. I award each of petitioners 1 to 13 general damages of Kshs 300,000/=.
5. I decline to award exemplary/aggravated damages.
6. I award costs of the proceedings to the petitioners against the respondents jointly and severally.
7. I award interest to the petitioners. Interest on special damages will accrue from date of filing suit (31/12/2013). Interest on other amounts will accrue from the date of determination of the same.

Dated and delivered at Garissa this 15th day of November 2016.


GEORGE DULU

JUDGE

Delivered in the presence of:-

Ms. Gikonyo holding brief for Mr. Mureithi for the Petitioner.

Mr. Ogosso for the A/G for the respondents.

Martin – Court Clerk.