

No Person Shall Be Subjected to Unlawful Detention, Cruel, Inhumane, and Degrading Treatment

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The Court of Appeal Renders Transitional Justice by Awarding Kshs. 20,000,000 to a Victim 1982 Coup Attempt

"We have no doubt the respondent's detention was not only unlawful but was also cruel and inhuman, and amounted to torture. His rights to due process were wholly compromised. His right to personal liberty was violated. To say that he was treated in the most unfair manner is an understatement."

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Introduction

In a landmark judgment of the Court of Appeal delivered by a three-judge bench comprised of Tuiyott, Muchelule & Odunga, JJ. A. in **Hon. Attorney General vs Francis Maranga Matu Civil Appeal No. 31 Of 2020**, the court delivered transitional justice to cure historical injustices meted to a victim of the 1982 coup attempt by awarding general damages of Kshs. 20,000,000/-, upgraded from Kshs. 3,000,000/- issued by the trial court. The Honourable Attorney General represented the Appellant, the Kenya Defence Forces while the firm of Wamae & Allen LLP represented the Respondent/Cross-Appellant in the appeal.

Brief facts & history of the matter

It is in the public domain that Kenya experienced a coup attempt on 1st August 1982. At the time, the Petitioner who was 36 years old served in the Kenya Air Force as a commissioned officer of the rank of Major. The aftermath of the failed coup was arbitrary arrests, detention, imprisonment, torture and execution of key conspirators and orchestrators of the coup and other innocent soldiers majority of whom were members of the Kenya Air Force. As one of the senior members of the Kenya Air Force, the Petitioner was arrested and detained incommunicado at the Naivasha Maximum Prison in solitary confinement for 125 days without being charged and convicted of any offence. The Petitioner was subjected to harsh, brutal, and most inhumane or degrading treatment that amounted to torture and extreme violation of the Petitioner's fundamental rights. Upon his release from detention, he was discharged from the force.

Vide a Petition dated 8th November 2011, the Petitioner instituted a suit against the Honourable Attorney General claiming infringement by the Kenyan Government of his inherent rights against torture and for unlawful termination from service. As such, the Petitioner claimed that he was entitled to compensation.

Holding by the Trial Court

The court (Radido, J.) delivered judgment on 22nd October 2018 holding in favour of the Petitioner that indeed his rights had been violated by the Kenya Defence Forces. The court noted that although what was applicable were the provisions of the old Constitution, the petition was nonetheless proper having been brought under the 2010 Constitution.

The court also held that the respondent had established that he had been subjected to torture and inhuman treatment guaranteed under section 74 of the retired constitution and that his right to personal liberty under section 72 had also been violated. For the violations, the court awarded general damages of Kshs.

3,000,000/-.

Appeal & Cross-Appeal

Aggrieved with the finding, the Honourable Attorney General proffered an appeal in the Court of Appeal on the grounds that: there was inordinate delay in filing the Petition having been brought 29 years after the alleged violations; the Petitioner did not meet the proper threshold for proof in constitutional petitions; and that the Petition was defective as it was premised on the Constitution of Kenya, 2010 yet the violations happened during the repealed constitution.

The Petitioner on his part filed a Cross-Appeal challenging the blunt award of general damages on the ground that it was too low when compared to cases of similar facts and that the court erred in failing to issue damages based on each violation proven.

Determination by the Court of Appeal

On the first question whether there was unexplained delay by the Petitioner in filing the petition in the High Court, the three judge bench took the view that the petition fell within the category of a transitional justice claim aimed at curing historical injustices, and therefore upheld the finding by the learned trial Judge that the political circumstances in the country, and especially those related to the 1982 attempted coup, were such volatile that it was difficult for victims of torture to file such a petition against the state. As such, the 29 years wait was found not to be inordinate delay.

The second issue regarded the applicability of the 2010 constitution in trying violations that occurred under the repealed constitution. The Honourable Attorney General had averred that the 2010 Constitution would not apply retrospectively for incidents that took place pre-2010. Citing a similar case of **Monica Wangui Wamwere & Others - vs- Attorney General, Petition Nos. 26, 34 and 35 of 2019**, the court held that detention without trial; right to be informed of reasons for arrest; right to be treated with dignity; right not to be tortured or be treated in cruel, inhuman or degrading manner; and freedom of movement, are all rights and freedoms that were protected in the repealed Constitution, and are also protected in the 2010 Constitution. Particularly, protection against torture, cruel and inhuman treatment were prohibited by section 74 of the retired Constitution and the same has been replicated in Article 29 of the Constitution of Kenya, 2010.

In so doing, the court upheld that the Constitution is not necessarily subject to the principles against retroactivity as in ordinary legislation; as it 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 good.

On the question whether the Petitioner discharged the burden of proof, the court found the same proved *inter alia* on the ground that the Petitioner had gone at great length to call his former colleagues to testify on the torture ordeal they had experienced together.

Conclusion

Having found the violations proved, the court moved on to address the last question regarding quantum of damages. The court faulted the trial court for awarding Kshs. 3,000,000/- and substituted it with Kshs. 20,000,000/-. The court held that the trial court had exercised broad- and open-minded discretion and had failed to award compensation for unlawful termination of his service, loss of eight (8) years of service, loss of career and detention for a long time without being charged. The court held that the enhanced award was reasonable and comparable with awards in similar cases.

Parting remarks

This case underscores grave historical injustices and violation of fundamental human rights suffered by many Kenyans at the state's behest. Such cruel, inhuman, and degrading treatment must never go unanswered, especially when perpetrated by the state. The responsibility of the state to uphold the dignity and rights of its citizens is paramount, and any act that disregards these principles calls for accountability and justice. This case therefore serves as a reminder that the protection of human rights is not only a legal obligation but a moral imperative that must be upheld by all.

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