REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO 603 OF 2013

JOHN MURUGE MBOGO.....PETITIONER

VERSUS

THE CHIEF OF THE KENYA DEFENCE FORCES.....1st RESPODNENT

THE HON. ATTORNEY GENERAL.....2ND RESPODNENT

JUDGMENT

1. ***John Muruge Mbogo,*** the petitioner, was a member of the Kenya Armed Forces. He was enlisted with the Kenya Air force (KAF) on 12th February 1976 under service ***No. 022128.*** After his initial military training, he further trained as an aircraft technician and armament and was serving with the Air Force on 1st August 1982 stationed at Nanyuki Airbase.

2. The petitioner averred that on 8th August 1982 he was arrested at Kerugoya Police Station after he presented himself at the Station as had been required of all serving officers who were outside their stations on 1st August 1982 during the coup attempt. He stated that he was thereafter held in various police stations, and was later handed over to Kenya Army officers on suspicion of taking part in the aborted coup of 1982.

3. The petitioner contended as well as deposed that in a bid to extract a confession from him to having taken part in the planning and execution of the coup attempt, he was tortured, subjected to cruel, inhuman and degrading treatment. He averred that he was stripped naked in public; made to walk on his knees on concrete floors; whipped; kicked around; bludgeoned all over the body; insulted and moved into custody in a military tract while naked in violation of his human rights and fundamental freedoms contrary to ***sections 70(a), 74(1)*** of the repealed ***Constitution*** and various international human rights conventions to which Kenya is a signatory.

4. The petitioner further averred that he was held in various Military and police holdings where he was kept in water logged and crowded cells; was denied food, water, medical attention and kept in intermittent solitary confinement. He stated that between August and October 1982, he was moved from one Police station to another in blind folds, handicapped and man folded. He stated that he was interrogated for five months in violation of ***sections 48*** and ***72*** of the ***Armed Forces Act*** (repealed), and that he was not charged with any offence or arraigned in a Court law in violation of his right to personal liberty contrary to section 72(3) of that ***Constitution.***

5. The petitioner also averred that in January 1983, he was detained without trial but was not served with a detention order. He stated that he was held as a detainee for 4 years until 12th December 1986 when he was released. He stated that for the 4 years he was held in unlawful detention under the Preservation of Public Security Act (Cap 57- repealed) he was not formerly served with a detention order and that during the said period, he was kept in solitary confinement in violation of his constitutional and

fundamental rights under sections 70(a) and 74(1) of the repealed ***Constitution.*** He therefore filed the petition dated and filed on 27th December 2013 and amended on 5th May 2014 and sought the following reliefs;

i) A declaration that the brutal arrest; the cruel, inhuman and degrading treatment inflicted on the petitioner upon being taken into custody in a bid to extort a confession from him; the cruelties, violence, brutalities and extreme and inhuman and degrading conditions that the petitioner was subjected to in the various police, military and prisons' custody that he was detained constituted breaches of the fundamental rights and freedoms of the petitioner as to human dignity, protection of the law, prohibition against torture, cruel, inhuman and/or degrading treatment or punishment guaranteed by sections 70(a) and 74(1) of the former Constitution (now Articles 27(1), (2), 28 and 29(a), (c), (d), (f) of the Constitution of Kenya, 2010).

ii) A declaration that the entire period of four (4) years and five (5) months that the petitioner was unlawfully detained in police, Military and Prisons' custody at first completely incommunicado as a criminal suspect and later unlawfully as a detainee – without trial deprived of any access by visitors of his choice and subject to censorship of all his correspondence constituted a period of arbitrary, unlawful, illegal and unconstitutional detention and invasion of privacy and a violation of the fundamental rights of the petitioner as to human dignity, the protection of law, personal liberty, freedom from cruel, inhuman and degrading treatment and/or punishment and the right to privacy guaranteed by sections 70(a), 72(3), 74(1) and 76(1) of the former constitution (now Articles 27(1), (2), 28, 29(a), 31(c), (d) 49(1)(f) & 50(2) of the constitution of Kenya, 2010.

iii) A declaration that the arbitrary and unlawful dismissal of the petitioner from the Armed Forces and termination of his peculiar career as an Armed Forces Aircraft technician and armament officer without a hearing, without any benefits, was unlawful, inhuman and cruel deprivation of the petitioner's means to a meaningful livelihood in violation of his fundamental right to life, human dignity and freedom from cruel and inhuman treatment and/or punishment guaranteed by sections 70(a), 71(1) and 74(1) of the former constitution (now Articles 26(1) and (3), 28 and 29(f) of the Constitution of Kenya 2010.)

iv) General damages consequential upon the declarations of violations of the fundamental rights and freedoms of the petitioner in prayers (i) to (ii) above as may be assessed by this Honourable court.

v) Exemplary/vindicatory, aggravated and/or punitive damages for arbitrary, highhanded and oppressive conduct of officers of the government towards the petitioner.

vi) An order that the respondents do pay to the petitioner such terminal dues and/or arrears of salary and allowances from the time of the petitioner's detention in august 1982 until his projected retirement in 2012 as the Honourable court shall assess.

vii) An order that the petitioner's status, rank of Corporal in the Kenya air Force and retirement benefits be restored.

viii) Costs of the petition.

ix) Interest on all monetary awards.

Respondents' response

6. The respondents filed a replying affidavit by ***Lt. Col. Paul Mwangemi Kindochimu,*** staff officer 1 at Defence Headquarters, sworn on 22nd May 2014 and filed in Court on 28th May 2014. The deponent denied that the petitioner was brutally arrested or detained; that the petitioner was subjected to torture, cruel, inhuman or degrading treatment; that the petitioner was stripped naked; walked on knees on concrete floors; or that he was whipped, kicked, bludgeoned in the body and insulted.

7. It was further denied that the petitioner was held in military custody; that his fundamental rights to human dignity, protection of the law, freedom from torture were violated or that he was subjected to cruel inhuman and degrading treatment in violation of sections 70(a) and 74(1) of the ***repealed Constitution***. ***Lt. Col Kindochimu*** deposed that the petitioner was lawfully arrested and detained by state security organs whose responsibility was to deal with the petitioner's involvement in the 1982 aborted coup; that the petitioner was not detained and interrogated for 5 Months and that if that was done, it was not in an institution under the 1st respondent.

8. He also denied that the petitioner's right to liberty under section 72(3) of the ***repealed Constitution*** was infringed; or that the petitioner was detained without trial for 4 years in violation of sections 83(2)(b) and 85(1) of the ***repealed Constitution.*** He further denied that the respondents were liable for the alleged violation of the petitioner's rights while being held at Naivasha and Kamiti Maximum security prisons and that the petitioner's discharge from the military was justified for his involvement in the 1982 coup, and that the discharge was done in accordance with the repealed Armed forces Act. He contended that the petitioner is not entitled to any terminal benefits under the Armed Forces (officers and servicemen's) pension Regulations 1980.

9. ***Lt Col. Kindochimu*** went on to depose that section 86(4) of the repealed Constitution was clear on how rights and fundamental freedoms would apply to members of the armed forces hence the rights claimed by the petitioner were limited; that the respondents were unaware of the petitioner's where about on 1st August 1982 and denied that the petitioner had been given permission to be out of his Nanyuki Base. He also denied that the petitioner was beaten when he presented himself at Kerugoya Police Station or that he was locked up and beaten at Nyeri police station and later at Nanyuki Army Barracks.

10. ***Lt. Col. Kindochimu*** also denied that the petitioner was forced to sign a confession or that he was taken to ***Kamiti*** or ***Naivasha Maximum security Prisons*** where he was mistreated. He stated that the respondents had nothing to do with the petitioner's tribulations, maintaining that the petitioner's arrest and detention was lawful and denied responsibility for any injuries or poor health on the part of the petitioner. He contended that the petition had been brought after an inordinate delay.

Evidence

11. The petitioner who testified as ***PW 1*** told the Court that he was enlisted with the Kenya Air force in 1976 and later trained as an aircraft technician and armament with the Kenya Airforce. He stated that he was arrested on 8th August 1982 at Kerugoya Police Station after presenting himself there and taken to Nyeri Police station where he was tortured for 4 nights; that was later taken to Kenya Army, Nanyuki Barracks then to Kamiti and Naivasha Maximum Security Prisons where he was held until he was released on 12th December 1986.

12. He testified that he was interrogated for 5 months during which he was forced to sign an already prepared confession but was not taken to Court; that on 2nd March 1983 he was removed from his cell, blindfolded and driven in a sealed prison van to unknown place to be detained due for lack of evidence to charge him in Court. He however stated that he was not served with a detention order neither was his detention gazetted. He referred to the letters attached to his affidavit in support of the petition to show that he was indeed detained. He testified that ***Mr. Philip Kilonzo*** had told him that he would not leave detention until the President he had attempted to overthrow ordered so.

13. The told the Court that he was never produced in a Court of law or charged with any offence for the years he was held confinement until he was released. He testified that on 12th February 1987, he went to the Department of Defence to inquire why he had been detained but instead, he was informed that he had been discharged from service but was not given a discharge certificate. He told the Court that he had taken long to file the petition because the political environment was hostile; that he was traumatized; that he had no money and was terrified by the regime. He also stated that he did not believe that if he filed the case he would get justice. However, after the ***2010 Constitution*** followed by the judicial reforms, he felt confident to file this petition. He said the reason given for his discharge from the armed forces was that his service was no longer required.

14. In cross examination, the petitioner told the Court that he was held for 5 months before he was detained. He stated that although he had no evidence of injuries or torture, he had attached to his supporting affidavit a medical report dated 3rd August 2006 to show that he was injured. He told the Court that he never willingly confessed to participating in the coup attempt but that he was forced to sign an already prepared statement. He told the Court that he never challenged that confession after his release because he was threatened when he was being released. He said he did not know the names of his interrogators.

Petitioner's submissions

15. ***Mr. Muriithi,*** learned counsel for the petitioner submitted, highlighting their written submissions, that the petitioner joined Kenya Air force on 12th February 1976 and was given service No 022128. He submitted that after the petitioner's arrest on 8th august 1982, he was subjected to mistreatment; was detained for 4 years and 5 months without trial; and that he was held under the provisions of the Preservation of Public Security Act but was not served with a detention order or given reasons for his detention as was required by section 83 of the repealed Constitution

16. Learned counsel submitted that the petitioner's detention was not reviewed and therefore section 83 of the repealed ***Constitution*** was not complied with. He relied on the case of ***Otieno Mak' Onyango v Attorney General & another*** [2015] eKLR, and contended that the petitioner's detention was also not gazetted although he was subjected to detention regulations under the repealed Preservation of Public Security Act.

17. Counsel argued that delay to file the petition was not inordinate contending that the petitioner had explained why he did not file his petition immediately. He also argued no prejudice was occasioned to the respondents by the delay in filing the petition. He relied on the decision in the case of ***Peter M Kariuki v Attorney General*** [2014] eKLR for the proposition that an explanation for the delay suffices. Counsel urged the Court not to follow the decision in the case of ***Wallington Nzioka Kioko v Attorney General*** (CA No 268 of 2016) contending that the petitioner in that case had not offered an explanation for delay to file the petition as opposed to the present case where the petitioner explained that he could not file a claim against the same government that had detained him.

18. In that regard, ***Mr. Muriithi*** urged the Court to lean towards the jurisprudence holding the view that there is no limitation period for filing claims against infringement of rights and fundamental freedoms. According to learned counsel, the people of Kenya did not find it necessary to place a limit in the ***Constitution*** neither had Parliament set limitation on filing of such petitions. In learned counsel's view, limitation periods the world over are set by statutes or within Treaties but should not be a matter of judicial legislation. He referred to the decisions in ***Domnic Arony Amolo v Attorney General*** [2003]eKLR, ***David Gitau Njau & 9 others*** [2013] eKLR and ***Harun Thungu Wakaba v Attorney General*** [22010] eKLR to support this submission.

19. Counsel therefore urged the Court take guidance from ***Otieno Mak' Onyango v Attorney General& another*** (supra) and grant compensation. He relied on several other decisions and urged the Court to award ***Ksh50 million*** as general and exemplary damages for the 4 and half years the petitioner was held without trial.

Respondent's submissions

20. ***Miss Gitiri,*** learned counsel for the respondents relied on the replying affidavit of ***Lt. Col Kindochimu*** on the issue of facts. On points of law, learned counsel submitted, first; that section 86 of the repealed ***Constitution was*** clear that anything done in accordance with the law relating to disciplined forces could not amount to violation of constitutional rights. Counsel contended that there was a coup attempt and the military applied the law in force and that the petitioner confessed and was discharged from service.

21. Second, learned counsel contended that the petitioner relied on mere allegations without clarity on those allegations as required by the principles set in ***Anarita Karimi Njeru v Republic*** (No. 1) [1979] KLR 154 and amplified in ***Trusted Society of Human Rights Alliance v Attorney General & 2 Others*** [2012] eKLR. Counsel also relied on the case of ***Republic v Commissioner of Police Exparte Nicholus Gitau Kuria*** and ***Meme v Republic & anothe***r [2004] eKLR for the proposition that an applicant who alleges that his/her rights have been infringed must not only make the allegations but must also state clearly with supporting facts instances where such rights have been infringed, and failure to do so makes the application defective.

22. Third, learned counsel submitted that the petitioner had not discharged the burden of proof and relied on the case of ***Margaret Wanjiru Ndirangu & others v Attorney General*** [2015] eKLR on the burden of proof required. Counsel contended that the Court should operate within the parameters of the law and that a party must substantiate his claims. In this regard counsel submitted that the petition alleged torture but the medical report produced was dated 3rd August 2006, about 20 years after the alleged torture hence the petitioner did not satisfy the requirements of sections 107 and 109 of the evidence Act on the standard of proof. Counsel further relied on the case of ***Lt Col Peter Ngari Kagume & Others v Attorney General*** [2009] eKLR on the submission that it is incumbent upon the petitioner to avail tangible evidence of torture and that the Court must be guided by evidence of probative value which the petitioner in the present case did not adduce.

23. Fourth, learned counsel contended that the respondents will suffer prejudice since the petition was filed on 27th December 2013 about 30 years after the cause of action arose. In learned counsel's view, Courts have emphasized on prompt filing of actions to avoid distortion of evidence. Counsel relied on the case of ***Attorney General of Uganda & another v Omar Awadh & another (No 2 of 2012 – East African Court of Justice -EACJ)*** for the submission that parties should have the zeal to prosecute their actions to avoid loss of evidence.

24. ***Miss Gitiri*** contended that the present petition was brought after 30 years when witnesses have either died or retired. She relied on the case of ***Joseph Mugere Onoo v Attorney General*** [2015] eKLR where a petition of this nature was dismissed on grounds of

delay. Counsel specifically relied on the case of ***Morris Oketch Owiti v Attorney General Attorney [2016] eKLR*** and ***Wellington Nzioka Kioko v Attorney General*** (CA No 268 of 2016) which were dismissed due to inordinate delay and urged the Court to dismiss the petition.

25. ***Mr. Muriithi***, in a short rejoinder, submitted that the case of ***Attorney General of Uganda v Omar Awodh & Others*** (supra) was considered in ***David Gitau Njau & Others*** (supra) and found inapplicable in our situation because limitation clause was founded in Article 32 of the East African Community Treaty, unlike our situation where there is no limitation clause or statute.

Analysis and Determination

26. I have carefully considered this petition, the response thereto; submissions by counsel for the parties and the authorities relied on. This petition raises two issues for determination. First; whether the petitioner's human rights and fundamental freedoms were violated, and second; whether there was inordinate delay in filing the petition and, depending on the answers to the above issues, the relief to grant.

27. The petitioner's complaint is grounded on unlawful arrest and detention as a violation of his human rights and fundamental freedoms. The petitioner was a member of the Kenya Air force a branch of the Armed Forces of the Republic of Kenya having been enlisted on 12th February 1976 under service number 022128. After initial training, the petitioner underwent further training as an aircraft and armament technician and as at 1st August 1982 during the coup attempt, he was stationed at Nanyuki Airbase but resided outside the Base.

28. The petitioner told the Court that he was arrested on 8th August 1982 after he presented himself at Kerugoya Police Station where he was brutally beaten and locked in a solitary cell. He was taken to Nyeri police station the following day where he was subjected to further cruel and inhuman treatment for 4 days while in a crowded cell without medical attention following injuries he had sustained from the beatings he had been subjected to. He told the Court that he was picked by army officers from the police station, beaten indiscriminately, made to kneel on concrete floors; was stripped naked in public and subjected to other inhuman and degrading treatment. He was taken to Nanyuki Army Barracks and later to Kamiti and Naivasha Maximum Security Prisons and again subjected to torture and inhuman and degrading treatment.

29. According to the petitioner, he was interrogated for 5 months without being produced in Court during which, he was forced to sign a confession. He was later detained without trial for 4 years without being served with a detention order or given reasons for the detention and that his detention was not gazetted though he was subjected to the provision of the Preservation of Public Security Act (Cap 57). It was the petitioner's contention that his constitutional rights guaranteed under sections 70(a) 74(1), 72(3) and 83 of the ***repealed Constitution*** were violated.

30. The respondents denied that the petitioner was mistreated and stated that that the arrest was lawful. They also denied violating the petitioner's constitutional rights and in particular denied that the petitioner was mistreated, tortured and subjected to inhuman and degrading treatment.

31. The fact that the petitioner was a member of the ***KAF*** was not disputed. He was enlisted under service number 022128 and according to an extract of service from the ***Kenya Defence Forces*** dated 15th May 2012 attached to the petitioner's affidavit in support of the petition, he was discharged from the Defence Forces on 12th February 1987 on grounds of ***"service no longer required"***.

32. As to the fact of detention or confinement, apart from the averments, depositions and the petitioner's oral testimony in Court, there are also letters attached to his affidavit exchanged between the petitioner and his family members. The letters were written through the security officer in charge of detained and restricted persons and relate to the period the petitioner said he was being held that is between 1983 and 1986. Also attached to the same affidavit, are letters from Provincial Police Headquarters forwarding the letters written by the petitioner to his wife ***Beatrice Murage***.

33. The letters were dispatched through the Provincial Security Officer signed by ***Philip Kilonzo*** the Officer in Charge of detained and restricted persons. The dispatch letters were dated 3rd December 1984, 26th September 1985, 13th May 1986, 30th May 1986, and 9th June 1986. From these letters there is no doubt that the petitioner was indeed held as a restricted or detained person. The

petitioner also stated that after he was arrested on 8th August 1982, he was held at various ***Police Stations*** and ***Nanyuki Military Barrack***s before he was transferred to ***Kamiti*** and later ***Naivasha Maximum Security Prisons***. He stated that he was neither produced in a Court of law nor charged with any offence. The petitioner's arrest and confinement is not therefore in doubt going by the evidence on record. The respondents did not adduce evidence to show that the petitioner was produced in a Court of law as was required by the ***repealed Constitution.*** Section 70(a) of the repealed Constitution provided that;

"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 connexion, political opinions, colour, 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;"***

34. The Constitution guaranteed every person the right to life, liberty, security of the person and protection of the law. That means everyone was protected from deprivation of his or her liberty without following the law. Section 72(1) also provided that no person shall be deprived of his personal liberty save as may be authorized by law in given cases while section 72(3)(b) states that;

"A person who is arrested or detained.

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is

arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with."

35. The ***repealed Constitution*** required that an arrested person be produced in Court within twenty four hours where he was suspected of committing a normal criminal offence and within twenty four hours where the offence was punishable by death. The Constitution was also clear that it was upon the respondents to show that they complied with this constitutional requirement. The reason for limiting one's liberty through arrest was for purposes of producing him or her in Court to be dealt with in accordance with the law, thereby checking on arbitrary arrest and unlawful detention of people in violation of their human rights to liberty.

36. The import of section 72 (3) of the repealed Constitution was the subject of discussion by the Court of Appeal in the case of ***Albanus Mwasia Mutua v Republic*** [2006] eKLR where the Court addressed that issue and held that there was gross violation of the appellant's constitutional right guaranteed by ***section 72(3) (b)*** because he was not brought before the Court within the time required by the Constitution after his arrest. The Court also observed that ***"it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place".***

37. From the evidence on record, it is not in doubt that that the petitioner's right to liberty was violated. The petitioner has demonstrated on the balance of probability that he was arrested and held in confinement from 8th August 1982 until he was released in December 1986. This is corroborated by the letters his family members wrote to him while in confinement dated 24th November 1983, 31st July 1984, 28th January 1985, 10th July 1985, 27th October 1985, and 9th April 1986 all addressed through the ***Commission of Prisons.*** Those from the petitioner as stated earlier were sent through ***Philip Kilonzo,*** then in charge of detained and restricted persons.

38. Where the Constitution guaranteed personal liberty, there could be no arbitrary arrest and detention without complying with the Constitution and the law. Section 70(a) and 72(3) (b) of the ***repealed Constitution*** did not allow detention without due process. That is why section 72(3) (b) demanded that a person arrested on suspicion of committing or of being about to commit an offence, he had to be produced before Court within twenty four hours or at the very latest within fourteen days if the offence was one punishable by death.

39. When the ***repealed Constitution*** provided in section 72 (1) that no person shall be deprived of his personal liberty save as may

be authorized by law and gave the limited instances for deprivation, that was a constitutional command that had to be obeyed and any deprivation of one's liberty had to be in accordance with the Constitution and the law. It was for purposes of outlawing abuse of power and deprivation of personal freedom, that our ***repealed Constitution*** included section 72(1) in the Bill of Rights to guarantee everyone physical freedom and protection against arbitrary arrest and detention without due process. In that regard, therefore, the Court must not lose sight of the fact that rights enshrined in the Bill of Rights must be protected and could not be unjustifiably infringed.

40. The petitioner further contended that he was illegally held in detention under the provisions of the Preservation of Public Security Act without being served with a detention order or given reasons for his detention. From the documents attached to his affidavit and more so, the letters signed by ***Mr. PM Kilonzo,*** the In Charge of detained and restricted persons, forwarding the petitioner's letters to his relatives, the petitioner was indeed held as a restricted and detained person. The question is; was his detention and restriction lawful and was it done in accordance with the law"

41. It was averred as well as submitted by the petitioner's counsel, that although the petitioner was held as a restricted and detained person, he was neither served with a detention order nor given reasons for his detention and restriction in violation of section 83 (2) of the repealed Constitution. The respondents argued that if the petitioner was indeed arrested and held, which is no longer in doubt anyway, it was done lawfully.

42. Section 83 of the ***repealed Constitution*** provided;

(1) Nothing contained in or done under the authority of an Act

of Parliament shall be held to be inconsistent with or in contravention of section 72, 76, 79, 80, 81 or 82 when Kenya is at war, and nothing contained in or done under the authority of any provision of Part III of the Preservation of Public Security Act shall be held to be inconsistent with or in contravention of those sections of this Constitution when and in so far as the provision is in operation by virtue of an order made under section 85.

(2) Where a person is detained by virtue of a law referred to in

subsection (1) the following provisions shall apply -

(a) he shall, as soon as reasonably practicable and in any case not more than five days after his detention, be furnished with a statement in writing in a language that he understands specifying in detail the grounds upon which he is detained;

(b) not more than fourteen days after the commencement of his detention, a notification shall be published in the Kenya Gazette stating that he has been detained and giving

particulars of the provision of law under which his detention is authorized;

(c) not more than one month after the commencement of his detention and thereafter during his detention at intervals of not more than six months, his case shall be reviewed by an independent and impartial tribunal established by law and presided over by a person appointed by the President from amongst persons qualified to be appointed a judge of the High Court;

(d) he shall be afforded reasonable facilities to consult a legal representative of his own choice who shall be permitted to make representations to the tribunal appointed for the review of the case of the detained person; and

(e) at the hearing of his case by the tribunal appointed for the review of his case he shall be permitted to appear in person or by a legal representative of his own choice.

(3) On a review by a tribunal in pursuance of this section of the

case of a detained person, the tribunal may make recommendations concerning the necessity or expediency of continuing his detention to the authority by which it was ordered but, unless it is otherwise provided by law, that authority shall not be obliged to act in accordance with any such recommendations…"

43. The respondents having contended that the petitioner was lawfully arrested and held, they were under obligation to show that there was compliance with the Constitution and the applicable law and that the petitioner was subjected to a lawful process. However, the respondents did not adduce evidence either to show that the petitioner was lawfully detained by producing a detention order or a Gazette Notice or other evidence that the petitioner was produced in Court and that his detention was as a result of a lawful Court order. The respondents did not also show that the petitioner's detention was periodically reviewed as was required by section 83 (2) of the ***repealed Constitution.*** In the absence of evidence to the contrary, I find and hold that the petitioner was held in violation of his human rights and fundamental freedoms contrary to sections 70 (a), 72 (1) and 72 (3) (b) and 83 of the ***repealed Constitution.***

44. The petitioner further contended that during his incarceration, he was beaten, stripped naked, kept in water logged cell, denied food and generally subjected to torture, inhuman and degrading treatment. He attached a medical report by ***Dr. M Ndambuki***, a specialist surgeon, dated 3rd August 2016 to confirm that he was tortured during his incarceration. The respondents contended that the petitioner did not prove his claims of torture and inhuman and degrading treatment. They argued that the medical examination was done 20 years after the petitioner had been released hence it was of little evidential value.

45. I agree with the respondents' counsel that the medical report by ***Dr. Ndambuki*** is of little assistance if it was intended to prove torture. There was no indication that the medical report was a follow up examination. If that was the only examination the petitioner had undergone, it could not prove that the petitioner sustained those injuries while in confinement. The petitioner ought to have presented himself for medical examination much earlier or as soon as he had the opportunity to do so for purposes of confirming that the injuries he had were as a result of his treatment while in detention or confinement.

46. The question one must ask is whether it is the case that there can be no proof of torture or inhuman and degrading treatment without a medical report" To answer this, we have to look at the meaning of torture, inhuman and degrading treatment.

47. According to ***Black's Law Dictionary***, 9th Edition, the word "***torture"*** is defined as ***"the infliction of intense pain to the body or mind to punish, to extract a confession or information, or to obtain sadistic pleasure".*** So torture is intended to inflicted intense pain by any means to the body or mind of a person as a form of punishment with a view to extracting or obtaining a confession or information against that person's will. It is achieved through use of some force. That is; there must be some physical act applied to the person's body to exact physical or mental pain.

48. The same Dictionary defines ***"inhuman treatment"*** as ***"Physical or mental cruelty so severe that it endangers life or health".*** Article 1 of The United Nations Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment defines the term ***'torture'*** as;

"Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

49. From the above definitions, there must be an element of force used to inflict pain in a human being's body or mind which is a threat to life or health of the victim. In that case, therefore, there should be evidence through medical examination of physical injuries as a result of the treatment the person has been subjected to. The petitioner did not produce an acceptable medical report to show that he sustained the injuries as a result of the treatment he was subjected to while in detention. I am unable to find that there was torture as legally defined.

50. However, the petitioner deposed as well as testified that he was beaten, forced to walk on his knees on concrete floors, stripped naked in public, and held in waterlogged cells. He also stated and deposed that he was transported in a vehicle while naked. Even though he did not adduce other independent evidence to corroborate his contention that he was subjected to this form of treatment, it is difficult to imagine what other evidence the petitioner would have adduced given the circumstances under which he had been held

for 4 years and 5 months. For instance, the petitioner could not produce photographs to show that he was stripped naked, or call a witness to testify in his favour to the effect that he was forced to walk on knees on concrete floors, or that he was stripped naked or kept in water logged cells. Taking such a view, would be to demand too much from a petitioner who had no control over his life for those 4 years and 5 months when he had no opportunity to collect such evidence.

51. 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"*** In my respectful view, the section used a disjunctive word ***"or"*** followed by ***"Other treatment"*** which meant torture, inhuman or degrading punishment ***or other treatment*** were prohibited. The words ***"or other treatment"*** used in section 74(1) being a constitutional provision conferring fundamental rights, should be given a broad, liberal and flexible interpretation to include any such treatment that is unusual to human beings and is intended to humiliate a person for sadistic pleasure. Stripping the petitioner naked in public, forcing him to walk on his knees on concrete floors and keeping him in waterlogged cells, was such ***"other treatment"*** that was outlawed by section 74(1) of the ***repealed Constitution.***

52. This view, finds favour in the case of ***Tinyefuze v Attorney General of Uganda*** (Constitutional Petition No 1 of 1996 [1997]3 UGCC) where the Court stated***;***

"A Constitutional provision containing a fundamental right is a permanent provision intended to cater for all time to come and, therefore, while interpreting such a provision, the approach of the Court should be dynamic, progressive and liberal or flexable, keeping in view ideals of the people, socio-economic and politico -cultural values so as to extend the benefit of the same to the maximum possible. In other words, the role of the Court should be to expand the scope of such a provision and not to extenuate it. Therefore, the provisions in the Constitution touching on fundamental rights ought to be construed broadly and liberally in favour of those on whom the rights have been conferred by the Constitution."

53. In ***Minister for Home Affairs & another vs. Fischer*** [1979] 3 ALL ER 21, ***Lord Wilbeforce***, speaking for the Court expressed himself thus;

"A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a Court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to the language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument and to be guided by the principle of giving full recognition and effect to those fundamental rights, and freedoms with a statement of which the Constitution commences."

54. And in ***Attorney General v Kituo cha Sheria & 7 others*** **[2017] eKLR,** the Court of Appeal stated that ***"there is a duty to recognize, enhance and protect the human rights and fundamental freedoms found in the Bill of Rights with a view to the preservation of the dignity of individuals and communities".*** That duty, in my view, falls on the Court when it is called upon to determine claims of violation of human rights and fundamental freedoms.

55. On the evidence on record, and taking into account the length of the period the petitioner was held in unlawful confinement, demanding that a person held in detention for 4 and a half years adduce evidence to prove that he was subjected to "***other treatment"*** in violation of his fundamental rights guaranteed under section 74(1) of the ***repealed Constitution***, would be to demand too much from such a person when there is clear evidence that he was held as a detained and restricted person for all that period with no opportunity to gather evidence. I am persuaded and therefore hold that the petitioner was subjected to ***other treatment*** that was outlawed by the ***repealed Constitution*** in violation of his human rights.

56. In doing so I take guidance from various persuasive decisions including the observation by the Constitutional Court of South Africa regarding that country's dark past in the case of ***AZAPO v President of Republic of South Africa (*** CCT 17/96) where it stated;

"***Most of the acts of brutality and torture which have taken place have occurred during an era in which neither the laws which permitted the incarceration of persons or the investigation of crimes, nor the methods and the culture which informed such investigations were easily open to public investigation, verification and correction. Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof. Loved ones have disappeared, sometimes mysteriously and most of them no longer survive to tell their tales. Others have had their freedom invaded, their***

dignity assaulted or their reputations tarnished by grossly unfair imputations hurled in the fire and the cross-fire of a deep and wounding conflict. The wicked and the innocent have often both been victims. Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible; witnesses are often unknown, dead, unavailable or unwilling. All that often effectively remains is the truth of wounded memories of loved ones sharing instinctive suspicions, deep and traumatizing to the survivors but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigours of the law."

57. In the ***Greek Case 1969 Y.B Eur. Conv. on H.R. 186 (Eur. Comm'n on H.R),*** the European Commission on Human Rights stated that; "***treatment or punishment of an individual may be said to be de-grading if it grossly humiliates him before others, or drives him to an act against his will or conscience." (Emphasis).*** And in the case ***Selmouni v France*** (2000) 29 EHRR 403, which dealt with ***Article 3*** of the European Commission on Human Rights, (equivalent to section 74(1) of our repealed Constitution), ***The European Court of Human Rights*** stated;

"[99] The acts complained of where such as to arouse in the applicant feelings of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical and moral resistance. The Court therefore finds elements which are sufficiently serious to render such treatment inhuman and degrading…In any event, the Court reiterates that, in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3"

58. The Court went on to observe that ***Article 3*** (section 74(1) of our repealed Constitution), enshrines one of the most fundamental values of democratic societies, and that even in the most difficult circumstances, such as the fight against terrorism and organized crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. In the same breath, with section 74(1) of the repealed Constitution in place, the petitioner could be not treated in the manner he was in violation of his fundamental freedoms and human dignity.

Whether there was inordinate delay in filing the Petition.

59. The respondents contended that there was inordinate delay in filing this petition and urged the Court to dismiss it on that account. ***Miss Gitiri*** submitted that the late filing of the petition was prejudicial to the respondents because some of their witnesses were dead while others had retired. According to learned counsel, the petition was filed 31 years after the date of the cause of action hence the Court should not allow it. Reliance was placed on the decision in the case of ***Attorney General of Uganda & Another v Omar Awadh & Another*** (No 2 of 2012, EACJ), ***Joseph Mugere Onoo v Attorney General*** [2015]eKLR , ***Moris Oketch Owiti v Attorney General*** [2016]eKLR and the Court of Appeal decision in ***Wellington Nzioka Kioko v Attorney General*** (CA No 268 of 2016.)

60. The petitioner on his part contended that he had explained why there was delay in filing the petition pointing out that he could not sue the same government that had detained him; that he did not expect to get justice from the judiciary then and that he did not have money to enable him file the petition. ***Mr. Muriithi*** , learned counsel for the petitioner, argued that there was a good explanation for the delay and that there is no limitation period within which to file claims challenging violation of human rights and fundamental freedoms. He also contended that limitation of actions is by statute and not through judicial legislation. He relied on the decision in the case of ***Peter M Kariuki v Attorney General*** (supra), ***David Gitau Njau & Others v Attorney General*** (supra) and ***Domnic Arony Amolo v Attorney General*** (supra) to argue that there was an explanation for the delay given that there is no statutory limitation.

61. The petitioner was arrested on 8th August 1982. He was held in detention and restriction on the basis of the aborted 1982 coup against the then government until 1986 when he was released. He therefore contended that he could not have sued the same government he was accused of attempting to overthrow and expect to get justice.

62. It is true that very few people dared file claims against the then government for violation of their fundamental rights. A few others tried after ***President Moi*** left office and even then, there were still misgivings because much had not changed. However, after the promulgation of the ***Constitution of Kenya 2010***, more people gained courage and filed petitions challenging violation of their human rights and fundamental freedoms. The petitioner filed his petition on 27th December 2013 about 3 years after the promulgation of the new ***Constitution*** and about 27 years after he was released from detention.

63. It is not in doubt that there is no law in this country limiting the period within which one should file a Constitutional petition for violation of constitutional and human rights. The ***repealed Constitution*** did not have such limitation clause either. In the case of ***Domnic Arony Amolo v Attorney General***[2003} eKLR, the Court dealt with the issue and observed that section 3 of the ***repealed Constitution*** excluded the operation of section 22 of the ***Limitation of Actions Act*** (cap 22) with regard to claims under fundamental rights. The Court also stated that fundamental rights provisions could not be interpreted to be subject to the heads of legal wrongs or causes of actions enumerated under that Act.

64. In ***David Gitau Njau 9 others v Attorney General*** (supra), the Court agreed with the position taken in ***Domnic AronyAmolo v Attorney General***[(supra) and stated;

"To my mind, I do not know any law or a particular provision of the Repealed Constitution that provided that a claim based on fundamental rights and freedoms has a limitation period within which the claims ought to be filed. A claim made under the Constitution is neither a claim in tort nor contract that would necessitate the application of the Limitation of Actions Act, Cap 22 Laws of Kenya. Further, a casual reading of the rules contained under the Legal Notice No. 133 of 2001 (Constitution of Kenya (Protection of Fundamental rights and Freedoms of the individual) Practice and Procedure Rules, 2001 would show that they do not place any limitations on the citizens' rights to institute a suit for the redress of violation of fundamental rights and freedoms under Section 84 of the Repealed Constitution." (See also Wachira Waheire v Attorney General (Misc. Civil Case No. 1184 of 2007(OS***)*** and ***Otieno Mak'onyango v Attorney General & another-*** supra)

65. Regarding the respondents' reliance on the case of ***Attorney General of Uganda & Another v Omar Awadh & Another*** (supra) for the submission that parties should have the urge to pursue their claims promptly, that case is distinguishable from the instant petition because the former was founded on the ***East African Community Treaty*** which had a limitation clause in Article 32 which is not the case with the ***repealed Constitution.*** The respondents also relied on the case of***Wellington Nzioka Kioko v Attorney General*** (supra) to support the view that there was inordinate delay in filing this petition. In the ***Wellington Nzioka Kioko case***, the Court (***Mumbi Ngugi J***) had dismissed the petition on the basis that there was no proof of violation of human rights and fundamental freedoms and further, that the petitioner had not explained why there was delay in filing that petition. When the matter went on appeal, the Court of Appeal agreed with the Learned Judge that the delay had not been explained and dismissed the appeal.

66. In ***Peter M Kariuki v Attorney General*** (supra) the Court of Appeal adverted to the fact that the appellant had filed his petition some twenty three [23] years after his conviction by the court martial, but agreed with this Court (***Ngugi J)*** that the claim was not time barred. The Court of Appeal however observed that the consequence of the appellant's delay in lodging his claim had some level of prejudice to the respondent but did not dismiss the appeal on the respondent's contention that the matters complained of by the appellant had taken place a while back and that many of the actors were no longer available as witnesses.

67. The Court of Appeal while dismissing ***Wellington Nzioka Kioko's*** appeal did not lay down a hard and fast rule that there is a limitation period within which claims for reparations for violation of human rights and fundamental freedoms must be filed. The Court of Appeal simply stated that there should be a plausible explanation for the delay thus leaving the matter at the discretion of the trial Court. I agree with the Respondents that it is prudent to institute proceedings as soon as possible when there is opportunity to do so. However, it is clear from the ***repealed Constitution*** and rules made under section 84 thereof as well as the judicial pronouncements, that there was no limitation period imposed for seeking redress for violation of fundamental rights and freedoms.

68. From the judicial pronouncements above, it is my respectful view that there was neither a provision in the ***repealed Constitution*** nor in any other law prescribing the period within which a petitioner was to file a claim challenging violation of his/her constitutional and human rights. There is therefore uncertainty as to what the limitation period was and still is for filing claims for violation of human rights in this country. As regards the explanation for delay, for my part, I do not think the explanation given by the petitioner was frivolous. He had been in unlawful detention for long, he had to get an advocate to institute his case and it is also possibly true as he stated, that he was traumatized by the long years he was held in that unlawful detention and therefore had to gather evidence to support his case.

69. In that regard, therefore, I hold that the delay in filing this petition was satisfactorily explained given that there is no specific limitation period provided for within which to file such claims. In doing so, I have also taken into account the nature of the violations the petitioner suffered where he was confined in unlawful detention for 4 years and 5 months without due process in violation of clear constitutional provisions. Ignoring such violations would be to run away from the fact that the there is a duty to recognize, enhance and protect the human rights and fundamental freedoms in the Bill of Rights with a view to preserving the

dignity of individuals and communities. That is a duty placed on this Court when called upon to enforce human rights and fundamental freedoms.

70. In taking this view, I am also persuaded by the decision of ***The Community Court of Justice of The ECOWAS*** in ***Federation of African Journalists & others v The Republic of The Gambia***; (Suit No. ECW/CCJ/APP/36/15; Judgment No. ECW/CCJ/JUD/04/18 -delivered on 13th February, 2018) which dealt with the issue of limitation period for filing claims for violation of human rights arising from the ECOWAS member states. After analyzing provisions of the Court's Supplementary Protocol, the Court concluded that there was no limitation clause for filing human rights claims observing;

"Statute limitations are laws promulgated by legislative bodies, local, national or international which sets the maximum time within which legal proceedings may be initiated or commenced. Where the period stipulated in a limitation statute lapses, a claim for reparation for the wrong suffered may not be filed and where filed is liable to be struck out as having become statute barred. In that case, a litigant is said to have lost his right of action despite the existence of a course of action thus depriving a court jurisdiction to entertain the claims"

71. The Court in particular held that there was no limitation in the clause 9(3) of the French version of the Supplementary Protocol which it said to be the preferred one. The Court stated that its position was ***"reinforced by the international best practices and the provisions of the fundamental human rights enforcement procedures of most states, that claims for enforcement of human rights cannot be caught by limitation statutes."***

72. I am acutely aware that delay to initiate human rights violation claims may be prejudicial to the respondents. That is why the law of limitation rests on the foundation of public interest given that dormant claims would most likely have more of cruelty than justice on the part of a respondent since the respondent may lose crucial evidence to disprove such a claim. It is therefore expected that people with claims should pursue them with reasonable diligence and within a stipulated period. However, in the absence of a statute of limitation or limitation clause in the ***repealed Constitution*** or even clear pronouncements by the Court of Appeal regarding when limitation period for instituting human rights claims begins and ends, it would be difficult for this Court to hold that the petitioner had lost his right to approach it for reparation for violation of his human rights and fundamental freedoms. Doing so would be to deny the petitioner his right of access to justice.

Reliefs

73. Having determined the two issues in the affirmative, what I must now decide is the appropriate reliefs to grant. When the Court is called upon to consider the issue reliefs to grant in cases of violation of human rights where violation is actually proved, it can only award compensation. However, it is always important to bear in mind that human rights are invaluable, are for enjoyment and not violation. It is also true that there can be no sufficient redress for violation of human rights and fundamental freedoms through monetary compensation. This is because Courts cannot place a commercial value on violated human rights. They merely impose some monetary compensation as a consequence of infringement of human rights and fundamental freedoms which is intended to deter future violations, but not to repair the already violated rights and fundamental freedoms. Through the act of compensation, Courts send a message to the would be violators of human rights that Courts will not let go such violations without some form of reparation.

74. In deciding what award to make, the Court will consider factors such as the torture, if any, inflicted on the Petitioner, the length of time the Petitioner was held in unlawful custody, decided cases on the issue and what would be fair and reasonable award in the circumstances of the case. (See ***Jeniffer Muthoni Njoroge & 10 others v Attorney General*** [2012] eKLR).

75. The petitioner's counsel asked the Court to award the petitioner a global figure of Kenya shillings 50 million as compensation while the respondent did not suggest any figure. However, considering that the petitioner was held in unlawful detention for 4 years and 5 months, and the only treatment he complained of was walking on knees on concrete floor, being stripped naked, kept in water logged cell and being beaten, the figure of 50 million sought as damages has no legal foundation or justification. As observed by the Court of Appeal in ***Koigi Wamwere v Attorney General*** (supra) the award of damages is not an exact science and no monetary sum can really erase the scarring of the soul and the deprivation of dignity that some of these violations of rights entailed. In the circumstances of this case I am of the considered view that a global award of Kshs. 7 million is fair and reasonable.

76. In arriving at this award, the Court has taken into account the awards made in ***Koigi Wamwere v Attorney General*** [2015]

eKLR where the Court of Appeal enhanced an award of 2.5 million to 12 million; ***Eliud Wefwafwa Luucho & 4 others*** (Petition No.121 of 2016 consolidated) where the Court awarded Kenya shillings 5 million to each petitioner, ***Francis Mwangi Munyiri v Attorney General*** (petition No. 400 of 2014) where Kshs. 5 million was awarded and ***Jamlik Muchangi Miano v Attorney General*** [2017] eKLR where again an award of Kshs. 5 million was made.

77. In the end, having been satisfied that the petitioner's rights were violate, the amended petition dated 5th May 2014 is allowed and I make the following orders which I deem appropriate.

i. A declaration is hereby issued that the petitioner's human rights and fundamental freedoms enshrined in sections 70 (a), 72(3) (b), 74(1) and 83(2) of the repealed Constitution were violated by agents of the state.

ii. The petitioner is hereby awarded Kenya shillings 7, 000, 000 as damages for the violation his fundamental rights in 1 above

iii. Costs and interest to the petitioner.

Dated, Signed and Delivered at Nairobi this 4th Day of May 2018

E C MWITA

JUDGE