



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI, MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO 441 OF 2015

IN THE MATTER OF ARTICLES 2, 10, 19, 20, 21(1), 23(1) & (3), 165(3)(A),(B)(D)(I)(II), 25(A), 27(1)(2), 28, 29(A)(C)(D)(F), 31 & 51(1) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTIONS 70, 72(1)(2)(3) (5), 74(1), 76(1) AND SECTION 84 OF THE CONSTITUTION OF KENYA (REPEALED)

BETWEEN

EDWARD AKONG'O OYUGI.....1ST PETITIONER

KAMOJI WACHIRA.....2ND PETITIONER

JOSEPH OTIENO MALO.....3RD RESPONDENT

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

Introduction

1. I find it fitting to start this determination by citing *Republic v Speaker of the Senate & Another ex parte Afrison Export Import Limited & Another*<sup>[1]</sup> in which I paraphrased the words of Baroness Helena Kennedy QC, a woman activist and chair of the British Council<sup>[2]</sup> who said that:-

*"Law is the bedrock of a nation, it tells who we are, what we are, what we value...almost nothing else has more impact on our lives. The law is entangled with everyday existence, regulating our social relation, and business dealings, controlling conduct which could threaten our safety and security, establishing the rules by which we live. It is the baseline."*

2. Law is the bloodline of every nation. The end of Law is justice. It gives justice meaning. It is by yielding Justice that law is able to preserve order, peace and security of lives and property, make the society secure and stable, regulate and shape the behaviour of citizens, safe guard expectations, function as a means of governance, a device for the distribution of resources and burdens, a mechanism for conflict resolution and a shield or refuge from misery, oppression and injustice. Through the discharge of these functions, the law has today assumed a dynamic role in the transformation and development of societies. It has become a instrument of social change.<sup>[3]</sup>

3. One can confidently say that peace is not absence of war. It is absence of justice. In a previous decision, I observed that:- *"While natural law theories hold less influence today, the human rights movement of the last fifty years reflects a remarkably parallel secular understanding, namely that there are certain basic human rights to which all persons are entitled, simply by virtue of their humanity. Human rights treaties, including those that Kenya is a party to or has ratified, uniformly provide that the rights of due process, fundamental rights and freedoms, and equal protection are owed to all persons, regardless of nationality."*<sup>[4]</sup>

4. In the above cited case, I observed that the Universal Declaration of Human Rights, for example, aptly described by Professor Richard Lillich as the *"Magna Carta of contemporary international human rights law,"* is expressly premised on *"the inherent dignity and ... the equal and inalienable rights of all members of the human family."*<sup>[5]</sup> The Universal Declaration explicitly guarantees the rights of due process, political expression and association, and equal protection.<sup>[6]</sup>

5. In the same decision I stated that the normative idea underlying this broad consensus is that fundamental rights are owed to persons as a matter of human dignity and should be honored no matter what form of government a particular community chooses to adopt. As David Feldman has written, *"there are certain kinds of treatment which are simply incompatible with the idea that one is dealing with a human being who, as such, is entitled to respect for his or her humanity and dignity."*<sup>[7]</sup> The rights of political freedom, right to life, freedom from inhuman and degrading treatment, due process, and equal protection are among the minimal rights that the world has come to demand of any society. In the words of the U.S. Supreme Court, these rights are *"implicit in the concept of ordered liberty."*<sup>[8]</sup> The starting point is that Human rights enjoy a *prima facie*, presumptive inviolability, and can only be limited as provided under the constitution. **Louis Henkin** wrote in *The Age of Rights*:<sup>-[9]</sup>

*"Government may not do some things, and must do others, even though the authorities are persuaded that it is in the society's interest (and perhaps even in the individual's own interest) to do otherwise; individual human rights cannot be sacrificed even for the good of the greater number, even for the general good of all. But if human rights do not bow lightly to public concerns, they may be sacrificed if countervailing societal interests are important enough, in particular circumstances, for limited times and purposes, to the extent strictly necessary."*

6. Perhaps I should add that the words of David Feldman cited above influence my thoughts while discussing the question of violation of constitutionally guaranteed Fundamental Rights in *Eliud Wefwafwa Lucho & 3 others v Attorney General*<sup>[10]</sup> where I observed that *"it is important at the outset to point out that the Courts simply do not and cannot countenance a denial or violation of the fundamental right to due process or violation of constitutionally guaranteed fundamental rights which are a cornerstone of our legal system. After all, it is the Court's primary duty to protect the basic rights of the people vis-à-vis government actions."*

7. Discussing the primary duty of the court in the above case, I remarked:<sup>-[11]</sup>

*"... perhaps, it would be fitting to recall the words of Albert Camus, noble prize winner who said "either cooperate with injustice or fight with it" and the words attributed to Elie Wiesel, a holocaust survivor who remarked that "...we must always side with the Rule of Law."* <sup>[12]</sup>

#### **The parties.**

8. The first and third Petitioners are Kenyan citizens residing Nairobi while the second Petitioner, also a Kenyan citizen resides at Georgetown, Guyana, South America.

9. The Respondent is the Hon. Attorney General sued in his capacity as the legal Representative of the Government of Kenya pursuant to Article 156 of the Constitution.

#### **The factual matrix**

10. This Petition is brought by the three Petitioners. However, for ease of clarity, I find it is convenient to summarize separately the facts giving raise to each of the Petitioner's case as enumerated in their respective supporting Affidavits.

#### **Edward Akong Oyugi.**

11. The first Petitioner, **Edward Akong Oyugi**, aged 72 years as at the time of filing this Petition avers that at all material times relevant to this case, he was a lecturer at the Kenyatta University College teaching Education and Psychology. He avers that on 15<sup>th</sup> June 1982, while having lunch with a friend, plain cloth police officers under the command of the late **Patrick Shaw** forcefully bundled him into a motor vehicle and drove him to the Central Police Station where he was booked into a cell that had several drunken inmates without being informed the reason for his arrest and subsequent detention.

12. **Mr. Oyugi** avers that that on 15<sup>th</sup> June 1982 at around 1800hrs, he was transferred to Carpet House at the junction of Muindi Mbingu Street/University Way in Nairobi where he was placed in solitary confinement in a dark room without food until the following day, that is, 16<sup>th</sup> June 1982 when at around 1500hrs, a one **Mr. Julius Omolo**, a policeman opened the door and introduced himself as the would be interrogator. He avers that for five consecutive days, the said **Julius Omolo** would go to the room and interrogate him for hours. Also, he averred that during this time he was held in comunicado, and, that, he was fed with very poor quality meals and he slept on a chair without blankets. **Mr. Oyugi** also avers that on the 5<sup>th</sup> day he was blindfolded, bundled into the boot of a saloon car and driven round for hours before being taken to the basement of Nyati House where he was locked in a dark cell without food for about two days. Further, he avers that on or about the fourth day, the said **Julius Omolo** and another security officer opened the door to his cell and took him to an interrogation room where he was grilled for close to 7 hours amid threats and accusations of failing to disclose the reasons why he and others wanted to overthrow the government of **President Daniel Arap Moi**. He avers that after the session he was transferred to a waterlogged cell with no lights and he was forced to sit and sleep there for two days, and, while there, he started experiencing signs of hypertension which he had not suffered from before.

13. **Mr. Oyugi** also averred that before being taken back to his cell, he was beaten by three police officers for nearly one hour until he became unconscious, and, upon regaining consciousness, he found himself naked lying in a water logged room. He averred that the physical assault was repeated several times punctuated by interrogations and threats, and, in the course of the interrogation he met the second Petitioner who had also been arrested.

14. **Mr. Oyugi** further averred that on 13<sup>th</sup> July 1982, he was woken up from sleep and was told to take cold shower after which he was led to a Land Rover draped with blankets. He avers that he was made to lie down, blindfolded and was driven to the Traffic Head quarters where the met the second Petitioner, and, that, they were each served with a detention order and immediately driven to Kamiti Maximum Prison's

Segregated wing where they found other detainees Alamin Mazrui and later Mukaru Nganga and Willy Mutunga joined them.

15. Additionally, **Mr. Oyugi** averred that his detention order dated **13<sup>th</sup>** July 1982 was published under Gazette Notice Number 1945 of **16<sup>th</sup>** July 1982. Also, he averred that on **1<sup>st</sup>** August 1982, with other detainees, they were blindfolded, handcuffed and flown to Shimo la Tewa prison where they were each held in a segregated cell. He averred that they were locked up to **23** hours and were allowed only **30** minutes per day for ablution, sunshine and measly penal diet. **Mr. Oyugi** also averred that due to the poor living conditions at Shimo la Tewa prison, he started losing his eye sight, and, began to suffer from piles, arthritis, hypertension and malaria, and, that, Further, it took long to receive medical attention. Also, he averred that from Shimo La Tewa prison, he was blindfolded and flown to Hola prison where the conditions were worse, food was worse and scarce, and the prison was infested with snakes, scorpions and strange insects forcing him to coil himself in the two blankets provided and wait for them to disappear in the morning.

16. Additionally, he averred that extreme heat, isolation and lack of medical attention forced him to go on hunger strike and after two weeks without food he was flown to Nairobi for forced feeding and then taken to Kamiti Maximum Prison Isolation block where he remained in isolation until his release on **12<sup>th</sup>** December 1984. He also averred that attempts to force him to eat destroyed his vocal cords which damage was corrected in Germany after he got the chance to be treated.

17. Further, he averred that upon his release, he could not secure a job anywhere in the country and that his passport had been confiscated and could therefore not take up any job opportunity abroad which nearly destroyed his academic career. He also averred that his family was affected. Additionally, he averred that at the intervention of Mr. Nyachae, the then Chief Secretary, he travelled to Germany in 1987 and took up a teaching job at Bayreuth University, but, he spent nearly all his earnings restoring his health.

18. Lastly, **Mr. Oyugi** averred that the detention was unsuccessfully challenged in court in *Republic v The Commissioner of Prisons ex parte Wachira*.<sup>[13]</sup>

#### **Mr. Oyugi's further Affidavit.**

19. **Mr. Oyugi** filed a further Affidavit dated **1<sup>st</sup>** February 2017 in which he averred that due to the circumstances enumerated above, he developed medical conditions detailed in the medial report by **Prof. Elijah Ogola**.

20. **Prof. Elijah Ogola**, in his Medical Report, states that **Mr. Oyugi** was made to endure all the manner of torture and extremely harsh environment which included prolonged isolation, constant exposure to harsh lighting conditions, long sitting in uncomfortable positions, lack of physical activity, poor diet among others, as a consequence of which he developed a wide variety of medical complications. He states that **Mr. Oyugi** sought treatment for poor eye sight, haemorrhoids, gain in weight, hypertension and musculoskeletal complications including lumbar spondylosis and knee arthritis. The Doctor states that some of the above conditions started manifesting themselves in prison. He also states that he has been **Mr. Oyugi's** personal physician. He also states that **Mr. Oyugi** suffers from poor eye sight, frequent flares of haemorrhoids with episodes of bleeding, and, that, he is on medication for hypertension and arthritis.

#### **Mr. Kamonji Wachira.**

21. The second Petitioner, **Mr. Kamonji Wachira** was aged **71** as a the time of filing this Petition. In his Affidavit, he avers that at all material times he was a Senior Lecturer at Kenyatta University College teaching in the Geography Department in the faculty of Arts. He averred that on the **4<sup>th</sup>** June 1982, he was attending a faculty of Arts meeting Chaired by the then Dean at the Geography-History Block at the then Kenyatta University College Campus at about **8.30am** when he was informed that there were people outside who wanted to see him, and, upon going outside, he saw about six men in civilian clothes standing about **50** metres away. He averred upon asking them who they were and what they wanted and one of them ordered him to quietly lead them to his office. He averred that he asked for reasons but they threatened to drag him by force if need be. He also averred that two men drew their guns and pointed them at him.

22. **Mr. Wachira** also averred that due to the nature of the meeting he was attending, he requested them to allow him to inform the chair of the meeting and Dean of the faculty, then, he utilized the opportunity to inform a colleague what was happening and requested him to inform his wife. He further averred that they searched his office for seven hours or more, though, he had no idea what they were looking for nor did they take anything from his office. Additionally, he averred that they led him to his house along Riarua Road, Nairobi and ordered his children then aged **2** and **4** years and his wife to stay away as they ransacked all the rooms searching everything including clothes, papers and the children's underwear. He averred that they picked one tiny, old paper with pencil scribbles which seemed to interest them and when he attempted to examine it, one of them cocked his gun. He averred that he told them that he could not remember what it referred to, and, that, one of them took the paper and put it in his pocket, and, at about **11pm** he was driven away.

23. **Mr. Wachira** also averred he was taken to Parklands Police Station and thrown into a smelly cell full of people, and, he was not offered food. He further averred that at **5.30am** they were woken up and frog-matched outside and he was ordered to pick a bucket and draw water from the roadside puddles to clean the toilets. Additionally, he averred that the following day at **8am**, he was driven to the then Nairobi Area Special Branch Headquarters at Carpet House where he was locked in a dark room without food or drinking water. Further, he averred that later in the day, an officer brought him a writing pad and ordered him to record his life history in detail, but, upon writing and handing over the document, the officer tore it up and dismissed it as a bundle of lies and ordered him to do it again. He also averred that the officer punching into his torso asked him why he was using students and plotting to overthrow **President Daniel Arap Moi's** government.

24. **Mr. Wachira** also averred that the next morning he was given tea and bread for breakfast, the first meal in **2** days and later two special branch interrogators came and led him to an office and started grilling him. Also, he averred that the interrogation lasted for **3** or **4** days with sessions varying from three to six hours at any time of the day and that his consistent answer was that he was unaware of the accusations. He further averred that they assaulted him for requesting to be charged in court or given access to his lawyer.

25. **Mr. Wachira** further averred that on the fifth day, a one **Mr. Rono** subjected him to a prolonged interrogation before he was released

unconditionally. Also, he averred that he was closely monitored and he was re-arrested on 29<sup>th</sup> June 1982, blindfolded, beaten and threatened with execution. Additionally, he averred that he was led to Nyati House where he was subjected to constant physical assault and psychological torture in a bid to secure confessions of alleged subversion, sedition and/or treason. In particular he avers that he was subjected to the following:-

*a. Physical assault, denial of sleep, food and water. Being transferred from one cell and police station to another. Being mocked that he was part of the group of professors who planned to overthrow the government. Being given a book to write his life story, his grand political plans and associates. Hurling insults to him and violent slaps, and in the same vein a friendly officer would come and order "mbuzi na ugali" and apologize for the crude behaviour of the attackers.*

*b. Violent interrogation. Threats to life. Being thrown into sewer like torture rooms. Standing naked for hours. Lack of toilet facilities. Being subjected to unsanitary conditions.*

26. **Mr. Wachira** also averred that on 11<sup>th</sup> July 1982, he was taken to the then traffic headquarters in Milimani Area where he spent two days before he was joined by the first Petitioner. He averred that he was formally served with detention orders on 13<sup>th</sup> July 1982 after which he was taken to Kamiti Prison isolation wing where he found **Alamin Mazrui** and later they were joined by **Mukaru Ng'ang'a** and **Willy Mutunga**. He averred that his notification of detention dated 13<sup>th</sup> July 1982 was published under Gazette Notice Number 1944 dated 16<sup>th</sup> July 1982.

27. Additionally, he averred that on 1<sup>st</sup> August 1982, together with the first and second Petitioners, they were blindfolded, handcuffed and flown to Shimo La Tewa Prison where they were held separately at segregated cells. **Mr. Wachira** also averred that they would be locked for 23 hours a day and allowed 30 minutes a day for ablution, sunshine and measly penal diet. Further, he averred that due to poor living conditions, he frequently contracted malaria and dysentery and other medical conditions which were not attended to in time. Also, he averred that the orthopaedic effects of the beatings manifested themselves in the form of sever back pains, hip problems and constant headaches.

28. **Mr. Wachira** also averred that in march 1983, he was transferred to Hola Solitary Prison which had much worse living conditions with extremely high temperatures at night and day and virtually no access to medical treatment where he was held for almost one year then returned to Kamiti Maximum Prison's Isolation Block for almost a year before being released from detention on 12<sup>th</sup> December 1984.

29. **Mr. Wachira** further averred that released detainees were routinely denied jobs and any means of subsistence, hence, he was unemployed for four years and was constantly trailed by police. Further, he averred that he lost his University pension, gratuity, and, that, his passport was cancelled hence, he could not immediately seek employment or medical attention outside the country. He averred that after 4 years of unemployment and constant police surveillance/harassment, he got asylum in Canada in 1988.

30. **Mr. Wachira** also averred that the effects of police torture, the long detention, the post release harassment and denial of job severely affected him and his family. Also, he averred that the injuries inflicted upon him evolved into chronic orthopaedic conditions and pain especially the back, neck and hips and that his career was destroyed.

31. Further, **Mr. Wachira** averred that the orthopaedic and back injuries were finally diagnosed and treated in South Africa as follows; Lumbar 4 vertebra broken and had healed over time naturally/untreated but severely out of alignment causing arthritis and chronic pain, the left scapula had been fractured or chipped and also healed naturally untreated but crooked; the left shoulder's tendons (rotator cuff tear) which required surgery. Additionally, he averred that the above injuries plus trauma to the neck and hips resulted in trauma related chronic arthritis. Further, he averred that periodic purities recurs often on both feet where heat induced inflation and infections damaged the skin during the Hola punishment. Lastly, he averred that mental effects on himself, his wife and their children are still evident.

32. **Mr. Wachira** also averred that the detention was unsuccessfully challenged court.[\[14\]](#)

#### **Mr. Wachira's further Affidavits.**

33. The second Petitioner swore a further Affidavit dated 3<sup>rd</sup> February 2017 in which he averred that owing to circumstances relevant to this case, he developed medical conditions as confirmed by the medical reports annexed thereto prepared by **Dr. A. B. Sharma, Tausif Patel, Msc. PT, RPT**, (Blackburn Physiotherapy & Sports Injury Clinic) and **Dr. Mark Sweazey**.

34. In his report, **Dr. A. B. Sharma, M.D.C.C.F.P**, states that he has attended **Mr. Wachira** since 1995, and, that, he informed him that he was subjected to physical and mental abuse while in detention. **Dr. Sharma** states that **Mr. Wachira** suffered from chronic anxiety, sleep disturbance and periods of depression for which he continues to be treated and he takes drugs daily. **Dr. Sharma** states that **Mr. Wachira's** symptoms are a suggestion of a post traumatic syndrome resulting from a psychologically traumatic experience suffered during his past detention. He states that **Mr. Wachira's** welfare and health has been impacted noticeably.

35. In his report **Tausif Patel, Msc.PT, RPT** states that **Mr. Wachira** has been periodically attended in physio for his muscular-skeletal complaining of multiple body parts (both shoulders, neck, low back etc) since 1997. He states that the said complaints are consistent with injuries sustained in the past, and, observed that **Mr. Wachira** will not return to fully functional and recreational lifestyle.

36. Lastly, **Dr. Mark Sweazey** in his report dated 27<sup>th</sup> January 2017 states that **Mr. Wachira** has been attending treatment for ongoing neck, shoulders and low back pain at their centre since 1994, and that clinical examination revealed chronic muscle tension and joint functional degradation common in long term stress, a possible cause being long detention. He states that findings on examination revealed *alordosis* (sic) of the lumbar spine, and, that, range of motion of the lumbar spine was limited to 50<sup>0</sup> flexion with pain radiating through the lumbar spine and tightness in both the paraspinal lumbar spine and quadrates lumborum musculature. He also states that cervical range of

motion is limited with pin in rotation bilaterally to 60<sup>0</sup>, lateral flexion to the left of 25<sup>0</sup> and moderate pain limited to lateral flexion to the right of 15<sup>0</sup>. He also states that motion palpation revealed joint fixations with the lumbar 3,4,5 vertebral joints, thoracic 2,3 and the cervical 4,5 vertebral joints. He concluded that **Mr. Wachira** has multiple levels of spinal joint dysfunction and will need ongoing health care intervention to maintain his level of flexibility and function from deteriorating to a level that limits more of his daily activities.

37. **Mr. Wachira** also swore the further Affidavit dated 13<sup>th</sup> February 2017 introducing a Medical Report prepared by **Dr. Enock Makori** whose findings on examination are tenderness at the gluteal region bilaterally and a large scar on the left shoulder which is suggestive of a healed contusion due to blunt force. He concluded that **Mr. Wachira** suffered multiple muscular pains which has led to inability to perform his otherwise normal duties, and, suffers from post traumatic stress disorder due to incarceration and mental torture and clinical depression.

#### **Mr. Joseph Otieno Malo**

38. The Third Petitioner, **Mr. Joseph Otieno Malo**, aged 74 at the time of instituting this suit, in his Affidavit, averred that at the material time he was a lecturer at the University of Nairobi, Department of Physics, where he taught physics. He averred that on 6<sup>th</sup> August 1982, he was in his office at Bruce House where he was working for UNESCO as a consultant in Basic Sciences. **Mr. Malo** also averred that on the same day **Mr. Patrick Shaw**, a police reservist visited the University of Nairobi's main campus to find out about a one **Professor Otieno**, and, he was directed to the Department of Physics where he was the chairman. He averred that while there, **Mr. Shaw** was informed that he was at his office at Bruce House, and, **Mr. Shaw** proceeded to the said office and ransacked it without following the requisite Diplomatic procedures causing a Diplomatic spat which culminated with the then foreign Minister apologizing to the UN Secretary General.

39. **Mr. Malo** also averred that he was arrested without being informed the reason for the arrest and taken to CID Headquarters where **Mr. Joginder Singh** insulted him and threatened to shoot him if he failed to disclose what he knew about the 1982 attempted coup and his alleged role in it. He averred that he was humiliated to be arrested and treated like a criminal by **Mr. Shaw** who was known for arresting if not shooting dangerous criminals. He further averred that he was handicapped and taken to the Department of Physics, Chiromo, where **Mr. Shaw** ordered all the staff to get out after which he illegally ransacked the office, and destroyed confidential examinations.

40. **Mr. Malo** also averred that he was taken to Riverside Drive next to Chiromo Library where his wife was working and his wife, children and house help were ordered out of the house at gun point and they were locked out after which they ransacked the house turning everything upside down in all the rooms, toilet and ceiling. Further, he averred that he inquiry what they were looking for in vain, and, instead he was threatened with beating or being shot dead. Further, he averred that after they found nothing they drove him to CID Headquarters where they further interrogated him about the coup attempt. He also averred that he slept without food.

41. **Mr. Malo** averred that on 7<sup>th</sup> August 1982, he was physically assaulted by **Mr. Joginder Singh** for failing to provide information about the attempted coup, and, that, he was continuously threatened with death. Further, he averred that on the same day at around 13000hrs, he was taken to GSU headquarters along Thika Road by **Mr. Patrick Shaw** who handed him over to the officer in charge and ordered that he be held in comunicado. He further averred that on 8<sup>th</sup> August 1982, **Mr. Shaw** returned to GSU and asked him if he owned a house along Ngong Road opposite Impala Club. He averred that he told him he did not, but mentioned to him that a one **Prof. Alfred Otieno** owned a house around the said area. He averred that it was at that point that **Mr. Shaw** told him that it was the said **Prof. Alfred Otieno** of Electrical Engineering whom they intended to arrest, and, that, despite confirming that they had arrested the wrong person, he was held in comunicado until 9<sup>th</sup> August 1982.

42. He averred that the chain of events was a clear and blatant abuse of power by the government officials without proper investigation to establish the facts before taking such a drastic, inhumane and illegal action. He also averred that he was a highly respected and recognized professor with high integrity and standing both local and international. Also, he averred that the arrest dented his name and personality and adversely affected his wife and son. Lastly, he averred that he ended up with severe duodenum ulcers and a kidney condition.

#### **Mr. Malo's further Affidavit.**

43. **Mr. Malo** filed the further Affidavit dated 3<sup>rd</sup> January 2017 in which he averred that owing to the circumstances relevant to this case, he developed medical conditions as confirmed by the report prepared by **Dr. Doreen Asimba** dated 17<sup>th</sup> January 2017.

44. In his report, **Dr. Asimba** states that both **Mr. Malo** and his wife had no history of major illness prior to 1982, and, that, **M. Malo** was treated for duodenal ulcer from July 1982 to December 1984. She also states that he had gouty arthritis diagnosed in 1982, and, he was noted to have hypertension in February 1991 and has been on hypertensive medication to date. Also, she states that **Mr. Malo** was admitted at the M.P. Shah Hospital in 2010 where he was treated for hypertension, acute renal failure and pulmonary oedema, and, that, he is still on follow up for renal failure.

45. Additionally, **Dr. Asimba** states that **Mr. Malo's** wife was diagnosed with depression in 2004, and that she was admitted thrice in hospital in 2004, and, that, she was severely depressed in 2006 and was on anti-depressants. Additionally, she states that she was re-admitted in the same facility in 2006 where she was diagnosed with hypertensive heart disease and was put on drugs. However, he states that she died in June 2010.

#### **Legal foundation of the Petition.**

46. The Petition is anchored on alleged violation of right to protection of security and personal liberty under Article 29(c)(d)(f) of the 2010 Constitution and sections 70,72(1)(2)(3) (5) of the Repealed Constitution, the Particulars whereof are:-

- a. *Being arrested without warrants and failure to inform them the reason(s) for the arrest;*

b. *Being detained in police cells in communicando;*

c. *that the first and second Petitioners were detained without charges being preferred against them at Carpet House and Nyati House basement for prolonged periods of time in contravention of section 72(3) and (5) of the Repealed Constitution, which places had not been officially gazetted as police stations;*

d. *that the third Petitioner was wrongfully arrested and detained at the CID and GSU Headquarters without being informed of the allegations against him or being charged with any cognizable offence.*

e. *that the Petitioners were denied the right to legal representation;*

f. *that the Petitioners were denied the benefit of all the rights and freedoms in the Bill of Rights in the Constitution.*

47. The Petitioners contend that the actions complained of herein above contravened their right to protection from torture, inhuman and degrading treatment under Articles 28 and 29 of the Constitution and section 74(1) of the Repealed Constitution in that:-

a. *that they were subjected to severe physical and psychological torture, inhuman and degrading treatment during the time of arrest, interrogation and detention;*

b. *that they were denied food, sleep, water and medicine and were placed in waterlogged cells.*

c. *that they were severely beaten leading to serious bodily and mental injuries as particularized as in their respective supporting affidavit summarized above;*

48. The Petitioners further contend that the Respondent's actions violated their Right to protection and arbitrary search as provided under section 76(1) of the Repealed Constitution. Additionally, the Petitioners contend that section 70 of the Repealed Constitution provided for the fundamental rights and freedoms of an individual while section 72 thereof provided for the right to personal liberty. Further, they contend that section 74(1) of the Repealed Constitution provided that no person shall be subjected to torture or to inhuman or degrading punishment or other treatment. Also, the Petitioners invoked the provisions of section 76(1) of the retired Constitution which guaranteed protection against arbitrary search or entry.

49. The Petitioners further contend that section 84(1) of the retired Constitution provided for the jurisdiction of the High Court to enforce fundamental rights and freedoms of a person. Additionally, the Petitioner's state that Article 165(3)(a)(b)(d)(i)(ii) of the Constitution provides for this court's vast jurisdiction. Lastly, the Petitioners placed reliance on sections 70,72(1)(2)(3)(5),74(1) and 76(1) of the retired Constitution as read together with Articles 25(a),27(1)(2),28, 29(a)(c)(d)(f),31,51(1), 28, 43, 43 of the 2010 Constitution.

#### **The Reliefs sought.**

50. As a consequence of the foregoing, the Petitioner's pray for the following orders/declarations:-

a. *A declaration that the Petitioner's fundamental rights and freedoms were contravened and grossly violated by officers who were Kenya Governments servants, and/or employees due to the harsh, inhuman and or degrading treatment occasioned to the Petitioners.*

b. *A declaration that the Petitioners are entitled to general, exemplary and punitive damages against the Respondent as may be assessed by this honourable court for the unjustified physical and psychological suffering.*

c. *Compensation against the Respondent as may be assessed by this Honourable Court for gross violations of the Petitioner's fundamental rights and freedoms.*

d. *An award of exemplary, aggravated and or punitive damages for blatant, callous, oppressive and high handed violation of the Petitioner's constitutional rights and illegal conduct by employees, officers, servants and/or agents of the government.*

e. *Costs and interests thereof of this Petition.*

f. *Such further, other and consequential orders as this honourable court may deem fit to make.*

#### **Respondent's preliminary objection.**

51. The Respondent filed a preliminary objection on 20<sup>th</sup> November 2015 stating that this suit is incompetent and a gross abuse of process; that, it is *res judicata* in that the same issues were litigated in High Court Misc Civil Case No. 60 of 1984 between the Respondent and the Petitioners. The preliminary objection was heard and dismissed on 5<sup>th</sup> April 2016 by Onguto J.

52. The Respondent did not file a Replying Affidavit or grounds of objection in opposition to the Petition nor did they call any witnesses. However, counsel for the Respondent participated in the trial, cross examined the Petitioners and their witnesses and filed written submissions.

## Oral evidence.

53. The second Petitioner was the first to take the witness stand. He adopted the contents of his affidavits summarized above. His oral testimony is a replica of his affidavits. I find no need to repeat it here. His account was not shaken by the cross-examination

54. His Doctor, **Enock Makori** confirmed that he examined him and also referred to his other medical reports which he said were in tandem with his findings. He produced his report as an exhibit. His evidence remained consistent even after intense cross-examination.

55. The third Petitioner's testimony was also a replica of his Affidavits referred to above. It will be unnecessary for me to rehash it here. It will suffice to state that his testimony was not shaken upon cross-examination.

56. Similarly, the first Petitioner's account was a repeat of his affidavits enumerated earlier. It will serve no useful purpose to reproduce it here. Additionally, he remained consistent and addressed questions put to him during cross-examination. His testimony remained consistent during the intense cross-examination.

57. **Prof. Eliza Ogolla**, a professor of Medicine at the University of Nairobi also testified. He stated that he holds a Bachelor of Medicine and Surgery from the University of Nairobi, Masters in Medicine in Internal Medicine, and, that, he is a fellow of the American College of Cardiologists. He stated that he knew **Prof Oyugi** as a patient. He confirmed that he prepared the report dated 30<sup>th</sup> January 2017. Also, he stated that he has seen him for 35 years, and, therefore, he is conversant with his history. He testified that **Prof. Oyugi** developed high blood pressure, poor eye sight and joint problems. He produced the medical report signed by him as an exhibit. Upon cross-examination, his testimony remained firm.

58. **Dr. Doreen Asimba**, a consultant Physician and Diabetologist testified that she knows the third Petitioner, and that she attended him as his Doctor. She testified that she prepared the Medical Report dated 17<sup>th</sup> January 2017. In preparing it, she stated that she referred to earlier reports in the University of Nairobi Health Services where she works and also referred to the patient's earlier Medical history. Her evidence was that before 1982 there was nothing significant, but after the third Petitioner was treated for ulcers and High Blood Pressure and arthritis he has continued to receive treatment for the same problems. She produced her report referred to earlier as an exhibit. She remained consistent upon being cross-examined.

59. At the close of the Petitioners case, **Miss Mwangi**, counsel representing the Honourable Attorney General stated that she would be calling one witness, but despite four adjournments, she never availed the witness. On 30<sup>th</sup> July 2018, the Respondent closed its case without calling witnesses. Both parties filed written submissions.

## Respondent's failure to call witnesses.

60. The Petitioner's counsel submitted that failure by the Respondent to adduce evidence leaves the Petitioner's case unchallenged. To buttress his argument he cited *Jamlik Muchangi Miano v AG* [15] in which the court made a similar finding.

61. True, the Respondent's counsel opted not to call witness despite being afforded an opportunity and numerous adjournments to do so. However, the Respondent's counsel cross-examined the Petitioners and their witnesses. The only evidence on record is the evidence tendered by the Petitioners and their witnesses. In *Interchemie EA Limited vs. Nakuru Veterinary Centre Limited* [16] it was held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted. It is trite that where a party fails to call evidence in support of his case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate his pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against the defence is uncontroverted and therefore unchallenged. [17]

62. The Respondent's counsel not only participated in the pleadings, but also cross-examined the petitioners and their witnesses. The purpose of cross-examination is three-fold; **(a) To elicit evidence in support of a party's case;** **(b) To cast doubts on, or undermine the witness's evidence so as to weaken the opponent's case, and to undermine the witness's credibility;** **(c) To lay out a party's case and challenge disputed evidence.** But once a party cross-examines an opponent's witness, he can only rebut the issues raised during cross-examination by calling witnesses. Hence, failure to call witness left the petitioners evidence unchallenged.

## Issues for determination.

63. Upon analyzing the facts before me and the submissions tendered by the parties, I find that the following issues distil themselves for determination:-

- a. **Whether this suit is caught up by the doctrine of laches.**
- b. **Whether the Petitioners fundamental Rights and Freedom were violated.**
- c. **Whether the Petitioners are entitled to damages and if so, what is the quantum?**
- a. **Whether this suit is caught up by the doctrine of laches.**

64. The Respondent's counsel submitted that this Petition was filed after an inordinate delay of 24 years. She argued that a court of equity has always refused to aid stale demands. [18] It was her contention 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 is entitled to consider whether there has

been inordinate delay.[19] Further, she argued that the delay must be explained and or justified.[20] She cited *Joseph Migere Onoo v AG*[21] in which the court stated 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.

65. The Petitioner's counsel's submission on this issue was that the delay in failing the case was sufficiently explained. The reasons given were that the prevailing political climate at the material time was not conducive to filing the case, and, that, the Petitioners had moved to other countries. To fortify his argument, counsel cited *Stephen Gaiho Njihia & 5 Others v AG*[22] in which a similar objection and similar reasons as in this case were given for the delay and the court after reviewing previous decisions declined to uphold the objection. Additionally, counsel cited *Jamlik Muchangi Miano v AG*[23] where a similar objection was raised and the court citing relevant previous decisions declined to uphold the objection.

66. It is common ground that the first and second Petitioners were arrested in June 1982. They were released on 12<sup>th</sup> December 1984. The third Petitioner was arrested on 6<sup>th</sup> August 1982 and he was released on 9<sup>th</sup> August 1982. This Petition was filed on 22<sup>th</sup> October 2015 after a delay of thirty three years. On 27<sup>th</sup> August 2010, the new Constitution was promulgated, a charter that radically altered the hitherto constitutional dispensation and ushered in a new system of governance. The 2010 Constitution has been hailed for being highly liberal, transformative, progressive. Simply stated, it is a charter that has been correctly described as fiercely progressive and transformative. It ushered in a new set of national values, a new Bill of rights and a new system of government and reset the relationship between the citizen and the state and reconfigured both the ethos and the architecture of governance.[24]

67. The Constitution 2010 gives prominence to national values and principles of governance which include human dignity, equity, social justice, inclusiveness, equality, human rights and Rule of law,[25] Leadership and Integrity,[26] Values and Principles of Public Service,[27] entrenchment of exercise of Judicial authority in the Constitution[28] and Independence of the Judiciary[29] and confers sovereignty to the people of Kenya to be exercised on their behalf by State Organs to perform their functions in accordance with the Constitution[30]

68. The philosophy, values and the structures of the previous Constitution had to give way to those of the new constitutional order which included enactment of new legislations, the realignment of the bureaucracy and management of institutions and the rallying of the national consciousness to the new dawn.[31] Judges and Magistrates are accountable to the Constitution and the law which they must apply honestly, independently and with integrity.

69. Chapter four of the Constitution of Kenya 2010 introduced an expanded Bill of Rights and expanded not only the democratic space but also guaranteed the right to approach the court citing violation of fundamental rights and breach of the Constitution. It is upon this charter that the Petitioners now approach this court.

70. Three questions arise. One, whether the delay of 33 years is inordinate, hence, inexcusable. Two, whether the delay has sufficiently been explained. Differently stated, are the Petitioners guilty of laches? Addressing a similar objection in *Eliud Wefwafwa Luucho & 3 others vs Attorney General*[32] stated as follows:-

*"The question of limitation of time in regard to allegations of breach of fundamental rights has in many cases been raised by the State and our courts have consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights[33] with a section of our judiciary holding 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 defense[34] and further the state cannot shut its eyes on its past failings[35] nor can the court ignore the dictates of transitional justice discussed below.*

71. As to whether the delay is prejudicial to the Respondent, it is common ground that the Respondent did not file a replying Affidavit to the Petition nor did the Respondent adduce evidence. The question whether the Respondent has been prejudiced by the delay is an issue of fact which requires evidence and must be proved to required standard. The Respondent was under a duty to adduce evidence either by affidavit or oral evidence and explain how he was prejudiced as a consequence of the delay. Persuasive argument to support prejudice includes loss of crucial evidence or witnesses as a result of the delay. This was not suggested or alluded to even in a remote way. Such an argument if it had been tendered, would have afforded the Petitioners the opportunity to challenge the evidence by way of cross-examination and leave it to the court to weigh the veracity of the evidence.

72. Section 107 (1) of the Evidence Act[36] provides that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." Sub-section (2) provides that "when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person." Additionally, I have severally stated that all cases are decided on the legal burden of proof being discharged (or not). **Lord Brandon** once remarked:-[37]

*"No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."*

73. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by **Rajah JA** in *Britestone Pte Ltd vs Smith & Associates Far East Ltd*[38] :-

*"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him"*

74. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Court decisions cannot be made in a factual vacuum. To attempt to do so would trivialize the Constitution and inevitably result in improper use of judicial authority and discretion. It will be a recipe for ill considered opinions. The presentation of clear evidence in support



of such prejudice is a prerequisite to a favourable determination on the issue under consideration. Court decisions cannot be based upon the unsupported hypotheses.

75. Additionally, a close look of previous jurisprudence on the subject reveals that courts are reluctant to shut out a litigant on account of limitation of time in cases of violation of fundamental rights unless there are obvious reasons to do so. In considering such delays, the court cannot avoid taking judicial notice of the immense difficulties which prevailed at the period of the alleged violations making it impossible for aggrieved persons to file cases of this nature against the government. In fact it is the promulgation of the constitution of Kenya 2010 that opened the doors of justice thereby making it possible for aggrieved persons to institute cases of this nature.

76. This petition was filed on 22<sup>th</sup> October 2015, about five years after the promulgation of the 2010 constitution. It is common ground that during the period before 27<sup>th</sup> August 2010, the political climate was absolutely not conducive for any citizen to file a challenge of this nature against the government. The question that follows is whether the delay of 5 years is an unreasonable long period of time, and, whether the delay has been accounted for.

77. Regarding the period prior to the promulgation of the 2010 Constitution, I am persuaded that the then prevailing political environment made it impossible for victims to file cases of this nature in court. In so concluding I am guided by the dictates of transitional justice, the need to uphold and strengthen the Rule of Law, and, the need to hold the perpetrators of violations of human rights accountable. Also relevant is the need to provide victims of such violations with compensation, and the need to effectuate institutional reform. The conclusion is irresistible that it would be unfair to uphold the defense of limitation in the circumstances of the present case.

78. There is no doubt that the 2010 constitution brought a fundamental change to this country with a strong emphasis on the Rule of Law and national values. It was a major transition from the dark past to a future where constitutionalism would reign supreme. However, was Kenya simply going to transit to the new constitutional dispensation and simply forget such atrocities. Andrea Bonime-Blanc [39] defines "transition" as referring to "a period of reformist change between regimes - not to a change of government within the same constitutional framework nor to a revolutionary transformation."

79. I find it apposite to recall what I said about transitional just in my earlier cited decision:-

*"The end goals of transitional justice in general should be to prevent similar recurrence of human rights violations in future; to repair the damage caused through systematic patterns of human rights violations; to uphold the rule of law; to recognize the human dignity and worth of those who have been victimized and to create a stable and governable political environment.*

*The primary objective of a transitional justice is to end the culture of impunity and establish the rule of law in a context of democratic governance. In general, therefore, one can identify the broad objectives that transitional justice aims to serve:- These are; establishing the truth, providing victims a public platform, holding perpetrators accountable, strengthening the rule of law, providing victims with compensation, effectuating institutional reform, promoting reconciliation. Transitional justice is not a special form of justice. It is, rather, justice adapted to the often unique conditions of societies undergoing transformation away from a time when human rights abuse may have been a normal state of affairs"[40]*

80. The next question is whether the delay of 5 years after the 2010 Constitution is unreasonable and whether it has been explained. In my view, the common law delay rule involves a two stage inquiry: *first*, whether the proceedings were instituted after a reasonable time has passed, and, *second*, if so, whether the court should exercise its judicial discretion to overlook the unreasonable delay taking the relevant circumstances into consideration.

81. The Respondents counsel's contention is that this suit is barred by the doctrine of laches. The doctrine of laches is a legal defense that may be claimed in a civil matter, which asserts that there has been an unreasonable delay in pursuing the claim (filing the lawsuit), which has prejudiced the defendant, or prevents him from putting on a defense. The doctrine of laches is an equitable defense that seeks to prevent a party from ambushing someone else by failing to make a legal claim in a timely manner. Because it is an equitable remedy, laches is a form of estoppel.

82. Laches ("latches") refers to a lack of diligence and activity in making a legal claim, or moving forward with legal enforcement of a right, particularly in regard to equity; hence, it is an *unreasonable* delay that can be viewed as prejudicing the opposing [defending] party. When asserted in litigation, it is an equity defense, that is, a defense to a claim for an equitable remedy. The person invoking laches is asserting that an opposing party has "slept on its rights", and that, as a result of this delay, circumstances have changed, witnesses or evidence may have been lost or no longer available, etc., such that it is no longer a just resolution to grant the plaintiff's claim. Laches is associated with the maxim of equity, "Equity aids the vigilant, not the sleeping ones [that is, those who sleep on their rights]." Put another way, failure to assert one's rights in a timely manner can result in a claim being barred by laches.

83. To invoke laches the delay by the opposing party in initiating the lawsuit must be **unreasonable** and the unreasonable delay must prejudice the defendant. Examples of such prejudice include: evidence favorable to the defendant becoming lost or degraded, witnesses favorable to the defendant dying or losing their memories, the defendant making economic decisions that it would not have done, had the lawsuit been filed earlier.

84. The Respondent's counsel cited laches but never attempted to mention how the Respondent will be prejudiced. As pointed out earlier, no argument was advanced that witness or evidence cannot be traced. In any event the Respondent is the government which has institutional succession and perpetuity, hence, evidence and records cannot be easily affected by lapse of time.

85. In considering whether delay is inordinate, the court has a discretion, to be exercised judicially upon a consideration of all the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the period of the delay, and the explanation offered and any possible prejudice to the Respondent. I have already addressed prejudice. The period is five years after 2010.

The reasons cited are inability to secure employment after being released from prison forcing them to travel overseas to look for employment and also obtain treatment for the various health conditions and complications inflicted upon them by the cruel torture and inhuman circumstances they were subjected to during arrest, interrogation and detention. All the Petitioners suffered serious injuries and developed life threatening health conditions which kept them busy. They are and continue to be on medication. To me, the delay has been sufficiently accounted for. They have provided a good and sufficient cause for the delay. I find that the explanation is reasonable.

86. In a nutshell, I find no difficulty in concluding that it would be against the dictates of transitional justice to uphold the defense of limitation in this case considering the difficulties Kenyans experienced at the material time and recognizing that it was not possible for aggrieved parties to seek court redress in cases of this nature at the material time. Additionally, I find and hold that a plea of laches on grounds that the Respondent has failed to demonstrate prejudice on their part or any of the permissible grounds discussed above to warrant the court to conclude that a plea of laches applies. On the contrary, the Petitioners have sufficiently accounted for the delay.

***b. Whether the Petitioners' fundamental Rights and Freedom were violated.***

87. The Petitioners' counsel submitted that the Petitioners Right to protection of security of the person and personal liberty under sections 70 and 72(1)(2)(3)(5) of the retired constitution as read with Article 29(c)(d)(f) of the Constitution were violated. He submitted that the Petitioners were arrested without warrants and without being informed the reasons for the arrest. He also submitted that they were detained in police cells incommunicado. Additionally, he argued that the first and second Petitioners were detained without charges being preferred against them in Carpet House and Nyati House for prolonged periods of time in contravention of sections 72(3) (5) of the retired Constitution. He pointed out that the said places were not gazetted as police stations. Further, he submitted that the third Petitioner was wrongfully arrested and detained at the CID and GSU headquarters without being informed of the allegations against him or being charged with any cognizable offence.

88. Additionally, counsel submitted that the Petitioners were denied the right to legal representation, and, that they were subjected to degrading treatment contrary to Article 28 and 29 of the Constitution and section 74(1) of the retired Constitution. He also submitted that the Petitioners narrated how they were subjected to severe physical and psychological torture, inhuman and degrading treatment during the time they were arrested, grilled and detained. Also, he argued that they were denied food, sleep, water medicine, and, that they were placed in waterlogged cells. Lastly, he argued that they were brutally tortured and kept in inhuman conditions, and, that, prior to their arrest they were subjected to arbitrary search.

89. The Respondent's counsel's submission on this issue was that the Petitioners did not prove their case to the required standard [41] because they did not produce medical reports dated in 1982. She argued that the retired Constitution permitted limitation of rights as may be allowed by law and that the police were allowed a latitude to hold a suspect beyond the statutory days with reasonable and justifiable cause. Lastly, she argued that the petitioners failed to plead with specificity the provisions of the Constitution alleged to have been violated.

90. The Respondent's counsel's argument fails for the simple reason that the Petitioners pleaded legal foundation upon which the Petition is grounded and expressly enumerated the various provisions of both the retired Constitution and the current Constitution which were violated. Additionally, they pleaded the particulars of the alleged violations with specificity as required.

91. Additionally, each of the Petitioners narrated the torture and inhuman treatment subjected to each one of them by the police. The acts complained of range from illegal search, arrest without a warrant or without being notified of the reason for the arrest and being held in police cells without being charged beyond the constitutional permitted period. Additionally, each of the Petitioners gave an account of being brutally beaten at times until they lost consciousness, being held in dark water logged cells under extreme inhuman conditions without food or water or toilet facilities and even being forced to sleep on water logged cell and being subjected to remain standing for long hours.

92. The story does not end there. The Petitioners were denied access to family members or legal representatives and they were also held in solitary confinement. They were constantly subjected to abuse and being blindfolded and transferred from one police station to another at odd hours of the night. The first and second Petitioners were held under extremely inhuman conditions while in detention from the August 1982 to 12<sup>th</sup> December 1994. In total, they were held in detention under inhuman conditions for 12 years.

93. This court cannot deviate from its own duty of determining acts which amount to infringement of constitutional rights of the citizens. I have on numerous occasions stated every act of the state and its organs must pass through the test of constitutionality which is stated to be nothing but a formal test of rationality. Thus when the constitutionality of the manner in which the police conducted the search, arrest and detention is challenged, this court ought first to determine whether, through "the application of all legitimate interpretive aids, the impugned conduct is capable of being read in a manner that is constitutionally compliant.

94. This court, in line with its constitutional mandate to promote and protect the values and ethos that underpin our Constitution, will undoubtedly find and hold that an arrest, search and detention of a citizen that violates privacy, liberty, dignity, freedom from torture, freedom from degrading treatment or generally violates the Bill of Rights is unconstitutional. The thrust of this conclusion is that, because an arrest, search and detention constitutes an infringement of a person's rights to his or her liberty, dignity and privacy, all of which are enshrined in the Bill of Rights, the actions must be justifiable according to the dictates of the Bill of Rights. Thus, in line with the nascent human rights culture, before every arrest, search and a detention of a citizen is executed, police officers must consider whether there are no less invasive methods which may be used to effect the arrest and detention in custody.

95. Article 259 enjoins the courts, in interpreting the Constitution, to promote the purposes, values and principles of the Constitution, advance the Rule of Law, and Human Rights and Fundamental freedoms in the Bill of Rights, permit development of the law and contribute to good governance. Article 259 of the Constitution introduced a new approach to the interpretation of the Constitution. This approach has been described as 'a mandatory constitutional canon of statutory and Constitutional interpretation'. The duty to adopt an interpretation that conforms to Article 259 is mandatory.

96. It is common ground that the former Constitution prohibited torture and acts of inhuman and degrading treatment. In cases of violation of

fundamental rights, the court examines as to what factors the court should weigh while determining the constitutionality of the actions complained of.[42] The court examines the case in light of the provisions of the Constitution. When the constitutionality of an act of state agents is challenged on grounds that it infringes a fundamental right, what the court has to consider is the “*direct and inevitable effect*” of such actions.[43] The litmus test is simple. Actions that amount to inhuman and degrading treatment are out rightly unconstitutional.[44]

97. Chapter 5 of the Repealed Constitution guaranteed Fundamental Rights and Freedoms of the individual. The notion of inhuman treatment covers at least such treatment as deliberately causes suffering, mental or physical, which, in the particular situation is unjustifiable. [45]The word torture is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be de-grading if it grossly humiliates him before others, or drives him to act against his will or conscience. [46]

98. The term "harassment" in its connotative expanse includes torment and vexation. The term "torture" also engulfs the concept of torment. The word "torture" in its denotative concept includes mental and psychological harassment.[47] In this case, we are not essentially dealing with personal injuries but with inhuman treatment, torture, harassment and the mental and physiological effects of such actions to the victims.[48] The actions visited upon the petitioners in my view amount to torture and a gross violation of their constitutional rights.

99. When a citizen is arrested on allegations of committing an offence as was alleged in the present case, his/her Fundamental Rights are not abrogated in *toto*. [49] The citizens dignity cannot be allowed to be comatose [50] except to such limitations as may be provided by the law. The right not to be subjected to inhuman treatment enshrined in the Constitution, includes the right to be treated with human dignity and all that goes along with it. [51]

100. Inhuman treatment has many a facet. It fundamentally can cover such acts which have been inflicted with an intention to cause physical suffering or severe mental pain. [52] It would also include a treatment that is inflicted that causes humiliation and compels a person to act against his will or conscience. [53] There is no shadow of doubt that any treatment meted out to a citizen which causes pain, humiliation and mental trauma corrodes the concept of human dignity. [54]

101. The majesty of law protects the dignity of a citizen in a society governed by law. It cannot be forgotten that the State is governed by rule of law which must be paramount. The Constitution as the organic law of the land has unfolded itself in manifold manner like a living organism in the various decisions of the court about the rights of a person under the Bill of rights. When citizenry rights are sometimes dashed against and pushed back by the members of the police force, there has to be a rebound and the Constitution springs up to action as a protector.

102. Fundamental rights are owed to persons as a matter of human dignity and should be honored no matter what form of government a particular community chooses to adopt. As David Feldman has written, "*there are certain kinds of treatment which are simply incompatible with the idea that one is dealing with a human being who, as such, is entitled to respect for his or her humanity and dignity.*" [55]

103. The rights of political freedom, right to life, freedom from inhuman and degrading treatment, freedom from torture, the right to due process, and equal protection are among the minimal rights that the world has come to demand of any society. In the words of the U.S. Supreme Court, these rights are "implicit in the concept of ordered liberty." [56]

104. It is the sacrosanct duty of the police to remember that citizens while in their hands are not denuded of their fundamental rights under the Constitution. The restrictions imposed on fundamental rights have the sanction of law by which the enjoyment of fundamental right is curtailed but the citizens basic human rights are not crippled so that the police officers can treat citizens in an inhuman manner. On the contrary, they are under obligation to protect fundamental rights of the citizens and prevent all forms of atrocities. The law enjoins the police to be scrupulously fair to an alleged offender and to ensure fair investigation and fair trial and also to ensure that the citizens constitutional and fundamental rights are not violated.

105. Fundamental rights and freedoms of the individual are inherent and not granted by the State. [57] They are to be respected, upheld and promoted so as to promote Constitutionalism.

106. It is my finding that the manner in which the Petitioners were arrested, beaten, harassed, tortured, subjected to degrading treatment, held in degrading and inhuman conditions both at the police stations and in detention (for the case of the first and second Petitioners) and denial of food, medical care, food, access to legal representation only to mention but some cannot be read in manner that is consistent with the retired Constitution. The acts were a blatant violation of the letter and spirit of Chapter five of the retired Constitution.

### ***c. Whether the Petitioners are entitled to damages and if so, what is the quantum?***

107. The Petitioner's counsel submitted that the Petitioners rights were violated, and, that, their careers were cut short unlawfully. He submitted that as a result of the physical and psychological torture, their lives were affected adversely. Counsel cited the case of *Koigi Wamwere v AG* [58] in which the Court of Appeal awarded damages in the sum of **Ksh. 12,000,000/=** for torture and detention and *Kenneth Stanley Njindo Matiba v AG* [59] in which the court awarded **Ksh. 15,000,000/=** for torture, degrading and inhuman treatment. Additionally, counsel cited *Peter M. Kariuki v AG* [60] where the court awarded **Ksh. 15,000,000/=** under similar circumstances. [61] He urged the court to award **Ksh. 20,000,000/=** to the first and second Respondent and **Ksh. 7,000,000/=** to the third Petitioner.

108. Counsel for the Respondent did not address the question of quantum of damages.

109. The purpose of public law is not only to civilize public power but also to assure the citizens that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting 'compensation' in proceedings under Article 23 of the constitution or seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalizing the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the

fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty, by not protecting the fundamental rights of the citizen or by subjecting the citizen to acts which amount to infringement of the constitution.<sup>[62]</sup>

110. It is well settled that an award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under the Constitution. The quantum of compensation will, however, depend upon the facts and circumstances of each case. In principle, constitutional damages as a relief separate and distinct from remedies available under private law is competent. This is because a violation of a constitutional right must of necessity find a remedy in one form or another, including a remedy in the form of compensation in monetary terms.

111. Award of damages entails exercise of judicial discretion which should be exercised judicially. The discretion must be exercised upon reason and principle and not upon caprice or personal opinion.<sup>[63]</sup> The jurisprudence that has emerged in cases of violation of fundamental rights has cleared the doubts about the nature and scope of the this public law remedy evolved by the Court. The following principles clearly emerged from decided cases:<sup>[64]</sup>

- i. Monetary compensation for violation of fundamental rights is now an acknowledged remedy in public law for enforcement and protection of fundamental rights;*
- ii. Such claim is distinct from, and in addition to remedy in private law for damages for tort;*
- iii. This remedy would be available when it is the only practicable mode of redress available;*
- iv. Against claim for compensation for violation of a fundamental right under the constitution, the defence of Sovereign immunity would be inapplicable.*

112. Arriving at the award of damages is not an exact science. I am aware that no monetary sum can really erase the scarring of the soul and the deprivation of dignity that some of these violations of rights entailed.<sup>[65]</sup> When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation is discretionary and, moreover, the violation of the constitutional right will not always be coterminous with the cause of action in law.<sup>[66]</sup>

113. It is convenient to add that an award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional rights and the gravity of the breach, and deter further breaches. All these elements have a place in helping the court arrive at a reasonable award. The court must consider and have regard to all the circumstances of the case.

114. Perhaps I should emphasize that an injury suffered as a result of discrimination, harassment or inhuman and degrading treatment is no less real because it does not possess tangible physical or financial consequences. And the difficulty in assessing the amount of compensation for that type of injury should not deter a court from recognizing its potential.<sup>[67]</sup>

115. Even though the Petitioners suffered physical harm caused by the brutal and callous violence visited upon them, they also suffered psychological and severe mental anguish which is neither physical or financial. It is self evident that the assessment of compensation for an injury or loss, which is neither physical nor financial, presents special problems for the judicial process, which aims to produce results objectively justified by evidence, reason and precedent. Subjective feelings of upset, frustration worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on and the degree of their intensity are incapable of objective proof or of measurement in monetary terms.

116. Differently stated, translating hurt feelings into hard currency is bound to be an artificial exercise. There is no medium of exchange or market for non-pecuniary losses and their monetary evaluation, it is a philosophical and policy exercise more than a legal or logical one.<sup>[68]</sup> The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution.

117. In other words, although they are incapable of objective proof or measurement in monetary terms, hurt feelings are none the less real in human terms. The courts and tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available in the calculation of financial loss or compensation for bodily injury.

118. The first and second Petitioners were arrested and mercilessly tortured. They were detained in un-gazetted cells, blindfolded, handcuffed and transported in police land rovers in a very inhumane manner, they were subjected to severe beatings and denied food and water for long periods. The interrogation was so brutal that it reminds me of the earlier quotation that there are things you can't do to a human being just because he is a human being. Life in detention was hell. The conditions and treatment in detention is nerve breaking. It was the worst form of violation a government can subject to its citizens. They remained in detention for twelve years. They were renowned academicians teaching at a leading institution of higher learning. Their promising careers were destroyed by the State that was supposed to protect them. They suffered immense economic loss. Upon release, they were under constant surveillance and could not get employment in the country. They lost their pension which could have helped them in their retirement.

119. The third Petitioner, also a lecturer in the same institution and a consultant with an international organization was arrested, tortured, subjected to brutal investigation and detained in police cells in absolutely inhumane conditions only to be told that they had arrested the wrong person. The mistake was not only careless, but it was costly to him. He was subjected to severe brutality on account of the mistake of the police.

#### **Final Orders.**

120. A common thread in the three Petitioners' case is that the torture, brutality, inhuman and degrading treatment left them with life threatening medical conditions. Their affidavits, their oral testimony backed by the Medical Reports enumerated earlier and the testimony of the Doctors tell it all. The encounter with the police brutality left each one of them a pale of their former self. Their torture and separation from their families affected them severely. They lost the opportunity to see their children grow. Their families were equally devastated. As stated above, it is not possible to quantify physical and psychological torture or a body and a soul that has been battered and shattered. Nevertheless, doing the best I can, and considering both the physical and mental suffering, the destroyed career, the emotional suffering caused by separation from family members and the life threatening health complications both mental and physical attributed to the brutality, and, also, considering awards made by our superior courts in comparable cases, I find and hold that a global sum of **Ksh. 20,000,000/=** for the first Petitioner and a similar amount for the second Petitioner will suffice. I have also considered that they were held in detention under harsh conditions for **12** years.

121. As for the third Petitioner, even though he was released after a few days and was never detained, he was equally subjected to severe torture. The effect of the torture left him a shadow of his former self. He was not able to secure a job in the country, and, when he managed to get a job abroad, his income went to restoring his health. The health complications still persist to date. His income was disrupted and his promising academic and consultancy career cut short. Doing the best I can, I find that a sum of **Ksh. 6,000,000/=** will suffice. I have considered the serious health challenges he suffered on the fact that he remains on medication to date.

122. In nut shell, I am persuaded that the Petitioners Proved to the required standard that they were physically tortured and subjected to unwarranted cruel, inhuman and degrading treatment. Their rights were violated by the police. They suffered both psychological and physical harm. No amount of money can adequately compensate such suffering. However, considering the nature of the violations of their constitutional rights, the psychological and physical suffering visited on each one of them, and considering the above legal principles and bearing in mind the fact that it may not be easy to quantify denial of fundamental rights and freedoms, I find that the petitioners are entitled to compensation. Accordingly, I enter judgement in favour of the Petitioners against the Respondent as follows:-

a) **A declaration** be and is hereby issued that each of the petitioners Fundamental Rights and Freedoms were contravened and grossly violated by the Police officers who were Kenyan Government servants, agents and or employees on or about the dates, times and places enumerated in the petitions herein.

b) **A declaration** be and is hereby made that the first and second Petitioners were detained under extremely harsh, inhumane and degrading conditions in total contravention of their constitutionally guaranteed rights.

c) **A declaration** be and is hereby issued that the manner in which the Petitioners were arrested, brutally tortured to extract confessions, and detention in police cells under inhumane conditions was in total contravention of their fundamental Rights and Freedoms guaranteed under Chapter five of the Repealed Constitution.

d) **A declaration** be and is hereby issued that each of the petitioners is entitled to damages for violation of their Fundamental Rights and freedoms enshrined in the Repealed constitution.

e) **That** judgement be and is hereby entered in favour of the petitioners against the Respondent by way of general damages as follows:-

a. **Edward Akong'o Oyugi.....Ksh.20, 000,000/=**

b. **Kamonji Wachira .....Ksh.20,000,000/=**

c. **Joseph Otieno Malo.....Ksh. 6,000,000/=**

f) **That** the above sums shall attract interests at court rates from date of filing suit until payment in full.

g) **The Respondent do pay the costs of these proceedings to the petitioners plus interests thereon at court rates.**

Orders accordingly.

Signed and Dated at Nairobi this      day of      2019.

**John M. Mativo**

**Judge**

Signed, Dated and Delivered at Nairobi this **11<sup>th</sup>** day of **February** 2019.

**P. Nyamweya**

**Judge**

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[1] {2018}eKLR.

[2] Published in Just Law {2004}.

[3] *Masinga vs Director of Public Prosecutions and Others* (21/07) {2011} SZHC 58 (29 April 2011: High Court of Swaziland.

[4] *Li Wen Jie & Others vs Cabinet Secretary, Interior and Coordination of the National Government & Others*, Pet. No. 354 of 2016

[5] Richard B. Lillich, *The Human Rights of Aliens in Contemporary International Law*, 41 (Manchester University Press 1984); *Universal Declaration of Human Rights*, G.A. Res. 217A(III), U.N. GAOR, 3d. Sess., Supp. No. 13, at 71, U.N. Doc. A/810 (1948).

[6] *Universal Declaration of Human Rights*, pmb., art. 7-11, 19,20(1). G.A. Res. 217A(III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

[7] David Feldman, *Human Dignity as a Legal Value -Part I*, 1999 Pub. L. 682, 690-91.

[8] *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

[9] Louis Henkin, *The Age of Rights* (Columbia University Press, 1990) 4.

[10] {2017} eKLR

[11] *Ibid.*

[12] Mr. Dainius Zalimas, President of the constitutional Court of the Republic of Lithuania, *The Rule of Law and Constitutional Justice in the Modern World*, 11-14 September 2017, Vilnius, Lithuania, delivering a speech at the Farewell Dinner for the 4<sup>th</sup> Congress of the World Conference on Constitutional Justice, 13<sup>th</sup> September 2017.

[13] High Court Miscellaneous Civil Case No. 60 of 1984, {1984} eKLR.

[14] *In Republic v The Commissioner of Prisons Ex parte Wachira* {1984}eKLR.

[15] {2017}eKLR.

[16] {Milimani} Hccc no. 165b of 2000

[17] *Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others* Nairobi (Milimani) HCCS No. 1243 of 2001

[18] Citing *Smith v Clay* {1767}EngR 55, {1767}3 bRO cc 646, {1767}29ER 743.

[19] Citing *Kabasellah & 2 Others v AG*, Pet. No. 41 of 2014.

[20] Citing *Ochieng' Kenneth K'Ongutu v Kenyatta University & 2 Others*, High Court Pet No. 306 of 2012.

[21] Pet No. 424 of 2013.

[22] {2016}eKLR.

[23] *Supra.*

[24] Njeri Githang'a, *Law Reporter*, June 2013, <http://kenyalaw.org/kenyalawblog/a-compilation-of-summaries-of-selected-cases-on-the-interpretation-of-the-constitution-of-kenya-2010/>. Accessed on 24<sup>th</sup> November 2017

[25] Article 10 (1) (a)-(e)

[26] Chapter six of the Constitution

[27] Chapter thirteen of the Constitution

[28] Article 159

[29] Article 160

[30] Article 1

[31] Ibid

[32] Supra.

[33] See *Joan Akinyi Kabasellah and 2 Others vs Attorney General*, Petition No 41 of 2014, *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

[34] *Joseph Migere Onoo vs Attorney General*, Petition No. 424 of 2013

[35] *Gerald Gichohi and 9 Others vs Attorney General* Petition No. 487 of 2012

[36] Cap 80, Laws of Kenya

[37] In *Rhesa Shipping Co SA vs Edmunds* {1955} 1 WLR 948 at 955

[38] {2007} 4 SLR (R) 855 at 59

[39] Andrea Bonime-Blanc *Spain's Transition to Democracy* (1987) 8-9.

[40] [http://www.un.org/en/peacebuilding/pdf/doc\\_wgll/justice\\_times\\_transition/26\\_02\\_2008\\_background\\_note.pdf](http://www.un.org/en/peacebuilding/pdf/doc_wgll/justice_times_transition/26_02_2008_background_note.pdf)

[41] Citing *Raila Amollo Odinga & Another v IEBC & 2 Others*, Presidential Pet. No. 1 of 2017, {2017} eKLR and *Moses Wanjala Lukoye v Bernard Alfred Wekesa Sambu*, Bungoma Election Petition No. 2 of 2013.

[42] Ibid

[43] Ibid

[44] Ibid

[45] Ibid

[46] Greek Case 1969 Y.B. Eur. Con. on H.R. 186 (Eur. Comm'n on H.R.). Also see Lenaola J. (As he then was) in the case of *Milka Wanjiku Kinuthia & Others vs The Attorney General*

[47] See *Joginder Kumar v. State of U.P.* (1994) 4 SCC 260, paragraph 23.

[48] Supra note 9

[49] Ibid

[50] Ibid

[51] Ibid

[52] Ibid

[53] Ibid

[54] Ibid

[55] Supra

[56] *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

[57] Article 19 (3) (a)

[58] {2015}eKLR.

[59] {2017}eKLR.

[60] {2014}eKLR.

[61] Counsel also cited *Eliud Wefwafwa Luucho & 3 Others v AG* {2017}eKLR; *Chege Kuria Mwere & 6 Others v. AG* {2017}; *Stephen Gaiho Njihia & 5 Others v AG* {2017}eKLR; *Jamlik Muchangi Miano v AG* {2017}eKLR; *Irene Wangari Gacheru & 6 Others v AG* {2017}eKLR; and *Captain (RTD) Frank Mbugua Munuku v Kenya Defence Forces & Another* {2013}eKLR.

[62] See *Kisilu Mutua v Republic* PET No. 91 of 2015.

[63] *Mbogo & Another vs Shah*{1968} EA 93.

[64] V.K. Sircar, *Compensation for Violation of Fundamental Rights, a new remedy in Public Law Distinct*

*from relief of damages in tort*, <http://ijtr.nic.in/articles/art7.pdf>

[65] *Koigi Wamwere v Attorney General*{2015} eKLR

[66] *Attorney General v Ramanoop* [2005] UKPC 15, [2006] 1 AC 338.

[67] This concept was well expressed by Mummery LJ in *Vento v Chief Constable of West Yorkshire Police* [2003] ICR 318, at 331: -

[68] As Dickson J said in *Andrews v Grand & Toy Alberta Ltd*(1978) 83 DLR (3d) 452, 475-476.