



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 227 OF 2014**

**BETWEEN**

**MAURICE OKETCH OWITI.....PETITIONER**

**AND**

**THE HONOURABLE ATTORNEY GENERAL.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The petitioner is employed by the University of Nairobi as a senior lecturer in its School of Law. He has filed the present petition dated 12<sup>th</sup> May 2014 alleging violation of his constitutional rights under the former constitution, which are also guaranteed under the 2010 Constitution, on various dates in 1986. At the time of the alleged violations, he was a lecturer in the Faculty of Law at the said University.
2. The petition is lodged against the office of the Attorney General of the Republic of Kenya, which is now established under Article 156 of the Constitution as the principal legal advisor of the national government and with the mandate to represent the national government in civil matters.
3. The petition is supported by an affidavit sworn by the petitioner on 12<sup>th</sup> May, 2014. In the said affidavit, the petitioner avers that at about 3.00 a.m. on the morning of Friday, May 9, 1986, about three people, who later introduced themselves as Special Branch officers, knocked at his residence in Kileleshwa. He opened his window curtains and saw a person holding a small gun in his hand while motioning to him to open the door. There were at least two other people behind him. He spoke to the trio through the window and they informed him that they were Special Branch officers who had gone to search the premises.
4. He avers that he opened the door for them and after a thorough search of the compound and the house (including the guest wing), which lasted about three hours, the officers collected about thirty books and booklets from the house and put them in a Land Rover, saying that the books were exhibits. At about 6.00 a.m., the officers arrested him and a family friend, Ben Onyimbo (now deceased), an advocate, who was staying with him at the time. They were put in the Land Rover and made to lie on the floor of the back seat. The officers sat on the back seat and

continuously taunted and stepped on them.

5. The petitioner avers further that after being driven around, they were taken to Muthangari Police Station where they were put in the same cell, which was vacated by those who were occupying it. At around 6.30 p.m. on the same day, they were removed from the cells and bundled onto the floor of a Land Rover; forced to lie on their stomachs and face down to prevent them from looking at or seeing anything else; driven around and then taken to a place within the city of Nairobi, which they later learnt was the basement cells of Nyayo House. At Nyayo House, they were put in a small cell and locked in. The petitioner deposes that this is the last time he saw Ben Onyimbo at Nyayo House. He deposes that he later came to discover that Onyimbo had been released after being interrogated on whether he was aware that the petitioner was a member of a clandestine political organization.
6. It is the petitioner's further deposition that on 10<sup>th</sup> May, 1986, he was blindfolded in his cell and taken by a lift to a room many floors up the building; that the blindfold was removed and he was subjected to continuous interrogation by nine Special Branch officers, led by a person he came to learn was a Mr. Opiyo. The officers alleged that he was a Marxist-Leninist and a member and political and legal advisor of Mwakenya, an alleged underground political movement intent on overthrowing the then Kenyan government through unlawful means. The interrogation was repeated on 11<sup>th</sup> May, 1986, and he denied the accusations on both occasions.
7. The petitioner further avers that from 13<sup>th</sup> to 17<sup>th</sup> May, 1986, he was given what he came to call a 'special water treatment' after having been forced to remove all his clothes. He was transferred from his cell to the next one, which was vacant, and sprayed with extremely cold water through a horse-pipe, and that he was locked in this cell which had become waterlogged to about two inches. It is also his averment that every morning for five days, an officer would open the door and ask him whether he was ready to confess but his response was always that he had nothing to confess, after which he would be re-sprayed with water and the cell waterlogged.
8. The petitioner alleges that he was not given food for each of the said days. On the afternoon of 17<sup>th</sup> May, 1986, he was taken out of the water-logged cell and to another room many floors up where he was further interrogated. Later on he was taken to the dry cell he had previously occupied.
9. It was his further averment that on 18<sup>th</sup> May, 1986, he was again blindfolded and taken to a room many floors up. He was interrogated further and asked to record a statement to admit that he was a Marxist-Leninist, a member of the Mwakenya and part of a group which wanted to overthrow the government. He deposes that he recorded a statement in which he denied the allegations, after which he was returned to his cell. He also wrote a second statement on 20<sup>th</sup> May, 1986.
10. According to the petitioner, he was left undisturbed in his cell on 21<sup>st</sup> May, 1986, but was interrogated on 23<sup>rd</sup> and 24<sup>th</sup> of the said month on a variety of issues related to the allegations against him. From 25<sup>th</sup> to 30<sup>th</sup> May, 1986, he was again given the 'special water treatment', which he was subjected to for various days. On June 12, 1986, during an interrogation, he was asked to identify a person, whom he does not name, whom it was alleged he had met. He denied having met the person, after which he was taken away and subjected to a two-hour physical assault with an assortment of crude wooden weapons while being forced to do strenuous exercises, all the while being taunted, insulted and interrogated. The petitioner alleged that this was repeated on 13<sup>th</sup> June, 1986.
11. The petitioner further alleges that on various dates in the month of June 1986, he was subjected to further interrogation. On 26<sup>th</sup> and 27<sup>th</sup> of the said month, he was informed by the said Mr. Opiyo that it had been decided that he was to be detained without trial, and that the police officers were waiting for the then President, Daniel arap Moi, to sign a letter ordering his detention. He was,

however, released and informed that he would be allowed to go home, but could be re-arrested at any time. On 27<sup>th</sup> June 1986, he was given back his property, except the thirty books which he alleges had been taken from him, blindfolded and made to lie on the floor of the back seat of a Land Rover, and dropped off at Moi Avenue next to Khoja Mosque in Nairobi.

12. The petitioner further deposes that during the entire period of his detention, he was held incommunicado and was only in contact with Special Branch Officers except on 12<sup>th</sup> June, when he avers he met the alleged Mwakenya representative. He was, however, aware of the presence of other detainees in the underground cells.
13. It is the petitioner's contention that the actions by the police were in blatant breach of his right to personal liberty and freedom of movement, security of the person including the right not to be deprived of freedom arbitrarily or without just cause, and detention without trial. They were also a gross and callous abuse of police powers and a blatant breach of his individual rights and fundamental freedoms including protection from inhuman treatment, torture and cruel, inhuman or degrading treatment or punishment, the right to inherent dignity and the right to have the dignity respected and protected. He asserts that the state completely failed in its mandate and obligation to protect his rights and individual freedoms. It is also his contention that during the period of incarceration, he contracted an allergic condition which manifests in periodic wheezing and coughing which to date remains a concern.
14. The petitioner further argues that he was neither informed of the reason for his arrest nor allowed to communicate with an advocate, and neither was he brought before a court of law. He was also subjected, throughout the period of incarceration, to inhuman and degrading treatment including physical and mental assault by police officers.
15. The petitioner avers that the events that he set out in his affidavit remain etched in his memory to date. He contends that upon his release and arrival back home, he immediately recorded the events in his private diary, which, together with a letter dated 19<sup>th</sup> June 2013 from the Attorney General to the then Inspector General of Police indicating the petitioner's intention to lodge his claim, he produced in evidence.
16. At the hearing of the petition, the petitioner adopted the averments contained in his affidavit which are summarised above, and was cross-examined by Mr. Moimbo, Learned Counsel for the AG. He stated in cross-examination that he had never attempted to take any action against the Mr. Opiyo whom he had alleged was involved in his torture, on the basis that he believed that the said Opiyo was acting as an employee of the Police Service. He had also never lodged a complaint in the matter, nor does he have an inventory of the books he alleged had been taken from him by the Special Branch officers as they did not allow him to take a list of the items they took from his house.
17. On re-examination by his Counsel with respect to whether he had lodged a complaint about his arrest and detention, the petitioner testified that he had written a notice to sue the AG dated 18<sup>th</sup> June, 2013, and that his Advocate informed him that the response was that the AG had forwarded the notice to the then Inspector General of Police. It was also his testimony that the books he lost were difficult to get and he has never been able to replace them.
18. He asked the Court to allow the petition, and grant the prayers sought therein as follows:
  - i. ***A declaration that the petitioner's fundamental rights and freedoms under sections 70, 72, 74, 75, 76, 77, and 81 of the former Constitution, and saved by Articles 25 (a), 28, 29 (c), (d), (f), 40, 49, and 50 of the Constitution, 2010 were contravened and grossly violated by police officers and other Kenyan Government servants and/or agents on the dates specified.***
  - ii. ***A declaration that the petitioner is entitled to general damages and compensation for the violations and contraventions of his fundamental rights and freedoms under sections 70, 72, 74, 75, 76, 77, and 81 of the former Constitution, and saved by Articles 22, 23, 25 (a), 28, 29 (c),***

*(d), (f), 40, 49, and 50 of the Constitution, 2010.*

- iii. *Exemplary damages and/or aggravated damages be awarded against the Attorney General for and on behalf of the National Police Service, the Government, its servants and or agents for the gross abuse of the petitioner's rights and fundamental freedoms.*
- iv. *Interest at Court rates and costs.*
- v. *Such other orders as this Honourable Court shall deem just.*

#### **The Case for the Respondent**

19. The Attorney General opposed the petition by way of Grounds of Opposition dated 18<sup>th</sup> May, 2015 and written submissions dated 18<sup>th</sup> September, 2015. No affidavit was filed in opposition to the petition.
20. The Grounds of Opposition are in the following terms:
- a. *That the petition has been brought after inordinate delay. Over thirty years after the alleged violation was committed.*
  - b. *That no reasons whatsoever have been advanced to explain the long and inordinate delay.*
  - c. *That the petitioner has not shown by way of evidence that the alleged acts of violation were committed and further that if they were indeed committed, that Government was involved.*
  - d. *That the petition filed herein is imprecise, it is based on generalities; and therefore fatally defective.*
  - e. *That the petition, as filed herein, is an abuse of the court process.*

#### **The Petitioner's Submissions**

21. In his written submissions dated 28<sup>th</sup> July, 2015, the petitioner disputed the allegation by the respondent that the present petition is an abuse of the court process, unless that ground was based on the ground that there was no proof of government involvement in his arrest. He reiterated that he was arrested by police officers attached to the Special Branch unit, but that in any event, even if the persons who had arrested him were not government agents, the State would still have failed at protecting him while allowing its facilities to be used illegally.
22. The petitioner relied on the decision in **Oduor Ong'wen and 20 Others vs Attorney General, Petition No. 777 of 2008** and **Gerald Juma Gichohi and 9 Others vs Attorney General [2015] eKLR** to submit that there are no limitations on claims for enforcement of fundamental rights and freedoms and therefore nothing barring a party from filing a petition for enforcement of the provisions of the Bill of Rights.
23. The petitioner maintained that his rights were violated, which the respondent had not denied despite the several opportunities afforded to the AG to file a replying affidavit. It was the petitioner's submission that the only inference that could be drawn by the Court is that the acts complained of occurred without justification. He also maintained that his rights were violated as outlined in his pleadings and he was therefore entitled to the reliefs claimed. He submitted that under Article 23 (3) of the Constitution, the Court had the power to make orders of declaration of rights and compensation in any proceedings under Article 22 of the Constitution.
24. With respect to his prayers for compensation, the petitioner urged the Court to be guided by the

decisions in **Oduor Ong’wen case (supra)**, **Gabriel Kariuki Mung’ura vs Attorney General, Petition No 785 of 2008**; **George John Njenga Wainaina vs Attorney General, Petition No 794 of 2008**; **Benard Wanjohi Kinga vs Attorney General, Petition No. 796 of 2008**; **George Kwanyah Odidi vs Attorney General, Petition No 798 of 2008**; and in **Estate of Cpt Kariuki Kingaru Murebu (Dcd) and 8 Others vs Attorney General [2014] eKLR**, and to make orders as prayed for in the petition. It was his submission that damages of Kshs.6, 000,000 are reasonable in the circumstances of the present petition.

### **Submissions in Response**

25. The AG reiterated his Grounds of Opposition and submitted that the petitioner is expected to prove how his rights under the Constitution were violated, infringed or threatened by the respondent. It was his position that it is a trite requirement of the law that anyone who alleges constitutional violations and infringements must meet the threshold established and set out in **Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272**.
26. It was further submitted on behalf of the AG that the petitioner has failed to provide with precision the particulars of violation or infringement, and the evidence in support. His submission was that the burden of proof lies entirely on the petitioner to demonstrate that the state, through known, identified and recognized agents, violated his rights. In the AG’s view, it was not enough to say merely that he was arrested by some Special Branch police officers and taken to certain police stations without producing an Occurrence Book Number showing his detention at the alleged police stations; and further, that it could have been different if he could at least identify any police officer.
27. The AG observes that while the petitioner alleges that he was tortured, no medical report was produced to corroborate the allegations of torture. It was his submission that it is not enough for a party to claim torture, for a party must corroborate and provide substantial evidence in support of its claim. In support of this proposition, the AG relied on the decision in **Kirugi and Another vs Kabiya and 3 Others [1987] KLR 347**.
28. Further, in the AG’s view, in order for the Court to determine whether an alleged claim is genuine or not, it has to assess the facts based on documentary proof as stipulated under section 112 of the Evidence Act (Cap 80) Laws of Kenya.
29. With regard to the petitioner’s claim for damages, the AG submitted that exemplary damages represent an importation of a criminal law principle into civil law, that is, the principle of punishment. The AG argued that such damages are awarded to serve the societal purpose of punishing the wrong doer and deterring him and others from similar conduct in the future. He urged the Court to adopt the position in **Benedict Munene Kariuki and 14 Others vs the Attorney General, Petition No 722 of 2009** where the Court declined to award exemplary damages in addition to general damages for reasons that there is no justification for such an award in changed political circumstances.

### **Determination**

30. I have considered the pleadings of the parties, the oral evidence adduced by the petitioner, and the respective submissions of the parties as well as the authorities relied on. In my view, three issues arise for determination. The first relates to the first ground of objection raised against the petition by the AG, namely whether the petition is time-barred having been brought after inordinate delay, the alleged events complained of having allegedly occurred in May-June of 1986. Should the Court find in favour of the petitioner on this issue, it shall proceed to consider the question whether a violation of his constitutional rights as alleged has been made out. Finally, the Court shall consider, if the first two issues are determined in favour of the petitioner, what relief he is entitled to.

## Whether the Present Petition is Time Barred

31. Our courts have on several occasions addressed the question on limitation of time and constitutional petitions touching on violations of rights in the Bill of Rights. In **Joan Akinyi Kabasellah and 2 Others vs Attorney General, Petition No 41 of 2014** the court observed that:

[24]“*Nonetheless, I take into account the views of the court with regard to limitation in respect of claims for enforcement of fundamental rights. In a line of cases such as Dominic Arony Amolo vs Attorney General, Nairobi High Court Misc. Civil Case No 1184 of 2003 (OS) [2010] eKLR, Otieno Mak’Onyango vs Attorney General and Another, Nairobi HCCC NO 845 of 2003 (unreported). Courts have consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights.*”

[25] *I note also the sentiments of the court in James Kanyiita vs Attorney General and Another, Nairobi Petition No. 180 of 2011 that: ‘Although there is no limitation period for filing proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under Section 84 of the Constitution, is entitled to consider whether there has been inordinate delay in lodging the claim. The court is obliged to consider whether justice will be served by permitting a respondent, whether an individual or the State in any of its manifestations, should be vexed by an otherwise stale claim.’*

[26] *In the present case, I am satisfied that no prejudice has been occasioned to the respondent by the filing of the present claim.”* (Emphasis added)

32. In High Court Petition No. 306 of 2012 Ochieng’ Kenneth K’Ogotu vs Kenyatta University and 2 Others, it was observed that:

[35]“ *As I conclude this matter, I will address the issue of delay in filing this petition. The respondent has argued that the petitioner is guilty of inordinate delay, and I am inclined to agree with it. The events complained of took place more than 12 years ago. There is nothing before the court that explains or justifies the delay in coming to court to vindicate his rights. The petitioner’s counsel submitted that he was so traumatised that he could not come to court before, but I can see no basis for this submission. While the petitioner alleges that he was arrested and charged, and that he served for 15 days before his fine was paid, I cannot see any basis for alleging that he was so traumatised that it has taken him 12 years to recollect that he had a claim against the respondents. While the reason for delay in cases such as those involving the Nyayo House torture cases may be acceptable, at least for a time, that they were not able to file claims because of the politically repressive climate then prevailing, there is no such justification in this case. Even had I found that the facts demonstrated a violation of the petitioner’s rights (which I have not), I would have had difficulty in excusing the 12 years’ delay in this matter.”* (Emphasis added)

33. The court went on to observe as follows:

[36]” *There is a great danger that parties are abusing the constitutional protection of rights to bring claims before the court whose sole aim is enrichment rather than vindication of rights. A delay of 10 years or more before one comes to court to allege violation of rights is clearly not justifiable. As Nyamu J observed in Abraham Kaisha Kanzika and Another vs Central Bank of Kenya (supra): “Even where there is no specified period of limitation it is proper for the court to consider the period of delay since the accrual of the claim and the reasons for the delay. An applicant must satisfactorily explain the delay. In this case a delay of 17 years is*

*inordinate and it has not been explained. The prosecution of the claimant took 6 years and although he gives this as the reason for the delay he has not explained the balance of eleven years.*

*In my view failure by a Constitutional Court to recognize general principles of law including, limitation expressed in the Constitution would lead to legal anarchy or crisis. It would also trivialize the constitutional jurisdiction in that applicants would in some cases ignore the enforcement of their rights under the general principles of law in order to convert their subsequent grievance into a “constitutional issue” after the expiry of the prescribed limitation periods.”(Emphasis added)*

34. In **Joseph Migere Onoo vs Attorney General, Petition No. 424 of 2013** this Court held that the petition was barred owing to the fact that it had been filed 27 years later. The petitioner had filed the suit against the Government of Kenya alleging violations of his various constitutional rights, violations which he averred occurred following his alleged arrest and torture in various places in 1986, when he was a student at Egerton University. In this case, this Court, while dismissing the petition made the following observation:

*[39]”The principle that emerges from the cases cited above is that a court must always consider whether the delay in filing a petition alleging violation of constitutional rights is unreasonable and prejudicial to a respondent’s defence.*

*[40] In the present case, the acts complained of took place some 29 years ago, and the petition was filed 27 years after the alleged events. No explanation has been proffered for the delay, or to explain or justify the institution of proceedings at this point in time. The petitioner contented himself with maintaining that there is no limitation in petitions such as this.”*

35. It is evident from the above cited authorities that courts have expressed dissatisfaction in the filling of petitions alleging violations of fundamental rights and freedoms after a considerable length of time has lapsed since the alleged violations occurred. The principle that emerges is that a court must examine each case and gauge the length of time taken before presenting such petitions, and the reason for the delay. A court is also entitled to consider whether justice will be served by permitting a respondent, whether an individual or the State in any of its manifestations, to be vexed by an otherwise stale claim. I am in agreement in this regard with the view expressed by Majanja J in the case of **James Kanyiita Nderitu vs Attorney General and Another, Petition No. 180 of 2011** when he stated as follows:

*[45.]” Before I consider the facts as presented, I must state that it is well established the law concerning limitation of actions cannot be used to shield the State or any person from claims of enforcement of fundamental rights and freedoms protected under the Bill of Rights (See *Dominic Arony Amolo v Attorney General Nairobi HC Misc. 494 of 2003 (Unreported)*, *Wachira Waheire v Attorney General Nairobi HC Misc. Civil Case no. 1184 of 2003 (OS) [2010]eKLR*, *Otieno Mak’onyango v Attorney General and Another Nairobi HCCC No. 845 of 2003 (Unreported)*). Although there is no limitation period for filing proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under section 84 of the Constitution, is entitled to consider whether there has been inordinate delay in lodging the claim. The Court is obliged to consider whether justice will be served by permitting a respondent, whether an individual or the State in any of its manifestations, should be vexed by an otherwise stale claim. Just as a petitioner is entitled to enforce its fundamental rights and freedoms, a respondent must have a reasonable expectation that such claims are prosecuted within a reasonable time. The words of *Didcott J. in Mohlomi v Minister of Defence [1996] ZACC 20,**

**1997 (1) SA 124, 129 are apposite in this regard, "Inordinate delays in litigating damage the interests of justice. They protract the disputes over rights and obligations sought to be enforced, prolong the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of those whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken." (See also Kenya Bus Service Limited and Another v Minister for Transport and Others HCCC No. 504 of 2008 [2012]eKLR).**

36. In reaching the conclusion that the petition before him was unmerited on account of the inordinate delay, the Honourable Judge concluded as follows:

**[46.] "Whether such a claim should be permitted is a question of fact dependent on the circumstances of each case. In the matter of Lt. Col. Peter Ngari Kagume & Others v Attorney General, Nairobi Constitutional Application No. 128 of 2006 [2009] eKLR where Nyamu J. considering the issue of delay in filing a suit for the enforcement of fundamental rights and freedoms stated observed that, "The petitioner had all the time to file their claim under the ordinary law and the jurisdiction of the court but they never did and are now counting on the constitution. None of the petitioners has given any explanation as to the delay for 24 years. In my view the petitioners are guilty of inordinate delay and in the absence of any explanation on the delay; this instant petition is a gross abuse of the court process .... In view of the specified time limitation in other jurisdictions the court is in a position to determine what a reasonable period would be for an applicant to file a constitutional application to enforce his or her violated fundamental rights. I do not wish to give a specific time frame but in my mind, there can be no justification for the petitioners delay for 24 years. A person whose constitutional rights have been infringed should have some zeal and motivation to enforce his or her rights. In litigation of any kind, time is essential as evidence may be lost or destroyed and that is possibly the wisdom of time limitation in filing cases."**

**[47.] The petitioner has held his grievance about his arrest and detention since 1985. These facts were known to him throughout the trial and appeal from the conviction."... I do not think the petitioner has justified why he waited to lodge this claim after 26 years. In other cases where the period has been excused, the parties have justified the reasons why the case could not be filed for a long period of time"**

37. In the present petition, it is not in dispute that the alleged violations took place from 9<sup>th</sup> May, 1986 to 27<sup>th</sup> June 1956. The petitioner filed the instant petition on 12<sup>th</sup> May, 2014. From the evidence, the petitioner waited 28 years to institute these proceedings. What was his justification for doing so? The petitioner has not given any justification for the said delay but has contented himself with the submission that there is no time limit for instituting cases on violations of fundamental rights and freedoms.

38. This is a position that can no longer be taken as justifying a litigant who waits inordinately, without presenting any justification, before filing his claim for alleged violation of fundamental rights. As the cases cited above illustrate, Courts have frowned upon and refused to accept the justification that because there is no time limit on constitutional petitions, a party can lodge his claim without proffering reasons for the undue delay.

39. Further, as observed in the above cases, delay in cases such as this involving the Nyayo House

torture cases may have been acceptable, at least for a time, on the basis that they could not be lodged in view of the politically repressive regime and climate then in place. However, there has been a change of government since 2002, and parties who had suffered under the repressive regime filed and litigated their claims soon thereafter, as the cases relied on by the petitioner illustrate. It cannot be justifiable now to accept that the petitioner could not have filed his claim before the expiry of 28 years after the alleged violations. I am therefore inclined to agree with the AG's contention that there has been inordinate delay in filing the present matter and no reasonable justification has been given by the petitioner.

40. As I observed in the case of **Wamahiu Kihoro Wambugu vs Attorney General-High Court Petition No. 468 of 2014**:

[46]. "Then there is the period it has taken the petitioner to file this petition. It was filed on 18<sup>th</sup> September 2014, more than 28 years after the alleged events. The petitioner alleges that he did not file his claim because there was a repressive government in place. However, as pointed out by the respondents, there have been more than three changes in government in the twelve years or so preceding the filing of the petition. A large number of petitions alleging violation of constitutional rights have been filed as far back as 2003 and 2004 by persons who had been arrested, held in Nyayo House, tortured and jailed. Cases in point include the two decisions relied on by the petitioner in his submissions that of **Mugo Theuri vs Attorney General** and **Simon Maina Waweru vs Attorney General**. The delay may have been as a result of the petitioner's own doubts about the credibility of his claim. Whatever the reason, however, this is one of the cases in which I would agree with the reasoning of Nyamu J (as he then was) in the case of **Lt. Col. Peter Ngari Kagume vs Attorney General (supra)** when he stated:

**"I do not wish to give a specific time frame but in my mind there can be no justification for the Petitioners delay for 24 years. A person whose constitutional rights have been infringed should have some zeal and motivation to enforce his or her rights. In litigation of any kind, time is essential as evidence may be lost or destroyed and that is possibly the wisdom of time limitation in filing cases."**

41. Having come to the conclusion that the present petition has been brought after inordinate delay, I need not consider the allegation of violation of the petitioner's rights. In the event, however, that I am mistaken in the above view and the position is that petitions alleging violation of constitutional rights are, as this and other petitioners allege, indefinite in terms of time, I will address my mind to the question whether a case of violation of constitutional rights has been made out.

### **Violation of the Petitioner's Constitutional Rights**

42. The petitioner alleges violation of his rights under sections 70, 72, 74, 75, 76, 77, and 81 of the former Constitution, which he states were saved by Articles 25 (a), 28, 29 (c), (d), (f), 40, 49, and 50 of the Constitution of Kenya 2010. As the events complained of took place in 1986, and as the 2010 Constitution has no retrospective application as held by the Supreme Court in the case of **Samuel Kamau Macharia vs Kenya Commercial Bank and 2 Others, Civ. Appl. No. 2 of 2011**, I will confine myself to consideration of the provisions of the former constitution which were applicable at the time the events complained of occurred.

43. Section 70 contained the general provisions with respect to fundamental rights and freedoms in the following terms:

**70. Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connection, political opinions, color, creed or sex, but subject to respect for the rights and freedoms of others and**

*for the public interest, to each and all of the following, namely-*

*(a) life, liberty, security of the person and the protection of the law;*

*(b)...*

44. Section 72 contained the provision with respect to the right to liberty as follows:

***72. (1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases..."***

45. The section then gave the instances in which deprivation of liberty was permissible. Such instances include the execution of a sentence or order of a Court in respect of a criminal offence, for contempt of court, or in execution of the order of a court made to secure the fulfilment of an obligation imposed on the arrested person by law. In addition, section 72(3) provided that a person held with a view to bringing him before a Court was to be brought before a court within reasonable time. If not brought within 24 hours except with respect to a capital offence, where the period provided was fourteen days, the state had a responsibility to explain why he was detained beyond the constitutionally permitted period.

46. Section 74 contained the prohibition against torture in the following terms:

***74. (1) No person shall be subject to torture or to inhuman or degrading punishment or other treatment.***

47. Section 75 contained the constitutional prohibition against deprivation of property without compensation, while section 76 prohibited the search of one's person or property without one's consent. Section 77 contained the constitutional guarantee to a fair hearing, while section 81 protected the citizens' right to freedom of movement.

48. Has the petitioner established the violation of the above constitutional guarantees? The petitioner's case is that he was arrested and detained at Nyayo House between 9<sup>th</sup> May and 27<sup>th</sup> June 1986. His evidence is that he was subjected to torture during his incarceration. He was not brought before a court within the prescribed period, and his freedom of movement was restricted. His evidence consisted of his oral and affidavit evidence.

49. The respondent did not file any reply to the averments by the petitioner. The AG's submission, however, was that despite the failure to file an affidavit in response, the onus was on the petitioner to establish his claim that the alleged acts complained of took place, and that they were perpetrated by officers of the state.

50. The petitioner has not produced any documentary or medical evidence to support his allegations of torture, and he relies on his personal diary, recorded after he was released, to support his allegation of torture. He has also not produced any oral or documentary evidence to support his claim regarding his arrest, or the deprivation of property.

51. The petitioner is a lecturer in law, and his demeanour in presenting his evidence was forthright. However, while the Court accepts his averments with regard to his arrest and incarceration, it has difficulty in accepting his allegations of torture, based as they are on his own self-recorded evidence that he was subjected to various acts on diverse dates during the period of incarceration.

52. The Court has also difficulty in making a finding with respect to the alleged deprivation of property. The petitioner alleges that several of his books, 30 in number, were taken away during his arrest, but there is nothing before the court that can assist in establishing what the books were, or their value. I can therefore make no finding in relation to the alleged violation of section 75 of the Constitution.

53.It is also the petitioner's case that his right to a fair hearing was violated. However, it is to be noted that on his own evidence, he was not subjected to a trial, but was held in custody and later released. As has been held in various decisions, the rights guaranteed under section 77 (now under Article 50(2)), are trial related - see **Julius Kamau Mbugua vs Republic Criminal Appeal No. 50 of 2008.**

54.Had I been able to find that the present petition is merited, the only constitutional violation in respect of which I would have been able to find in favour of the petitioner is in respect of the deprivation of liberty guaranteed under section 72. However, in light of the finding on the first issue that the petitioner is guilty of inordinate delay which has not been explained, I am constrained to dismiss his petition, but with no order as to costs.

**Dated, Delivered and Signed at Nairobi this 29<sup>th</sup> day of February 2016**

**MUMBI NGUGI**

**JUDGE**

**Mr. Kabata instructed by the firm of L. M. Kambuni & Associates Advocates for the petitioner**

**Mr. Moimbo instructed by the State Law Office for the respondent**