



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NUMBER 78 OF 2010
(As consolidated with Petitions Nos.80 and 81 of 2010)

BETWEEN

HON. GITOBU IMANYARA.....1ST PETITIONER

HON. NJEHU GATABAKI.....2ND PETITIONER

BEDAN MBUGUA.....3RD PETITIONER

AND

THE HON. ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

Petition No.78 of 2010

1. The Petition herein is dated the 16th of November, 2010 and is supported by an Affidavit of even date sworn by the Petitioner in Nairobi. The Respondents filed Grounds of Opposition dated the 23rd of June , 2011 and submissions dated the 20th of December, 2012. By an order dated the 6th of February, 2012, Petitions Nos.78, 80 and 81 of 2010 were consolidated for purposes of hearing. A further consent was entered between the parties in which it was stated that liability was not contested save for any lawful convictions which issues would be left for adjudication by the Court on the basis of the written submissions, evidence and authorities submitted by the parties.

Case for the Petitioner

2. It is the Petitioner's claim that he began his practice sometime in the 1970s as an Advocate in Nanyuki Town and that in the course of his work, he took up the defence of one, Paul Nakwale Ekai who had been charged with the murder of the famous Joy Adamson, at the trial held at the High Court in Nyeri. The Presiding Judge was Justice Matthew Guy Muli (deceased) and the prosecution was led by Mr. E.J. Gicheru (later Chief Justice of Kenya). During the trial, accusations were made by the family of the accused that the Judge had been compromised by "*some white men*". That the Petitioner, being young and inexperienced, brought up the matter in Court and he was directed by the Judge to appear in Chambers to address him on the issue but he was instead arrested on an unspecified charge and was later released because of the intervention of the State Prosecutor, Mr. E J Gicheru.

3. The Petitioner alleges that shortly after the conclusion of the Adamson trial, he took up the cases of

scores of airmen and officers who had been charged with treason or mutiny after the failed coup of 1982 and it is his claim that former President Daniel Arap Moi sent the Petitioner's late father, who was a Lieutenant Colonel, to advise him not to represent the airmen and officers. The Petitioner claims that he did not budge as this was a call of duty and that to dissuade him from representing the officers, his late father was appointed the presiding officer of the Court Martial at Langata where the Petitioner was set to appear for one of the officers charged with treason. It is the Petitioner's claim that because of the obvious conflict of interest, the matter was adjourned and his late father was retired from the armed forces immediately thereafter.

4. It is the Petitioner's further claim that the Government later published a forged document that included the Petitioner's name as one of the coup plotters and when Justice Matthew Guy Muli was appointed the Attorney General, he immediately took up the former President's cue and ordered the Law Society of Kenya to investigate whether the Petitioner had any pending complaints. When it was established that he had a pending complaint on an unpaid cheque, it was ordered that he should be arrested and charged with the offence of stealing by agent.

5. That the Attorney General personally supervised the subsequent prosecution and trial and intimidated and compromised the trial magistrate into convicting and sentencing the Petitioner to five years in prison at Kamiti Maximum Security Prison Block E where insane prisoners are routinely held and without the option of a fine. That he managed to draft a handwritten appeal as he was not granted the right of representation for purposes of appealing but that later he managed to secure the legal services of Paul Muite, an advocate who took up the appeal.

6. That at the direction of the Attorney-General, he was struck off the roll of Advocates and subsequently his family was evicted from their house in Ngummo Estate and that the same was sold by HFCK without any advertisement or notice. That his young children's education was thereafter interfered with and they could not attend school for a while. After his release from prison, he was diagnosed with post-traumatic stress syndrome and that he was economically ruined. He appealed against his being struck off the Roll of Advocates and launched the "Nairobi Law Monthly" Magazine to expose human rights abuses in Kenya and the rot and corruption in the Judiciary as well as championing for democratic reforms in the country which campaign later came to be known as the "*Second Liberation*."

7. It is also the Petitioner's case that in 1990, he was arrested again at his Ngummo House by a gang of ten and thrown into the boot of a car and driven to Nairobi Area Police Station where he was locked up until 3 am after which he claims he was transferred to a van and made to lie on the floor where he was severely tortured by his body being trampled upon and being assaulted with rubber clubs on his genitalia and around his ankles and as such he could not walk properly thereafter.

8. He alleges that he was later transferred to a building which he came to know was the Nyayo House where he claims he was put in a water logged cell for 10 days where his health deteriorated and his ears and chest were blocked and his toe nails fell off. That he was later transferred to Naivasha Maximum Security Prison and held in a cell block with about other 50 prison warders guarding him while being treated with expired anti-biotic drugs for his injuries.

9. He further claims that while in Nyayo House, he was moved to the 22nd floor and paraded completely naked with heavily swollen ankles and toes before a battery of about 20 police officers. The Petitioner claims that a document was read to him which he later understood to be a detention order under the Preservation of **Public Security Act** and that he was held in detention without trial at Naivasha Maximum Security Prison until about 22nd July, 1990 when he was handed a copy of the detention order and transferred to the CID Headquarters and charged with sedition.

10. He has also claimed that he was arrested again in September, 1990 and held at various police stations around Nairobi and Nakuru before being released without any charges being preferred against him but he was served with a notice that declared all past, present and future editions of the "Nairobi Law Monthly" as prohibited publications and that what followed was a raid on his offices at Tumaini House and his house in Ngummo. During the raid, his computers and files were destroyed and he was forced

to temporarily relocate his offices. That thereafter, he was unable to pay rent and had to borrow a loan to make ends meet and he claims that his landlord then sued him for rent arrears and these suits are still pending to date as he has been unable to raise funds to discharge those liabilities.

11. That when he resumed publication of the “Nairobi Law Monthly” in March 1991, he was again arrested and locked up incommunicado at JKIA Police Station where he lost count of days and nights and that his whereabouts were only known through a report made by an American tourist who was also held in the same cell as him. The said tourist then informed the American Ambassador of the Petitioner's arrest and the Ambassador mounted pressure on former President Daniel Arap Moi for the Petitioner's release.

12. Thereafter, that he was taken to court at about 7.00 p.m., charged with sedition and denied bail and was transferred to Kamiti Maximum Security Prison and held once again in Block E wherein insane prisoners are also held. That his health deteriorated and he collapsed and was transferred unconscious to Kenyatta National Hospital where he was chained to a hospital bed for the next three and a half months and he claims that he suffered severe head and chest injuries and had to be flown to London for treatment by Amnesty international and to-date he is still under medication for the said injuries.

13. The Petitioner alleges that he has suffered psychological trauma and his family has suffered great uncertainty and anxiety and that he was tortured only because he championed for the second liberation of Kenya and agitated for democratic reforms.

14. On quantum of damages, the Petitioner submits that he is carrying physical, mental and emotional scars from his long run-in with the Government and that he has suffered great economic loss when his magazine the “Nairobi Law Monthly” was crippled by the brutal destruction and removal of his tools of trade. Further, that his law practice also suffered and that he is still on medication and suffers from Post Traumatic Stress Disorder.

15. The Petitioner relies on various International Human Rights Instruments, Covenants and Conventions, various pronouncements by Government Ministries and the Attorney General on reparations for victims of torture, Parliamentary Proceedings, 2003 on compensation for torture victims, to buttress his argument that he is entitled to an award in damages.

16. For the above reasons the Petitioner prays for the following orders;

- a) *That there be a Declaration that the Petitioner's fundamental rights and freedoms under **Articles 28, 29, 31, 33(1), 34(1), 34(2), 37, 39 and 40(1)** of the **Constitution 2010** Similar provisions were provided under **Sections 72(1), 72(2), 72(3), 72(5), 74(1), 75(1), 76(1), 77(1), 77(2), 79(1), 80(1) and 81(1)** of the repealed Constitution of Kenya have been and were contravened and grossly violated by the Police Officers, Kenyan Government servants, agents, employees and institutions, on various dates at various police cells, Kamiti Maximum Prison, Mbagathi Prison and Manyani Maximum Prison*
- b) *A declaration that the Petitioner is entitled to the payment of damages and compensation for the violations and contraventions of his fundamental rights and freedoms under the aforementioned provisions of the Constitution and in particular to full indemnity from the Government arising out of suits filed against the Petitioner by the National Bank of Kenya, the Deposit Protection Fund on behalf of Euro Bank and the National Council of Churches of Kenya and for such damages and/or order.*
- c) *General damages, exemplary damages and aggravated damages under Article 23(3) of the Constitution of Kenya 2010 (previously under Section 84(2) of the Repealed Constitution) for the unconstitutional conduct of the Government of Kenya, and its agents and/or servants.*
- d) *A Declaration that the conduct of the then Attorney General Matthew Guy Muli at his trial and conviction on account of alleged theft by agent was a mistrial amounting to a gross miscarriage of justice and an order quashing the same and restoring the Petitioner's record.*
- e) *Any further orders, writs, directions as this Honourable Court may consider appropriate.*

f) *Costs of the Petition*

g) *Interest.*

Petition No.80 of 2010

17. The Petition herein is dated the 22nd of November, 2010 and is supported by an Affidavit of even date sworn by the Petitioner in Nairobi. The Respondents filed Grounds of Opposition and later filed submissions dated 20th December, 2012.

Case for the Petitioner

18. The Petitioner's case was that he is an accomplished journalist and author of many works on public affairs, research and specialized topics. That he was the Publisher and Editor-in-Chief of the "Finance Magazine", a local magazine that has not been in print for some years. The Petitioner alleges that his fundamental rights and freedoms as contained in **Articles 28, 29, 31, 33(1), 34(1), 34(2), 37, 39 and 40(1)** of the **Constitution 2010** and **Sections 72(1), 72(2), 72(3), 72(5), 74(1), 75(1), 76(1), 77(1), 77(2), 79(1), 80(1) and 81(1)** of the Repealed Constitution were breached by agents of the State of Kenya in circumstances to be seen below.

19. That between 1990 and 2002, persons he believed to be members of the Kenya Police, Criminal Investigation Department (CID) Officers, Prisons Service and other Government servants and agents, unlawfully and without just cause arrested him and on diverse dates held him in Nairobi Industrial Area Remand Prison and Kamiti Maximum Prison in Block E for insane prisoners and subjected him to solitary confinement in Kileleshwa, Gigiri, Loresho, Langata, Embakasi, Central, Railways, Pangani, Kiambu, Parklands, Muthaiga, Muthangari, Ngong, Makadara, Spring Valley, Starehe, Bahati, Athi River, Ruiru, Kibera and JKIA Police Stations. Further, that at his homes in Nairobi, in his offices and various other social places, he was subjected to forceful arrest, attempted arrest and/or harassment on allegations of publishing or having the intent to publish seditious material through the "Finance Magazine" aforesaid.

20. Specifically, it his claim that on or about November, 1990, a contingent of armed policemen raided his office and confiscated 50,000 copies of the "Finance Magazine". The Petitioner believes that the confiscation came about due to a feature in the said magazine which was in the form of a letter to Former President Daniel Arap Moi from the Late Jaramogi Oginga Odinga on the need for democratic reforms in Kenya. It is the Petitioner's belief that thereafter he was put under heavy surveillance by the Police, CID and the National Intelligence Agency.

21. The Petitioner has also claimed that public condemnation of the magazine by former President Daniel Moi led to his harassment from the police force and other intelligence agencies which led to the isolation of his family and subsequent desertion by friends and business associates.

22. He further alleges that between the years 1991 and 1997, persons he believes to be police officers both garbed in uniform and plain clothes, routinely raided the "Finance Magazine" premises, disabled printers and impounded copies of various issues of the magazine which the Petitioner believes totalled 950,000 copies each retailing at Kenya Shillings One Hundred (Kshs.100/=) and that the income deprivation from the aforesaid impounding was Kenya Shillings Ninety Five Million (Kshs.95,000,000/=). He has also alleged that he and his family lost properties in Lavington and Githunguri areas through public auctions which the Petitioner believes were State directed and calculated to impoverish him.

23. It is also his contention that the Government ordered its Ministries and agents not to advertise with the "Finance Magazine" and that this "black out" persisted until 2002 after which the advertisements resumed albeit minimally. It is the Petitioner's claim therefore that the Government was out to cripple him financially by destroying his sole source of livelihood - the publishing and editorial business.

24. The Petitioner has added that he was charged in a total of 18 sedition and incitement to violence cases plus an additional charge of murder. That the Attorney General later entered a *nolle prosequi* in all the cases due to what the Petitioner believes was public outcry and pressure both on the domestic and international fronts and that thereafter he was released after a week of incarceration vide a Presidential Order.

25. The Petitioner alleges that during his incarceration, he was confined incommunicado in a dark mosquito ridden cell at Railways Police Station for over one week and claims that he was denied bedding materials, medical attention and initially water and food and claims that the harsh conditions after the murder charge against him exacerbated and aggravated his already bad health condition. That subsequently he was diagnosed with serious hypertension and was allegedly put on treatment for a month under the supervision of one, Dr. D.K. Gikonyo. The Petitioner urges the point that his health condition has impacted negatively on his family in terms of resources spent and that as a result he had to transfer his children from schools in Nairobi to St. Andrews Turi in Molo at enormous costs to escape the frequent police raids at the family home.

26. The Petitioner also alleges that on the 8th of August, 1993 about 30 persons believed to be police officers but dressed in Maasai regalia armed with bows, arrows, whips, Somali swords, clubs and pistols invaded the "Finance magazine" offices in Afro House on Tom Mboya Street and attacked his staff and it was during this invasion, property worth Kenya Shillings Five Hundred Thousand (Kshs.500,000/=) was impounded. It is the Petitioner's claim that these invaders then poured petrol on the floor and set the offices on fire and reduced everything in the said office to ashes. Further that the invasion and arson attack were attempts on his life instigated and perpetrated by the State.

27. The Petitioner believes that the treatment meted out to him during the periods of 1990 and 2002 were because he was a strong advocate for good governance and that he championed for democratic and constitutional reforms in Kenya and further believes that he suffered the alleged atrocities because he held a differing political opinion from the status quo and urges this Court to note that he dared to publish statements by those perceived to be "Anti-Nyayo" and as such his contribution to the democratization process that culminated into the new constitutional dispensation should not go unrecognized.

28. On quantum of damages, it is the Petitioner's claim that due to directions on the impounding and destruction of the printers known as Colour Print and Fotoform, the "Finance Magazine" could not continue running and this compounded his losses and further that at the time the said Magazine was running 60,000 copies per month and therefore when the printers were closed for 6 months, he lost 720,000 copies of the publication. Further, that after the Magazine was banned on the 10th of July, 1998, it took more than two months to set it up again which resulted in the loss of four issues totaling 240,000 copies. The Petitioner submits that such personal risks and sacrifices for greater public good are invaluable and that any financial reward must be reflective of such extra-ordinary demonstration of courage for public interest.

29. The Petitioner now prays for the following orders from this Court;

a) *That there be a Declaration that the Petitioner's fundamental rights and freedoms under **Articles 28, 29, 31, 33(1), 34(1), 34(2), 37, 39 and 40(1)** of the **Constitution 2010** and under **Sections 72(1), 72(2), 72(3), 72(5), 74(1), 75(1), 76(1), 77(1), 77(2), 79(1), 80(1) and 81(1)** of the repealed Constitution of Kenya at material times had been and were repeatedly contravened and grossly violated by the Police and CID Officers, NSIS (formerly Special Branch), prison warders and other Kenyan Government servants, agents, employees and institutions, on numerous dates at various police stations in Nairobi City and surrounding towns, in Nairobi Industrial Area Remand Prison, Police Cells and Kamiti Maximum Prison.*

b) *A declaration that the Petitioner is entitled to the payment of damages and compensation of 950,000 copies of "Finance Magazine" directly impounded by the Kenya Police and CID officers amounting to Kenya Shillings Ninety Five Million (Kshs. 95,000,000/=) in addition to damages and compensation for*

the gross violations and contraventions of his fundamental rights and freedoms under the aforementioned provisions of the Constitution.

c) *General damages, exemplary damages and aggravated damages under **Article 23(3)** of the **Constitution of Kenya 2010** (previously under **Section 84(2)** of the Repealed Constitution) for the unconstitutional conduct of the Government of Kenya, and its agents and/or servants.*

d) *Any further orders, writs, directions as this Honourable Court may consider appropriate.*

e) *Costs of the Petition.*

f) *Interest.*

Petition No.81 of 2010

30. The Petitioner's case is that he was the Editor-in-Chief of "Beyond" magazine and he was earning a salary of One Thousand Dollars plus allowances and other benefits which included a motor vehicle and medical cover. It is his claim that "Beyond" magazine was banned in 1988 culminating in him losing his job and that it was very difficult for him to seek employment after the alleged ban on what he claims was fear of the repercussions from Government by any prospective employer. He alleges that to make ends meet and upon losing his job he had to sell family properties to take his children to school and to feed them and also claims that the family home on Land Reference Number Dagoretti/Riruta/S 567 was auctioned for failure to meet his financial obligations and that today it is valued at Kshs.5 Million. He has added that after five years, he managed to get a job with the "People" magazine and therefore mitigated his losses.

31. It is the Petitioner's claim that between 1994 and 1998, his fundamental rights and freedoms were also grossly violated and infringed by persons he believed to be Kenya Police, CID Officers, Prison Warders and other Government Servants, Agents and Employees and that between the aforesaid years he was unlawfully arrested and held at Kamiti Maximum Prison Block E for insane prisoners and in solitary confinement in Manyani Prison.

32. It is his case that he was arrested and charged with criminal offences after he wrote an article in "Beyond" magazine which article was critical of infamous "mlolongo" voting system. The Petitioner further alleges that he wrote the said article at the height of political dictatorship under former President Daniel Arap Moi and that he exposed the massive rigging in the 1988 General Elections and that he published the actual results which he alleges other media houses were afraid to publish.

33. He also claims that his house and offices were arbitrarily searched and his personal effects confiscated and that he was taken to several Police Stations by persons he perceived to be Special Branch and Criminal Investigation Department officers and allegedly locked up in a room for over 10 hours on continuous interrogation without the right to legal representation.

34. He further alleges that he was arrested and charged with failure to Register Bonds for the "Beyond" Magazine and then jailed for 27 months at Kamiti Maximum Prison. That at that Prison he was confined to a maximum prison despite the fact that he was to serve a short sentence. That prior to incarceration, he was denied bail after plea was taken which he believes was purely done for political reasons and that he was subjected to hard labour and corporal punishment which punishments were not a part of the sentence that he was serving.

35. He has also claimed that he was confined under inhuman conditions while at Kamiti Maximum Prison which conditions he alleges caused him diverse ailments and that he had no mattress to sleep on and only had one blanket and what he terms as rags for clothing which he claims were infested with lice. The Petitioner further alleges that he was made to break stones into ballast under the hot sun and alleges that he did not have the energy to do so as the food conditions were deplorable, so were the sanitary conditions.

36. The Petitioner further alleges that his imprisonment caused unusual unrest in the International Community and several press bodies wrote letters and made several demands to the Government and following this outcry, a single judge, Justice Frank Shields, was appointed to sit on his appeal against conviction and sentence and indeed the jail term was quashed and he was released from custody.

37. It is the Petitioner's further case that in 1994, he was in Court again when he was employed by the "People" Daily, on fabricated charges of contempt. It is the Petitioner's allegation that the said matter originated at the Court of Appeal due to an allegedly offending article which insinuated that former President Daniel Moi had interfered with a ruling in a certain case involving the welfare association of University dons. The Petitioner alleges that his right to a fair trial was infringed because his Advocate had fallen ill and had left the country for treatment. That he was given two hours to find alternative counsel and upon finding another Advocate, the new Advocate was locked out of the proceedings, and he was convicted without being given a proper hearing.

38. He alleges that he was thereafter detained in Kamiti Maximum Prison and subsequently transferred to Mbagathi Prison which he says was done so as to seclude him from visits by foreign envoys. He was subsequently moved to Manyani Maximum Prison and held in solitary confinement where he claims he was held in a tiny room with very bright light and he alleges that once again he was subjected to hard labour and corporal punishment and made to break ballast under the hot sun which was not part of his sentence.

39. That at Manyani Prison, he was subjected to inhuman treatment and from time to time he would be stripped naked in the guise of periodic bodily searches. Upon his release, the "People" newspaper had hired another Editor-in-Chief and he was once again rendered jobless.

40. He further alleges that the case involving "Beyond" Magazine lasted a year and during this period he and his family were subjected to psychological torture, stress, trauma and loneliness. The Petitioner alleges that he had turned out to be a security risk and his social life was interrupted and that he had to engage the services of a social worker, one Dr. Wanjiku Kironyo, to assist him in gaining normalcy. That he now suffers very low self esteem as a result of the trauma caused by the actions of the State against him.

41. The Petitioner also claims that as a result of the foregoing his marriage broke down and his spouse successfully filed for divorce. That his son also dropped out of Biola University in California due to lack of school fees and his daughters deferred their studies due to lack of school fees and only returned after the Petitioner had managed to hold a fundraising to assist him return them to school.

42. The Petitioner adds that as a result of the above inhuman treatments, he suffered severe ill health and developed ulcers, and tension headaches which ailments he suffers to-date. He alleges that his physical, psychological, economic and political life was ruined because he chose to champion Kenya's Second Liberation and because he held differing opinions from those in the ruling party, KANU.

43. Like the other Petitioners, he has relied on various International Human Rights Instruments, Covenants and Conventions, various pronouncements by Government Ministries and the Attorney General on reparations and Parliamentary proceedings in 2003 on compensation for torture victims, to buttress his case.

44. It is on the account of the aforesaid claims that he prays for the following orders;

*a) That there be a Declaration that the Petitioner's fundamental rights and freedoms under **Articles 28, 29, 31, 33(1), 34(1), 34(2), 37, 39 and 40(1)** of the **Constitution 2010** and under **Sections 72(1), 72(2), 72(3), 72(5), 74(1), 75(1), 76(1), 77(1), 77(2), 79(1), 80(1) and 81(1)** of the repealed Constitution of Kenya have been and were contravened and grossly violated by the Police Officers, Kenyan Government servants, agents, employees and institutions, on various dates at various police cells, Kamiti Maximum Prison, Mbagathi Prison and Manyani Maximum Prison.*

b) A declaration that the Petitioner is entitled to the payment of compensatory and aggravated damages under Article 23(3) of the Constitution and Section 84(2) of the repealed Constitution for the unconstitutional conduct of the Kenyan Government and its agents or servants.

c) General damages, exemplary damages and aggravated damages under Article 23(3) of the Constitution of Kenya 2010 (previously under Section 84(2) of the Repealed Constitution) for the unconstitutional conduct of the Government of Kenya, and its agents and/or servants.

d) Any further orders, writs, directions as this Honourable Court may consider appropriate.

e) Costs of the Petition.

f) Interest.

Case for the Respondent

45. The Respondent admits liability and subject to the consent order earlier referred to, merely submitted on the quantum of damages payable. The Respondent begin his submissions by interrogating the kind of compensation payable under **Article 23 (3)(g)** of the Constitution of Kenya and rely on **Ferreira vs. Levin 1996 (1) SA 984 (CC)** where it was espoused that in public litigation, the nexus between the harm and the injury suffered by the injured is not as intimate as in private litigation. The Respondents also rely on the holding in **Maharaj vs. The Attorney General of Trinidad and Tobago (1979) AC 385 (PC)** where it was held that a claim for redress by what has been done by an individual in his official capacity is a liability of the State itself and not against the officer as an individual.

46. That following the decision in Maharaj, the Respondent argues that the Petitioners are seeking hefty amounts in damages which would only enrich the Petitioners and would not vindicate the Constitution considering damages against the State are paid from public coffers and that in awarding damages, the Court should be minded of the scarce resources available to the State, generally.

48. Regarding the Petitioner's claim for exemplary damages, the Respondent submits that exemplary damages are sought not for compensation of the victim but to punish and serve as an example to the wrongdoer and ultimately act as a deterrent. The Respondent adds therefore that exemplary damages would not be an effective deterrent because the same would be paid from public coffers and not be obtained from the perpetrator directly thus placing a heavy burden on the tax payer. They argue that punitive damages should only be awarded against State agents directly involved in violations in their personal capacities and not the State qua State.

49. Reliance is also placed on the New Zealand Case of **Simpson vs. The Attorney General (1994) 3 NZLR 667 (CA)** which case espoused the principle that compensation for violating of the Constitution should be such that it emphasizes on the importance of the rights and freedoms and deters breaches thereof and the Respondents further submits that the wording of **Article 23(3)** pegs the relief as being appropriate and that "appropriate relief" is that which will protect and enforce the Constitution and not that which impoverishes the State.

50. The Respondents also relies on the holding in **Saskatchewan Human Rights Commission vs. Kodellas (1989) 60 DLR (4th) 143 at 162** where it was held *inter-alia* that appropriateness in the award of damages connotes efficaciousness and suitability from the stand point of the violation itself. The case also raises the point that to be just, a remedy must be fair to all who are affected by it which may well include persons not directly affected.

51. The Respondents adds that the Court must look at the balance of rights of the Petitioners on one hand and the public interest on the other and that by the wording of **Article 23(3)** the Court is not compelled to only award a relief in damages but also any other relief that is appropriate in the circumstances.

52. The Respondent admits that indeed the Petitioners individually and with others, made monumental

sacrifices towards democratic and constitutional reforms in the country but submits that no amount of money can compensate such sacrifice. That therefore the Petitioners are entitled to symbolic compensation for their contribution to the "Second Liberation" and the Respondents have asked the Court to exercise its discretion and award a global amount of Kenya Shilling One Million Five Hundred Thousand to each of the Petitioners.

Determination

53. Since liability is expressly admitted (a rare gesture on the part of the Respondent), I merely reproduced the above facts to guide the eventual judgment on the issue of compensation for the admitted violations of the Petitioner's fundamental rights and freedoms as provided for under **Article 23(3) of the Constitution**. In doing so, I am guided by the following decisions on grant of general damages for breach of fundamental rights and freedoms;

i) Rumba Kinuthia & 6 Others vs. The Attorney General Nairobi HC Misc. App. No.1408 of 2004

- the Plaintiff was arrested and taken to Nyayo House Torture Chambers where he remained for 14 days and suffered severe torture. He was then arraigned in court on criminal charges that he denied but was still detained at Kamiti Maximum Prison in solitary confinement. Upon his release, he filed the said suit seeking special damages and was awarded Kenya Shillings 1.5 Million.

ii) Harun Thungu Wakaba & 20 Others vs. The Attorney General HC Misc.appl. No.1411 of 2004

- 21 people who were arrested and tortured were awarded general damages ranging from Kenya Shillings One Million to Three Million for breaches of fundamental rights by the State of Kenya.

54. Regarding the prayer for exemplary damages by each Petitioner, in the case of **Obongo vs. Kisumu Municipal Council (1971) EA 91**, the Court of Appeal referred to the English case of **Rookes vs. Barnard & Others (1964) AC 1129** where it was held that exemplary damages in tort may be awarded in two classes of cases i.e.

i) Where there is oppressive arbitrary or unconstitutional actions by the servants of the Government; and

ii) Where the Defendant's conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the Plaintiff

On that issue, I share the same thoughts as Majanja, J. in **Benedict Munene Kariuki & 14 Others vs. The Attorney General Petition Number 722 of 2009 (2011) eKLR**, where he stated as follows;

"I am constrained to depart, from the position taken by my learned brother. In my view, these cases under Section 84 of the Constitution are cases concerning the Constitution. It is unnecessary to consider the element of "unconstitutional action" when the relief is awarded for unconstitutional conduct. It is also clear that the principle in Obongo v Kisumu Municipal Council (Supra) was a case in tort so that the issue of "unconstitutional action" was an additional factor the Court would consider in awarding exemplary damages. I shall therefore not award exemplary damages." Further, in the case of **Wachira Waihere vs. the Attorney General HC Misc. App.No.1184/2003 (O.S.)** the Court did not find it appropriate to award aggravated and exemplary damages and stated that;

"In the light of the acknowledged change in the government, and the attempts at dealing with human rights violation, we find it inappropriate to award exemplary or aggravated damages."

55. This holding encapsulates my position on awarding aggravated and exemplary damages in cases where unconstitutional action has been challenged in a changed and improving political environment. I must take judicial notice of that fact in today's Kenya and I am satisfied that no benefit was procured by the Moi regime in its obviously unconstitutional actions. Kenya's Government has learnt from its past and the deterrent effect is alive and obvious. I also agree with the Respondents that in the circumstances, exemplary damages are not properly awardable noting the burden to the innocent tax-

payer. Further I note that the Petitioners were not labouring for the “Second Liberation” in order to get momentary compensation but for the attainment of a higher ideal; a just society. That Society is slowly coming alive and their contribution by this judgment has been recognised.

56. Before addressing the issue of the proper award in each case, parties required a determination of one other issue; What is the liability of the Respondents in instances where the Petitioners were taken to Court, tried, sentenced and later released either on appeal or upon an executive order?

57. I have seen little by way of submissions on this point because parties were focused on the issue of quantum of damages ultimately payable. My view is however as follows;

58. **Section 72(1) (a)** of the **Repealed Constitution** while protecting freedom to personal liberty also provided that such liberty is not protected in a case involving the “... *execution of the sentence or order of a Court, ... in respect of a Criminal Case of which he has been convicted.*”

Another exception is found in **Section 72(1)(b)** which is with respect to the “... *execution of the order of the High Court or the Court of Appeal punishing ... for contempt of that Court or tribunal.*”

The Petitioners in many instances were incarcerated upon being charged with some criminal offence and in the case of Bedan Mbugua, once, upon being cited by the Court of appeal for contempt. I am unable to circumvent the Constitution and without more than the statements made by the Petitioners, and by a stroke of my pen, I cannot declare those convictions to be unconstitutional. I say so also because it is admitted by the Petitioners that in some instances, the criminal convictions and sentences were actually overturned (wholly or partly) on appeal. Connected with this issue is the conditions under which the Petitioners were held in prison. Save for the fact (which by extension of the consent order is admitted), that the Petitioners were held together with insane prisoners and sometimes in solitary confinement, the conditions of our prisons were and may still be appalling. Each inmate, to that extent, suffered terribly under those conditions and to isolate the Petitioners' cases and pay them separately for their pain may well amount to discrimination. I say so guardedly because in my final orders, I will certainly take into account the fact of being held with insane prisoners and for Bedan Mbugua, being obligated to do forced labour, when determining quantum of damages. That is all to say on that subject.

60. Turning back to the reliefs sought, the following orders have been sought outside the framework of Constitutional violations;

i) Declarations relating to Gitobu Imanyara's liabilities with National Bank of Kenya, Deposit Protection Fund on behalf of Euro Bank and the National Council of Churches of Kenya.

ii) Declarations regarding the conduct of Hon. Mathew Guy Muli as Attorney-General with regard to Imanyara's trial and conviction on account of alleged theft by agent.

iii) A declaration relating to the payment of damages and compensation of 950,000 copies of “Finance Magazine” allegedly impounded by the Kenya Police and CID officers whose total sale price is estimated at Kshs.95 Million.

These three prayers have caused me great concern because before me is a consent on liability and the only issues I was asked to dress are two viz;

a) whether lawful convictions should attract orders against the Respondents. Elsewhere above, I have settled that issue and I need not repeat what I stated.

b) the quantum of Damages payable for breach of fundamental rights and I will address the issue at the end of the judgment.

The parties did not see it fit to address me on the nexus between the three declarations I have set out above and the easier option would have been to say that since there is an admission on liability, then that

is the end of the matter. But from where I sit, I am still obligated to interrogate all matters placed before me and reach a fair decision on the merits of each issue so placed.

61. In that regard, on Mr. Imanyara's liabilities, National Bank of Kenya, Deposit Protection Fund and the National Council of Churches of Kenya were never involved in the present proceedings. They are the ones to whom monies are owed and to make orders that may well affect their claims without affording them a chance to be heard would amount to an unconstitutional act and I decline to follow that route. In any event, the details of the liabilities are so scanty that I would not reach a fair decision based on the material before me. I would for example expect to know how the liabilities were incurred and the nexus between the present proceedings and those liabilities.

My advice, if any is required, is that the judgment herein may well be used to create that nexus but in the proceedings, if any, where the liabilities are directly and materially in focus.

62. On issue No.(ii), it seems to me that once liability is admitted, then it means that the Respondent also admits that the Hon. Matthew Guy Muli acted improperly as Attorney-General and therefore to that extent, it can also be surmised that he instigated Imanyara's arrest. I say this because the Respondent is the present Attorney-General and if he admits past misconduct on the part of his predecessor, surely this Court cannot but accept that admission.

63. On issue No.(iii), while noting the admitted liability on the part of the Respondents, I am certain that the allegations that 950,000 copies of "Finance Magazine" were destroyed, may well be exaggerated. But that is not the worrisome issue; Njehu Gatabaki instituted the present proceedings on his own behalf and while he had interests in "Finance Magazine", in fact the magazine was published by and was the property of Finance Institute Ltd with or without Productions and Communications Ltd. and Wanjega Enterprises Ltd having similar interests. None of those legal entities has sued for the alleged losses and it is not enough that Njehu Gatabaki may have an association with them.

64. I have also seen extracts from the "Daily Nation" and "the Standard" regarding the seizure of copies of "Finance" on or about 28th – 29th April 1993. They refer to 30,000 copies and 60,000 copies respectively being the numbers of the magazine that were seized.

65. In any event, a separate claim by the correct legal entity should be made in that regard and proper evidence to prove the loss. I am unable to decide on the issue for the above reasons.

66. Having addressed the above issues of concern, I must now turn to the issue of general damages awardable to each Petitioner for their suffering and as detailed out above.

67. In awarding general damages I am persuaded by the holding in **Dominic Arony Omolo vs. Attorney General. H.C. Misc. Application No.494/2003**, where it was held that monetary compensation must be reasonable and fair and taking into account all the circumstances of each case. The specific circumstances of each case are well set out above and in addition, I will give a global sum for breach of fundamental rights in each case and it is obvious that each Petitioner suffered breach of those rights for differing periods and in differing circumstances. My eventual judgment in quantum must be looked at in that light. Elsewhere above I have set out the facts that I shall rely on.

68. The above being my findings, I will now enter judgment in favour of the Petitioners and against the Respondent in the following terms;

Petition No.78 of 2010

a) A declaration is hereby issued that *the Petitioner's fundamental rights and freedoms under Articles 28, 29, 31, 33(1), 34(1), 34(2), 37, 39 and 40(1) of the Constitution 2010 and under Sections 72(1), 72(2), 72(3), 72(5), 74(1), 75(1), 76(1), 77(1), 77(2), 79(1), 80(1) and 81(1) of the repealed Constitution of Kenya at material times had been and were repeatedly contravened and grossly violated by the Police and CID Officers, NSIS (formerly Special Branch), prison warders and other Kenyan Government*

servants, agents, employees and institutions, on numerous dates at various police stations in Nairobi City and surrounding towns, in Nairobi Industrial Area Remand Prison, Police Cells and Kamiti Maximum Prison.

b) The Respondent having admitted that the conduct of the then Attorney-General, Hon. Mathew Guy Muli with regard to the Petitioner's arrest for alleged theft by agent, amounted to a misconduct, it is so declared, whatever the value of that declaration.

c) The Petitioner be awarded general damages of Kshs.15 Million in (a) above.

d) The Petitioner be awarded the costs of the Petition.

e) The Petitioner is awarded interest at Court rates on damages from the date of this judgment until payment in full.

Petition No.80 of 2010

a) A declaration is hereby issued that the Petitioner's fundamental rights and freedoms under **Articles 28, 29, 31, 33(1), 34(1), 34(2), 37, 39 and 40(1)** of the **Constitution 2010** and under **Sections 72(1), 72(2), 72(3), 72(5), 74(1), 75(1), 76(1), 77(1), 77(2), 79(1), 80(1) and 81(1)** of the repealed Constitution of Kenya at material times had been and were repeatedly contravened and grossly violated by the Police and CID Officers, NSIS (formerly Special Branch), and other Kenyan Government servants, agents, employees and institutions, on numerous dates at various police stations in Nairobi City and surrounding towns, in Nairobi Industrial Area Remand Prison, Police Cells and Kamiti Maximum Prison.

b) The Petitioner be awarded general damages of Kshs.10 Million in (a) above.

c) The Petitioner be awarded the costs of the Petition.

d) The Petitioner is awarded interest at Court rates on damages from the date of this judgment until payment in full.

Petition No.81 of 2010

a) A declaration is hereby issued that the Petitioner's fundamental rights and freedoms under **Articles 28, 29, 31, 33(1), 34(1), 34(2), 37, 39 and 40(1)** of the **Constitution 2010** and under **Sections 72(1), 72(2), 72(3), 72(5), 74(1), 75(1), 76(1), 77(1), 77(2), 79(1), 80(1) and 81(1)** of the repealed Constitution of Kenya at material times had been and were repeatedly contravened and grossly violated by the Police and CID Officers, NSIS (formerly Special Branch), prison warders and other Kenyan Government servants, agents, employees and institutions, on numerous dates at various police stations in Nairobi City and surrounding towns, in Nairobi Industrial Area Remand Prison, Police Cells and Kamiti Maximum Prison.

b) The Petitioner be awarded general damages of Kshs.7 Million in (a) above.

c) The Petitioner be awarded the costs of the Petition.

d) The Petitioner is awarded interest at Court rates on damages from the date of this judgment until payment in full.

69. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 14TH DAY OF JUNE, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Mr. Kouna for Petitioner

Mr. Moimbo for Respondent

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE