



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mulombi v Attorney General (Petition E004 of 2021)  
[2023] KEHC 21388 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21388 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
PETITION E004 OF 2021**

**DK KEMEI, J**

**JULY 28, 2023**

**IN THE MATTER OF ARTICLES 22, 23,25(A) AND ARTICLE  
29 OF THE CONSTITUTION OF KENYA 2010.**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF  
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER  
ARTICLES 25(A) AND 29(A), 9(C), (D) AND (F) & ARTICLE  
(C) & (F) OF THE CONSTITUTION OF KENYA 2010**

**BETWEEN**

**TIMOTHY MWASAME MULOMBI ..... PETITIONER**

**AND**

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

**JUDGMENT**

1. The Petitioner Timothy Mwasame Mulombi and 8 others filed Petitions in this Court against the Respondent seeking several prayers. By order of this Court all the 9 Petitions No. E004 of 2021, No. E005 of 2020, E006 of 2020, E005 of 2021, E006 of 2021, E007 of 2021, E008 of 2021, E009 of 2021 & E010 of 2021 were consolidated and Petition No. E004 of 2021 made the operational file; as all the Petitions were premised on same grounds and seeking similar reliefs.
2. The Petitions were pursuant to Articles 22, 23, 25(a) and 29(c) (d) & (f) of *the Constitution* of Kenya, 2010 and Rules 4 and 10 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 as read together with Chapter 4 of *the Constitution* (namely Articles 19, 20, 21, 22, 23, 165 and 259(1) thereof. The Petitioners sought the following orders:



- i. A declaration that the Petitioners fundamental rights and freedom from torture were contravened and grossly violated by the Respondent's Special Branch Police Officers who were Kenyan government servants, agents, employees in its institutions at Bungoma Police Station and Kakamega Police Station.
  - ii. A declaration that the Petitioners are entitled to the payment of damages and compensation for the violations and contraventions of their fundamental rights and freedoms from torture under Articles 29(a), 9(c), (d) and (f) of *the Constitution* of Kenya of 2010.
  - iii. General damages, exemplary damages and moral damages on an aggravated scale under Article 23(3) of *the Constitution* of Kenya 2010 for the unconstitutional conduct by the Kenyan government servants and agents be awarded.
  - iv. Any further orders, writs and directions as this Honourable Court may consider appropriate.
  - v. Costs of the suit and interest.
3. February Eighteen, refers to the date when Kenya's Foremost Freedom Fighter Dedan Kimathi was hanged by the British Colonialist on 18th February 1957 at Kamiti Maximum Prison. The name was adopted in the mid 1990s to denote an underground political grouping referred to as the February Eighteen Movement (FEM) which later allegedly formed a military Wing namely; February Eighteenth Revolutionary Army (FERA). The Kenyan Government claimed the leaders of the outfit were the late Brigadier John Odongo who reportedly died in exile in the Democratic Republic of Congo and Mr. Joseph Wangamati who is a prominent businessman in Bungoma in the former Western Province. The Petitioners case are expressed through the Petition; their individual supporting affidavits; and submissions.
  4. In their respective Petitions, the 9 Petitioners have averred that due to the publicity of the FERA Torture Victims, the Kenya – Government did three of the torture things to cover-up the evidence of FERA Human Rights violations; One, all Official records at various Police Stations were destroyed at the behest of the Special Branch Officers. Two, all Court records in various Courts Registries were destroyed at the behest of the Special Branch Officers to cover-up the FERA Torture Victims Court Cases. Three, the torture victims were ordered not to talk to the press or to tell anybody about the degrading torture or else the Special Branch officers would come for them again for more torture.

**1<sup>st</sup> Petitioner – Timothy Mwasame Mulombi:**

5. The 1<sup>st</sup> Petitioner filed his Petition, BUNGOMA HC.PET. NO. E004 Of 2021-Timothy Mwasame Mulombi Vs The Attorney General, dated 18<sup>th</sup> December 2020 and his supporting affidavit sworn on the even date.
6. The 1<sup>st</sup> Petitioner avers that on 3<sup>rd</sup> December 1995 at 7.00 PM, he was arrested at his home by police officers from Sirisia Police Station, bundled into a waiting Police Land Rover and driven to the police station only to be later transferred to Nzoia Police Post where he was locked up until 9.00 PM.
7. He deponed that on that same day at 10.00 PM he was blindfolded, bundled in the waiting Police Land Rover and transferred to Bungoma Police Station where he was kept in undergrounds police cells for a while and later transferred to Kakamega Police Station.
8. The Petitioner averred that the following day he was handed a letter which asked him to follow the instructions of the police and was taken to the District officer at Sirisia Constituency and later taken to Bungoma Police Station where he remanded at a dark room for days, tortured by the police and told to confess that he was a member of a movement known as February Eighteen Revolutionary Army



(FERA) which was formed by the Late Brigadier John Odongo and Mr. Joseph Wangamati who was a prominent Businessman in Bungoma District.

9. He averred that thereafter, he was bundled into a Police Land Rover while blindfolded and taken to a destination which he later came to know as Naivasha GK Prison Detention Blocks where he still underwent gruesome torture.
10. He averred that he was eventually released on 16<sup>th</sup> March 1995 and was ordered not to tell anybody where he had been and the experiences he was subjected to or face the consequence of re-apprehension.

### **2<sup>nd</sup> Petitioner's Case-alice Nasambu Wanjusi:**

11. The 2<sup>nd</sup> Petitioner filed her Petition, BUNGOMA HC.PET. NO. E005 of 2020-Alice Nasambu Wanjusi Vs The Attorney General, dated 18<sup>th</sup> December 2020 and her supporting affidavit sworn on even date.
12. The 2<sup>nd</sup> Petitioner asserts that on 8<sup>th</sup> February 1995 at Malaba Market, she was arrested by police officers, blindfolded and bundled into a waiting Police Land Rover and taken to Bungoma Police Station then later transferred to Kakamega Police Station, where she was locked up for four (4) days.
13. She averred that after 4 days she was blindfolded and bundled into a waiting Police Land Rover and taken to a destination which she later came to know as Naivasha GK Prison Detention Blocks where she still underwent gruesome torture.
14. She averred that she was released on 13<sup>th</sup> April 1995 after being remanded at a dark room for days, tortured by the police and told to confess that she was a member of a movement known as February Eighteen Revolutionary Army (FERA) which was formed by the Late Brigadier John Odongo and Mr. Joseph Wangamati who was a prominent Businessman in Bungoma District.
15. She swore that prior to her release, she was ordered not to tell anybody where she had been and the experiences she was subjected to or face the consequence of re-apprehension.

### **3<sup>rd</sup> Petitioner's Case-paul Sakari Nyongesa:**

16. The 3<sup>rd</sup> Petitioner filed his Petition, BUNGOMA HC.PET. NO. E006 of 2020-Paul Sakari Nyongesa Vs The Attorney General, dated 18<sup>th</sup> December 2020 and his supporting affidavit sworn on even date.
17. The 3<sup>rd</sup> Petitioner deposed that on 9<sup>th</sup> February 1995, he was arrested at his home by police officers and was bundled into a waiting Police Land Rover-Reg. No. KAA 085Y and driven to Chepkube Police Patrol Base for a short while and was later transferred to Bungoma Police Station then Kakamega Police station where he was locked up in the underground cells for days without food and that he was not allowed to contact his family.
18. He deposed that on that same day he was blindfolded, bundled into a waiting Police Land Rover and transferred to Bungoma Police Station where he was beaten up while being asked to reveal how he knew about Mwakenya Movement which was mobilizing people to go to Libya for military training.
19. The Petitioner averred that later in the night at around 8.00 PM he was taken to Kakamega Police Station where he remanded in a dark room for days, tortured by the police and told to confess that he was a member of a movement known as February Eighteen Revolutionary Army (FERA) which was formed by the Late Brigadier John Odongo and Mr. Joseph Wangamati who was a prominent Businessman in Bungoma District.



20. He averred that on 13<sup>th</sup> February 1995 he woke up at Kakamega Provincial Hospital where he was treated for swollen head and backbone injuries due to the severe torture he underwent at Kakamega Police cells.
21. He averred that on 16<sup>th</sup> February 1995, at around 2.00 PM, he was bundled into a Police Land Rover and taken back to Kakamega Police cells where he was locked up till the following day when he was again, bundled into a Police Land Rover while blindfolded and taken to a destination which he later came to know as Naivasha GK Prison Detention Blocks where he still underwent gruesome torture.
22. He averred that he was eventually released on 17<sup>th</sup> February 1995 and was ordered not to tell anybody where he had been and the experiences he was subjected to or face the consequence of re-apprehension.

#### **4<sup>th</sup> Petitioner's Case-patrick Wose Wabomba:**

23. The 4<sup>th</sup> Petitioner filed his Petition, BUNGOMA HC.PET. NO. E005 of 2021-Patrick Wose Wabomba Vs The Attorney General, dated 18<sup>th</sup> December 2020 and his Supporting Affidavit sworn on the even date.
24. The 4<sup>th</sup> Petitioner avers that on 6<sup>th</sup> February 1995, he was arrested at his home in Chesikaki Village by police officers and was bundled into a waiting Police Land Rover and driven to Chesikaki Police Station where he was detained for a short while without food and was not allowed to contact his family.
25. He averred that on that same day he was blindfolded, bundled into a waiting Police Land Rover and transferred to Kakamega Police Station where he was tortured by the police and told to record a statement that he was a member of a movement known as February Eighteen Revolutionary Army (FERA) which was formed by the Late Brigadier John Odongo and Mr. Joseph Wangamati who was a prominent Businessman in Bungoma District.
26. He averred that after six hours of interrogation and torture, he was bundled into a waiting Police Land Rover where he was blindfolded and taken to Sirisia Police Station where he was locked up and interrogated again for killing a police officer in Mt. Elgon.
27. He averred that after all those days he was bundled into a Police Land Rover while blindfolded and taken to a destination which he later came to know as Naivasha GK Prison Detention Blocks where he still underwent gruesome torture for six days.
28. He averred that he was eventually released on 2<sup>nd</sup> February 1995 and was ordered not to tell anybody where he had been and the experiences he was subjected to or face the consequence of re-apprehension.

#### **5<sup>th</sup> Petitioner's Case-stephen Nalianya Walukhu:**

29. The 5<sup>th</sup> Petitioner filed his Petition, BUNGOMA HC.PET. NO. E006 of 2021- Stephen Nalianya Walukhu Vs The Attorney General, dated 18<sup>th</sup> December 2020 and his Supporting Affidavit sworn on the even date.
30. The 5<sup>th</sup> Petitioner deponed that on 6<sup>th</sup> January 1995, he was arrested at his home in Chesikaki Village by police officers and was bundled into a waiting Police Land Rover and driven to Chesikaki Police Station for being associated with Ford Kenya and about a pistol which he knew nothing about and that he was not allowed to contact his family.
31. He averred that on that same night he was blindfolded, bundled into a waiting Police Land Rover and transferred to Kakamega Police Station where he was tortured by the police and told to record a statement that he was a member of a movement known as February Eighteen Revolutionary Army



(FERA) which was formed by the Late Brigadier John Odongo and Mr. Joseph Wangamati who was a prominent Businessman in Bungoma District.

32. He averred that after six hours of interrogation and torture, he was bundled into a waiting Police Land Rover where he was blindfolded and taken to Sirisia Police Station where he was locked up for 14 days and interrogated again for killing a police officer in Mt. Elgon.
33. He averred that after all those days he was bundled into a Police Land Rover while blindfolded and taken to a destination which he later came to know as Naivasha GK Prison Detention Blocks where he still under went gruesome torture for 6six days.
34. He averred that he was eventually released on 2<sup>nd</sup> February 1995 and was ordered not to tell anybody where he had been and the experiences he was subjected to or face the consequence of re-apprehension.

#### **6<sup>th</sup> Petitioner-kelas Kilongi Mafura:**

35. The 6<sup>th</sup> Petitioner filed his Petition, BUNGOMA HC.PET. NO. E007 of 2021- Kelas Kilongi Mafura vs The Attonery General, dated 18th December 2020 and his Supporting Affidavit sworn on the even date.
36. The 6<sup>th</sup> Petitioner deponed that on 8<sup>th</sup> February 1995, he was arrested at Malaba Market by police officers and was bundled into a waiting Police Land Rover and driven to Kakamega Police Station where he was held in the underground cells for hours without food while being interrogated for being associated with Ford Kenya and about a pistol which he knew nothing about and he was not allowed to contact his family.
37. He deponed that on that same night, he was released but on 16<sup>th</sup> February 1995 while at Cheptais Market, he was re-arrested and taken to Malakisi Police Station where he was told to record a statement that he was a member of a movement known as February Eighteen Revolutionary Army (FERA) which was formed by the Late Brigadier John Odongo and Mr. Joseph Wangamati who was a prominent Businessman in Bungoma District.
38. He averred that on 20<sup>th</sup> February 1995 in the evening he was bundled into a waiting Police Land Rover where he was blindfolded and taken to Kakamega Police Station where he was locked up for four days.
39. He deponed that after those four days, he was bundled into a Police Land Rover while blindfolded and taken to a destination which he later came to know as Naivasha GK Prison Detention Blocks where he still under went gruesome torture for six days.
40. He averred that he was eventually released on 13<sup>th</sup> April 1995 and was ordered not to tell anybody where he had been and the experiences he was subjected to or face the consequence of re-apprehension.

#### **7<sup>th</sup> Petitioner's Case-josephat Papela Wabuke:**

41. The 7<sup>th</sup> Petitioner filed his Petition, BUNGOMA HC.PET. NO. E007 of 2021- Josephat Papela Wabuke Vs The Attonery General, dated 18<sup>th</sup> December 2020 and his Supporting Affidavit sworn on the even date.
42. The 7<sup>th</sup> Petitioner averred that on 2<sup>nd</sup> February 1995, he was arrested at Lwakhakha Primary School at 5.30 pm by police officers and was bundled into a waiting Police Land Rover and driven to Webuye Police Station where he was held in the underground cells for 14 days without food while being interrogated for being suspected to be a member of a movement known as February Eighteen Revolutionary Army (FERA) which was formed by the Late Brigadier John Odongo and Mr. Joseph Wangamati who was a prominent Businessman in Bungoma District.



43. He deponed that on 17<sup>th</sup> February 1995 he was released without being arraigned in Court only to be re-arrested on 21<sup>st</sup> May 1995 and bundled into a waiting Police Land Rover where he was taken to Lwakhakha Police Station where he was locked up for four hours while being tortured and forced to say that he was a member of the February Eighteen Revolutionary Army (FERA) which was formed by the Late Brigadier John Odongo and Mr. Joseph Wangamati who was a prominent Businessman in Bungoma District.
44. He deponed that on the same day at 1.00 AM, he was bundled into a Police Land Rover and driven to Kakamega Police Station where he was held for one day without any food or water.
45. He deponed that the following day, he was bundled into a waiting Police Land Rover while blindfolded and taken to a destination which he later came to know as Naivasha GK Prison Detention Blocks where he still under went gruesome torture for 65 days and he was denied meals.
46. He deponed that he was eventually released on 26<sup>th</sup> June 1995 and was ordered not to tell anybody where he had been and the experiences he was subjected to or face the consequence of re-apprehension.

**8<sup>th</sup> Petitioner's Case-richard Kimungi Wakhale:**

47. The 8<sup>th</sup> Petitioner filed his Petition, BUNGOMA HC.PET. NO. E009 of 2021- Richard Kimungi Wakhale Vs The Attonery General, dated 18<sup>th</sup> December 2020 and his Supporting Affidavit sworn on the even date.
48. The 8<sup>th</sup> Petitioner asserts that on 2<sup>nd</sup> February 1995, he was arrested while heading home from Cheptais Market by GSU officers and was driven to Cheptais District Office for interrogation and was later taken to Cheptais Police Station where he was locked up the whole night.
49. He deponed that on that the following morning he was transferred to Kimilili Police Station where he was kept for a while before he was taken to Kapsokwony DO's office where he was tortured mercilessly,
50. He deponed that later in the day he was taken back to Kimilili Police Station where he stayed for a while before he was transferred to Kakamega Police Station where he was held for two days.
51. He deponed that while being held at Kimilili Police Station, he was forced to record a statement that he was a member of a movement known as February Eighteen Revolutionary Army (FERA) which was formed by the Late Brigadier John Odongo and Mr. Joseph Wangamati who was a prominent Businessman in Bungoma District.
52. He deponed that on 6<sup>th</sup> February 1995 while blindfolded, he was driven to a destination which he later found out was Nyati House where he was locked up for a while being tortured and was only released after six months.
53. He deponed that he was eventually released and was ordered not to tell anybody where he had been and the experiences he was subjected to or face the consequence of re-apprehension.

**9<sup>th</sup> Petitioner's Case-leonard Wafuko:**

54. The 9<sup>th</sup> Petitioner filed his Petition, BUNGOMA HC.PET. NO. E010 of 2021- Leonard Wafuko vs The Attonery General, dated 18<sup>th</sup> December 2020 and his Supporting Affidavit sworn on the even date.
55. The 9<sup>th</sup> Petitioner averred that on 25<sup>th</sup> January 1995, he was arrested at his home by police officers and was bundled into a waiting Police Land Rover and driven to Malakisi Police Station where he was



- interrogated for being associated with Ford Kenya and about a pistol which he knew nothing about and that he was not allowed to contact his family.
56. He averred that on that same night he was blindfolded, bundled into a waiting Police Land Rover and transferred to Bungoma Police Station where he was tortured by the police and told to record a statement that he was a member of a movement known as February Eighteen Revolutionary Army (FERA) which was formed by the Late Brigadier John Odongo and Mr. Joseph Wangamati who was a prominent Businessman in Bungoma District.
  57. He averred that after six hours of interrogation and torture he was bundled into a waiting Police Land Rover where he was blindfolded and taken to Kakamega Police Station where he was locked up for four days and interrogated again for killing a police officer in Mt. Elgon.
  58. He averred that after all those days, he was bundled into a Police Land Rover while blindfolded and taken to a destination which he later came to know as Naivasha GK Prison Detention Blocks where he still under went gruesome torture for six days.
  59. He deponed that he was eventually released on 24<sup>th</sup> February 1995 and was ordered not to tell anybody where he had been and the experiences he was subjected to or face the consequence of re-apprehension.
  60. On the basis of these unjust treatment, all the Petitioners allege that their fundamental rights were violated in particular; violation of their freedom from any form of violence from either the public or private under Article 29, freedom from torture in any manner whether physical or psychological under Article 29(d) and freedom from being Treated or punished in a cruel, inhuman or degrading manner under Article 29(f) of *The Constitution* of Kenya 2010.
  61. The Respondent, the Attorney General on behalf of the State filed grounds of opposition dated 24<sup>th</sup> June 2021 stating;
    - i. That the petition has been brought after inordinate delay.
    - ii. That the Petitioner are abusing the constitutional protection of rights in bringing claims before the Court with the sole aim of enrichment rather than vindication of rights given the delay of more than 15 years.
    - iii. That there is insufficient material disclosure to demonstrate that the Petitioners are entitled.
    - iv. That the Petitioners are not entitled to the prayers sought.
    - v. That the Petition is otherwise an abuse of the process of this Honourable Court.
  62. By Consent, this Petitions were to be canvassed by way of written submissions. The Counsels for the parties filed their respective submissions.
  63. Mr. Gitau for the Petitioners, submitted that the Petitioners were/are Citizens of Kenya and persons entitled to the enjoyment of the Fundamental Rights and Freedoms of individuals under *the Constitution* of Kenya 2010, and particularly Article 22, 23, 25(a) and 29(a), 29(c) 29(d) and 29(f) of *the Constitution* of Kenya 2010.

Article 25(a) provides that,

“despite any other provision of this Constitution, the rights and fundamental freedom from torture and cruel, inhuman or degrading treatment or punishment shall not be limited.”

Article 29 of *the Constitution* of Kenya 2010 which provides that “Every person has the right to freedom and security of the person, which includes the right not to be—



- (a) deprived of freedom arbitrarily or without just cause;
- (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;
- (c) subjected to any form of violence from either public or private sources;
- (d) subjected to torture in any manner, whether physical or psychological;
- (e) subjected to corporal punishment; or
- (f) treated or punished in a cruel, inhuman or degrading manner.”

Article 49(c) provides:-

“An arrested person has the right to communicate with an Advocate and other persons whose assistance is necessary.”

Article 49(f) provides:-

“An arrested person has the right to be brought before a Court as soon as reasonably possible but not later than;

- i). Twenty-four hours after being arrested; or
- ii). If the Twenty-four hours ends outside ordinary court hours. Or on a day that is not ordinary court day, the end of the next court day.

64. Counsel submitted that whereas the Respondent’s Special Branch Police Officers were entitled to arrest the Petitioners on suspicion of committing a cognizable offence, they had no lawful, legal or statutory power to keep them in their custody for more than 24 hours in different Police Stations hence the incarceration of the Petitioners in illegal Police custody was contrary to the protection of the Petitioners’ right to personal liberty as provided under Article 49(f) of *The Constitution* of Kenya 2010.
65. Counsel for Petitioners submitted that whereas the Respondent’s Special Branch Police Officers had power to arrest Petitioners, they had no lawful, legal or statutory power to deny them communication with members of his family, friends or Advocate to organize their defence or to threaten them with being returned to the torture chambers or further torture if they dared disclose their deal. This was violation of their rights and freedom from any form of violence and torture as provided under Article 49(c) of *the Constitution* of Kenya 2010.
66. Finally, Counsel for Petitioners submitted that the 9 Petitioners are entitled to compensation(quantum) to ensure that the Petitioners are indemnified for their pain, hurt and that justice is done to them. Counsel relied on the cases of Nrb H.C. Petition No. 126 of 2016 (Consolidated with Petitions 127,128 &129 of 2016) Rodgers Godfrey Wafula & 3 others vs Attorney General & Another where Justice Mativo made an award of general damages to a tune of Kshs. 6 Million for each Petitioner plus interest at Court rates and costs of the suit plus interest on the same. He also relied on the case of Nrb H.C. Petition No. 121 of 2016 Eliud Wefwafwa Luucho & 4 others vs Attorney General where the Honourable Court in a similar FERA torture victims cases made an award of Kshs. 5 Million for each of the Petitioners plus costs and interests at Court rates.
67. He beseeched this Honourable Court to award general damages to each of the 9 Petitioners to a tune of Kshs 6 Million plus costs of the suit and interest from the date of filing the suit until payment in full.



68. The Respondent, Attorney General, did not file any response to the 9 Petitioners' Petition and supporting affidavits despite being afforded the opportunity before the hearing date save only for grounds of objection.
69. Mr. Tarus, learned State Counsel for the Respondent submitted on three issues;

**i. Whether the provisions of *the Constitution* of Kenya, 2010 can be applied retrospectively.**

70. According to the learned State Counsel, the facts relied upon by the Petitioners are events which occurred in the year 1995, March or thereabout which events occurred before the promulgation of the 2010 Constitution of Kenya.
71. He submitted that this Court cannot be called upon to enforce the rights and fundamental freedoms as created under *the Constitution* of Kenya 2010 unless those rights were recognized and protected under the previous *Constitution of Kenya, 2010* and thus the retrospective effect does not apply.
72. Counsel further submitted that the Court can only enforce the violation of rights and fundamental freedoms of events which occurred prior to the promulgation of *the Constitution* of Kenya, 2010 only if the former Constitution is invoked and proceeded to invite the Court to refer to Paragraph 25 of the Margret Wanjiru Ndirangu vs Attorney General (2015) eKLR where the Court stated that it could only enforce claims for the violations of the fundamental rights and freedoms which occurred during the existence of the repealed Constitution but such claims must be made by invoking the provisions of the repealed Constitution as it was at the moment.
73. He urged this Honourable Court to take cognizance of the Petitioners Petition which clearly did not invoke the provisions of the former Constitution and proceeded to urge the Court to dismiss the same.

**ii. Whether the fundamental freedoms and rights of the Petitioners were violated by the Respondents**

74. It is the Respondents Submissions that the 9 Petitioners herein have failed to prove that their fundamental rights and freedoms under *the Constitution* were violated by the Respondents nor its agents and that it is upon the Petitioners to prove the alleged violations of the fundamental rights and freedoms.
75. That the Burden of proof expected of any claimant including the Petitioners herein is well set out in the *Evidence Act* under which Section 107 of the *Evidence Act* provided as follows;
- “i) 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.
  - ii) Where a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
76. That Section 109 of the *Evidence Act*, Cap 80 also provides as follows;
- “The Burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any particular person”.
77. According to Counsel, the Petitioners failed to provide any evidence that they were treated to the injuries they sustained during the torture and that they only visited the hospital after 25 years, which medical report is attached to their affidavits are not to be believed by this Court as they are simply meant



to hoodwink the Court and assist in their claim for compensation and not to support the allegations of torture. Counsel relied on the case of Peter Ngari Karume & 7 Others vs Attorney General.

### **iii. Whether the Petitioners are entitled to the damages sought**

78. Counsel submitted that the Petitioners are not entitled to the damages sought as they have failed to prove their case to the required standard. He urged this Court to make a global award of KShs. 500,000/= for each of the Petitioners and find that the Petitioners are guilty of inordinate delay having filed this Petition after 25 years.
79. From the Petitions, supporting affidavits and submissions by Counsels, the issues for determination in these Petitions are;
- a) Whether the Petitioners fundamental rights and freedoms were violated by the Respondents.
  - b) Whether the Petitioners are entitled to the damages sought.
80. Prior to my analysis of the identified issues for determination, it is imperative that this Court deals with the issue raised by the Respondents in their Grounds of Opposition and Submission that the Petition was brought after inordinate delay and that no reasons have been advanced to explain the long and inordinate delay of 25 years before filing these Petitions.
81. It is well settled that a Court is entitled to consider whether there has been inordinate delay in lodging a claim of violation of rights. The Supreme Court landmark judgement in *Wamwere & 5 others v Attorney General (Petition 26, 34 & 35 of 2019 (Consolidated))* [2023] KESC 3 (KLR) (Constitutional and Human Rights) was explicitly clear that claims of violation of human rights must be filed in Court within reasonable time and where there is delay, a Petitioner ought to explain the reasons for the delay to the satisfaction of the Court.
82. It is clear that the Petitioners in their petitions claim that the alleged violations were done during the year 1995. They filed these Petition in 2020 about 25 years later. No doubt a quarter century is a long time to wait. The Respondent submits that this was a long time and therefore an afterthought and that the Court should consider that the Petitions are time barred.
83. Violation of fundamental rights committed by State Agencies are usually done with approval of the sitting Government. There is always a well elaborate scheme to conceal these acts and open conspiracy to intimidate any aggrieved party wishing to seek redress by instilling fear, intimidation and coverup. Addressing this issue Lenaola, J, as he then was, held the following persuasive view in *Gerald Juma Gichohi & 9 others v Attorney General, HC Petition 587 of 2012; [2015] eKLR at paras 94-95:*
- “The history of this country would lead a reasonable man to state that it was almost impossible a few years ago to sue the regime and get away with it especially on matters of human rights. In that regard, the recent public apology by President Uhuru Kenyatta for violations of human rights by past regimes is an affirmation of that fact. In the same breath, it was also the petitioners’ claim that the Judiciary has affirmed that it is vindicating past violations of fundamental rights and freedoms in order to secure the country’s future...”
84. I therefore find and hold that though these Petitions were filed after 25 years since violations, the Petitioners have adequately explained the delay to the satisfaction of this Court.
85. It is noteworthy that the Petitioners in contending violation of their fundamental rights and freedoms cited the current Constitution in their pleadings. In particular, they urged violation of their rights and freedom not to be subjected to torture, inhuman and degrading treatment, and arbitrary deprivation



of property under Articles 25(a), 29(a), (c), (d), (f), 40(1)(a) and (b); and in their respective Submission stated that the said rights were also protected under sections 74 and 75 of the repealed Constitution.

86. Since the events in issue are alleged to have taken place before the current Constitution came into force, the repealed Constitution is applicable but bearing in mind that the rights and freedoms alleged to have been infringed are protected in both the repealed and current Constitution albeit with some minor variations in formulation. I will proceed to determine the question as to whether the Petitioners proved violation of their fundamental rights and freedoms to the requisite standard based on the current Constitution as relied upon. I bear in mind the dictates of transitional justice, and in particular the need to uphold and strengthen the rule of law, and to hold the perpetrators of violations of human rights accountable, and the need to provide victims with compensation, and the need to effectuate institutional reform. The repealed constitution just like the 2010 constitution prohibited torture and acts of inhuman and degrading treatment.

87. I shall now proceed to determine the issues as identified.

#### **A. Whether the Petitioners fundamental rights and freedoms were violated by the Respondents.**

88. I reiterate that a Judge makes decisions based on the evidence presented by parties and guided by various rules of evidence. For instance, Section 107(1) of the *Evidence Act* places the burden of proving the existence of a fact on the person who wants the Court to find in his favour that the fact truly exists. That is the often-stated principle of “he who asserts (alleges) must prove”. Section 108 explains this further by stating that; “The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side”.

The effect of this is that if the party seeking judgment in a suit fails to avail evidence, or to avail evidence to the required standard, then such a party would fail to obtain judgment.

89. The provisions of the *Evidence Act* as to the burden of proof was also highlighted in the case of CHINA WUYI CO. LTD. -VS- SAMSON K METTO [2014] eKLR, Civil Appeal No. 181 of 2009 in which the Court stated;

“The cardinal principles of law that he who alleges must prove is also well captured in Section 107 to 109 of the *Evidence Act*.”

90. The Petitioners have adduced their evidence through the affidavits sworn and filed. In their affidavits, they deponed how they were arrested by Police officers and GSU officers, taken to various Police Stations and/or Police Patrol Bases and/or DO’s offices, detained and tortured while in custody for various periods, later released and/or re-arrested after their initial release. The callous acts of police officers such as squeezing the testicles/penises of some of the male Petitioners in their custody or the act of stripping naked a female victim under arrest as happened in this or subjecting as happened to one of these Petitioners cannot be justified in any way, not to mention the brutal beatings and mock shooting sessions. The availed medical history reports give a chronology of various complaints both in physical and mental capacity clearly indicating that the same is as a result of their experiences in the hands of the police officers.

91. The Respondent though served with these affidavits did not rebut the averments by way of affidavit or Statement filed. The averments in the Petitioners affidavits are therefore not challenged by any evidence or affidavit by the Respondent and thus they are not controverted in any material respect whatsoever.

92. Upon perusal of the affidavit evidence and witness statement of the respective Petitioners, I am satisfied that the Petitioners have established their case that each of the Petitioners was arrested by agents of



the Respondent, held in custody, for longer periods than provided by law, tortured and later released without charge. I am satisfied that their constitutional rights to freedom from any form of violence, and freedom from torture and freedom from cruel and inhuman treatment was violated. The repealed Constitution rightly outlawed such inhumane and degrading treatment and it is regrettable that security agents had degenerated to such a level. Such acts should only be consigned in the dustbin of our history never to resurface again.

## **B. Whether the Petitioners are entitled to the damages sought.**

93. The Courts are often called upon by Petitioners to redress Constitutional violation by state organs. It is not contested that the violation complained of in these Petitions were committed under the old Repealed Constitution. However, in the repealed Constitution;

Chapter 4 of the Repealed constitution contained the Bill of Rights, that is Protection of fundamental rights and freedoms of the individual. The notion of inhuman treatment covers at least such treatment that deliberately causes suffering, mental or physical, which in the particular situation is unjustifiable. 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 degrading if it grossly humiliates him before others, or drives him to an act against his will or conscience.

94. 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.

95. If they were violated, and this Court so finds, then the Petitioners would be entitled to an award of damages. The assessment of quantum of damages is a matter of discretion of the Court. The award of damages entails exercises of judicial discretion which should be exercised judicially and that means it must be exercised upon reason and principles and not upon caprice or personal opinion.

96. The jurisprudence that has emerged in cases of violation of fundamental rights has cleared the doubts about the nature and scope of the public law remedy evolved by the Court. The following principles clearly emerged from decided cases;

- (i) Monetary compensation for violation of fundamental rights is now an acknowledged remedy in public law for enforcement and protection 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 to 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.

97. Considering the nature of the violations of the constitutional rights, the injuries sustained by each Petitioner as demonstrated by their respective medical reports, the torment they were each subjected to 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 an award of damages as enumerated below.



98. Doing the best I can, I find that the following awards would be reasonable in the circumstances.

- a. 1<sup>st</sup> Petitioner-Timothy Mwasame Mulombi...5,000,000/=
- b. 2<sup>nd</sup> Petitioner-Alice Nasambu Wanjusi.....5,000,000/=
- c. 3<sup>rd</sup> Petitioner-Pius Sakari Nyongesa.....5,000,000/=
- d. 4<sup>th</sup> Petitioner-Patrick Wose Wabomba.....5,000,000/=
- e. 5<sup>th</sup> Petitioner-Stephen Nalianya Walukhu.....5,000,000/=
- f. 6<sup>th</sup> Petitioner-Kelas Kilongi Mafura.....5,000,000/=
- g. 7<sup>th</sup> Petitioner-Josephat Papela Wabuke.....5,000,000/=
- h. 8<sup>th</sup> Petitioner-Richard Kimungui Wakhale.....5,000,000/=
- i. 9<sup>th</sup> Petitioner-Leonard S. Wafuko.....5,000,000/=

99 Accordingly, I enter judgement in favour of the petitioners against the Respondent as follows: -

- i. A declaration be and is hereby issued that each of the Petitioners Fundamental Right and Freedom from torture, degrading and inhuman treatment was violated by the Respondent's Special Branch Police Officers who were Kenyan Government Servants, agents, employees in its various Police Stations in Western Kenya and Naivasha G.K Prisons on diverse dates specified in each Petition.
- ii. A declaration be and is hereby issued that each Petitioner are entitled to damages and compensation for violations and contraventions of their Fundamental Rights and Freedom from Torture as enshrined in the Repealed constitution.
- iii. That judgement be and is hereby entered in favour of the Petitioners against the Respondent by way of general damages as follows: -
  - a. 1<sup>st</sup> Petitioner-Timothy Mwasame Mulombi 5,000,000/=
  - b. 2<sup>nd</sup> Petitioner-Alice Nasambu Wanjusi 5,000,000/=
  - c. 3<sup>rd</sup> Petitioner-Pius Sakari Nyongesa 5,000,000/=
  - d. 4<sup>th</sup> Petitioner-Patrick Wose Wabomba 5,000,000/=
  - e. 5<sup>th</sup> Petitioner-Stephen Nalianya Walukhu 5,000,000/=
  - f. 6<sup>th</sup> Petitioner-Kelas Kilongi Mafura 5,000,000/=
  - g. 7<sup>th</sup> Petitioner-Josephat Papela Wabuke 5,000,000/=
  - h. 8<sup>th</sup> Petitioner-Richard Kimungui Wakhale 5,000,000/=
  - i. 9<sup>th</sup> Petitioner-Leonard S. Wafuko 5,000,000/=
- iv. That the above sums shall attract interests at Court rates from date of filing suit until payment in full.
- v. The Respondent do pay the costs of these proceedings to the petitioners plus interests thereon at Court rates.

Orders accordingly.



**DATED AND DELIVERED AT BUNGOMA THIS 28TH DAY OF JULY 2023.**

**D.KEMEI**

**JUDGE**

