REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL PETITION NO. 361 OF 2015

IN THE MATTER OF ARTICLES 19, 20, 21(1), 22(1), 23(1) and 165(3) (a), (b), (d) (i), (ii), (6), (7) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTIONS 70 (a), 71(1), 72(3), 74(1) & 77 OF THE FORMER CONSTITUTION (EQUIVALENT ARTICLES 26(1), 27(1), (2), 28, 29(a), (d), (f), 31(c),(d) and 49(1)(f) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE ARMED FORCES ACT (CHAPTER 199) (REPEALED)

IN THE MATTER OF THE PRISONS ACT (CAP 90, LAWS OF KENYA)

BETWEEN

MUSA MBWAGWA MWANASI

SAMUEL SANGA MWALIMU ELIJAH

ERASTUS NJOROGE CHUTHU

WILLIAM MWANGI NGIGE

MBWANA BAKARI MWANYOTA

FRANCIS NGUGI MWARIRI

JOHN NYALE KAHI

DENIS MTIMBA NGALA

JOHN KIPCHIRCHIR BIRGEN

ESAU KIORA MJOMBA.....PETITIONERS

AND

THE CHIEF OF THE KENYA DEFENCE FORCES

THE HON. ATTORNEY GENERAL.....RESPONDENTS

JUDGEMENT

THE PETITION

1. The Petitioners through a Petition dated 27th August, 2015 seek the following orders:-

a) A declaration that the brutal arrest, cruel, inhuman, degrading and extreme ill-treatment inflicted on the Petitioners on being taken into custody; the cruelties, violence, brutalities, deprivation of basic necessities of life and the extreme, inhuman and degrading prison conditions that the Petitioners were held in incommunicado pre-trial detention and in prison serving sentences constituted violations of the fundamental rights and freedoms of the Petitioners to human dignity, cruel, inhuman and degrading treatment contrary to sections 70(a), 74(1) and 77 of the former Constitution (now Articles 27(1), 28 and 29(c) and (d) of the Constitution of Kenya, 2010) and Articles 7 of the Intentional Covenant on civil and Political Rights (ICCPR).

b) A declaration that the period of between 64 and 166 days that the respective Petitioners were detained in pre-arraignment incommunicado detention between 01.08.1982 and 13.01.1983 when they were arraigned before the Court Marital constituted periods of arbitrary, unlawful and illegal detention in violation of the Petitioners' fundamental rights to inherent human dignity, equal protection and benefit of the law, personal liberty and fundamental freedom from servitude and from torture, cruel, inhuman and/or degrading treatment or punishment contrary to sections 70(a), 73(1), 74(1) and 77 of the former Constitution (now Articles 27(1), 28, 29(c) and (d) and 30(1) of the Constitution of Kenya, 2010) and Articles 7 and 9(3) of the ICCPR.

c) A declaration that the period of between 1 year and 2 years and 3 months that the 1st to 7th Petitioners continued to be imprisoned in deprivation of their respective periods of remission of sentence constituted periods of arbitrary, unlawful and illegal detention in violation of the petitioners' fundamental rights to equal protection and benefit of the law, personal liberty and fundamental freedom from servitude contrary to sections 70(a), 73(1) and 77 of the ormer Constitution (now Articles 27(1), 29(a) and 30(1) of the Constitution of Kenya, 2010) and Articles 8(3) and 9(1) of the ICCPR.

d) A Declaration that the dismissal of the petitioners from the Armed Forces was vitiated by the unlawful pleas of guilty exhorted at the Court Martial pursuant to severe torture inflicted on the Petitioners in the cause of the inordinate unlawful pre-trial detention and the dismissals were unlawful inhuman and cruel deprivation of the Petitioners' means to a meaningful livelihood in violation of their fundamental right to life, human dignity and freedom form cruel and inhuman treatment and/or punishment guaranteed by sections 70(a), 71(1) and 74(1) of the ormer Constitution (now Articles 26(1) and (3), 28 and 29(f) of the Constitution of Kenya, 2010) and Article 6(1) of the ICCPR and Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICSECR).

e) General damages consequential to the declarations of violations of fundamental rights and freedoms of the Petitioners' in prayers (i) to (iv) above as may be assessed by this Honourable Court.

f) Costs of the Petition

g) Interest on all monetary awards.

PETITIONER'S CASE

2. The Petitioners case is that at the time of the failed Military Coup of 1st August 1982, the 1st, 2nd, 4th, 5th, 6th and 8th to 10th Petitioners herein were serving officers of the Kenya Air force while the 3rd Petitioner was an officer of Kenya Army and 7th Petitioner an Officer of Kenya Navy.

3. Between 1st and 2nd August 1982 all the Petitioners were arrested by police officers of Kenya Army on suspicion of plotting and/or participating in the failed Coup and immediately after arrest were subjected to untold torture, brutalities, inhuman and degrading treatment by the army soldiers by being stripped naked in public, frog marched on their knees on concrete floors, whipped, kicked and bludgeoned all over their bodies and transported to custody in open trucks whilst naked in full view of the public.

4. The Petitioners further aver that they were detained in ***communicado*** in various military and prison custody where the wanton torture, brutalities, cruel, inhuman and degrading treatment continued including being assaulted with buttons, whips, rungus, gun butts, fists, slaps and kicks, locked up naked in overcrowded, filthy cells in the same block with full time noisy insane inmates intermittent with solitary confinement in tiny, pitch dark or permanently lit, filthy, waterlogged cells, deprived of sleep, rest, food, drinking or cleaning water, medical attention for wounds inflicted by army and prison officers and toilet facilities for days on end and continuously interrogated whilst being coerced and cajoled to confess plotting and participating in the failed coup and attendant crimes.

5. The Petitioners aver that they were frequently moved from one place of detention to another whilst being detained incommunicado without access to any persons from the outside world that could render assistance to them and further state that they were held in communicado pre-arraignment detention for unlawful durations of between 64 and 166 days before they were arraigned at the Court Martial and coerced and cajoled to plead guilty, convicted and sentenced and all dismissed form the Armed Forces.

6. The Petitioners further state for much of the period of the said unlawful inordinate pre-arraignment detention, the petitioners were held in legally designated prisons despite not having been charged and arraigned before any court of law with any criminal offence and without orders of court committing them to remand in such prisons and while serving their sentence the Petitioners were subjected to cruel, inhuman and degrading prison conditions by being locked up incommunicado in solitary confinement for prolonged periods in permanently dark or permanently lit cells and without any bedding or sanitary toilet facilities.

7. The 1st to 7th Petitioners aver that they were without any hearing and without any lawful justification deprived of their statutorily entitled remission of sentence and continued to be unlawfully imprisoned for periods ranging from 2 years and 3 months and 1 year in deprivation of

the said remission of sentence.

8. The Petitioners Petition is supported by the annexed affidavits of each of the Petitioners respective affidavits and annextures thereto and oral evidence of the 1st, 2nd, 3rd, 6th, 7th and 9th Petitioners who testified before the Court adopting the contents of their respective affidavits.

9. The 5th Petitioner Mbwana Bakari Mwanyota was unable to give oral evidence because he is suffering from Osteo-Arthritis a condition that affects hips and joints of the lower limbs seriously hindering mobility. A medical report of his Doctor, J. W. Daluma dated 16.3.2018 is annexed to the further affidavit of the 5th Petitioner sworn on 28th September 2018 and filed herein on 12th October 2018.

10. The claim of the 4th Respondent was withdrawn as he is since deceased and a copy of his death certificate was produced before court. However the 10th Petitioner's claim was withdrawn as he is no longer interested in the Petition.

RESPONDENTS CASE

11. The Respondents are apposed to the Petitioner's claims and in doing so filed a Replying Affidavit by Major Frankline Oyise Omuse sworn on 23rd October 2019.

12. The Respondents rebut the allegations made by the Petitioners. It is their contention that the Petitioners were indeed members of the then Kenya Armed Forces (now Kenya Defence Forces) and therefore were subjected to the Armed Forces Act (now repealed) and its Rules and Regulations. It is Respondents case that the Petitioners were lawfully arrested on suspicions of having participated in the attempted 1982 Coup, detained and upon completion of investigations, arraigned before the Courts Martial. The Petitioners were then lawfully and procedurally tried by Courts Martial convicted and sentenced to imprisonment and therefore discharged from service.

ANALYSIS AND DETERMINATION

13. I have carefully perused the parties pleadings herein, the affidavit in support of the petition and in opposition, the parties oral evidence and counsel rival submission in support of the Petition and in opposition of the same and from the aforesaid the following issues have arisen for consideration:-

a) Whether the Petition is time barred by limitation of actions?

b) Whether the Petitioner have proved the allegations of violation of fundamental rights and freedoms?

c) Whether Petitioners are entitled to damages and what is the quotum?

A. WHETHER THE PETITION IS TIME BARRED BY LIMITATION OF ACTIONS?

14. It is urged on behalf of the petitioners that they filed the Petition 30 years after the violation complained of and explained the delay in their respective supporting affidavits. The Respondents raised the issue of the delay in filing the Petition vide paragraph 43 of the Replying Affidavit of Major Frankline Oyese Omuse.

15. It is Petitioners' contention that it is trite that neither the former nor the current constitution provides for limitation of actions for enforcement of fundamental rights and freedoms. It is further stated by the Petitioners that given the supremacy of the Constitution, statutes of limitation do not apply to actions for enforcement of the Bill of Rights. To buttress the point the Petitioners refer to the case of ***Dominic Arony Amolo Amolo v Attorney General [2003] eKLR,*** Hayanga J, succinctly sated the law thus (page 2 and 4,)"-

> ***"…The point to decide here is whether breach of Fundamental Rights and redress thereof can be brought to Court any time irrespective of the provisions of Limitation Act. Like for example colonized persons seeking redress years after independence. To put it another way whether in interpretation of constitutionally entrenched provisions of Fundamental Rights, the Court is in any way circumscribed by legislative statutes like Limitation Act. Section 3 of the Kenyan Constitution provides:- "This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and subject to Section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void." … I, therefore, think and I so hold that Section 3 of the Constitution excludes the operation of Cap 22 with regard to claims under Fundamental Rights and further that the Fundamental Rights provisions cannot be interpreted to be subject to the legal heads of legal wrongs or causes of action enunciated under the Limitation Act Cap 22."***

16. The reasoning in ***Dominic Arony Amolo v Attorney General*** was adopted in the case of ***David Gitau Njau & 9 others v. Attorney General [2013] eKLR*** in which Lenaola J, (as he then was) held thus (paragraph 43 to 44);

> ***"[43]. 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 Legal Notice No. 133 of 2011 (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. I therefore agree with the reasoning of Hayanga J while determining a preliminary issue in Dominic Arony Amolo (supra) …Despite my positon on this issue as can be seen above, I strongly believe***

that I must hereby state that I am not persuaded by the authority of Peter Ngari Kagume & Others v Attorney General (supra) cited by the Respondent where the Applicant had filed his Petition 24 years late. I note that the Judge in that case did not expressly hold that there were limitation imposed for filing of proceedings to enforce constitutional rights as enshrined under the Bill of Rights…

44. Turning to the authority of the East African Court of Justice Attorney General of Uganda & Another v Omar Awadh & 6 others (supra) also relied by the Respondent, I find it to be distinguishable with the instant case. As stated above, the Repealed Constitution was silent on time frames within which to institute a claim for violation of fundamental rights and freedoms. But the East African Community Treaty at Article 30(2) has stipulated a time limit within which a claim to the court can be instituted as either within two months of the action complained of or on the day it came to the knowledge of the complainant. I therefore find that the Petition is properly before this Court…"

17. The Petitioners further urge that this Court has affirmed that it is sound judicial policy for the courts to assure transitional justice by vindicating past violation of fundamental rights in order to secure the country's future. Expounding on the decision of the Court of Appeal in ***Cholmondely v Republic [2008] eKLR***, Lenaola J, (as he then was), in ***Jennifer Muthoni Njoroge & 10 others v Attorney general [2012] eKLR***, held that (paragraphs 18 and 19);

"[18] …The reasoning for the proposition that it is the State that must be held liable also found favour in the case of Cholmondely v Republic [2008] eKLR …

[19]. In the same case, the Court of Appeal admitted failing of the Courts in the past and argued that Courts "must now vigorously enforce and enforce against the State the fundamental rights and freedoms of the individual guaranteed by the Constitution." I emphasize this point because it is quite obvious to me that as a lesson for the future, the State must today pay the price for its failings in the past." *[Emphasis added)*

18. The Petitioners further sought reliance from the case of ***Peter Mauki Kaijenja & 9 others v Chief of the Kenya Defence Forces & another [2019] eKLR***, a Petition filed in 2014 by former Kenya Air Force officers for similar claims, this Court, Mativo J, further reaffirmed that the dictates of transitional justice require that suits for vindication of fundamental rights should not be stopped on account of laches where the respondent does not demonstrate prejudice. (See paragraphs 62 to 80).

19. The same position was recently realised in the case of ***Zipporah Seroney & 5 others v Attorney General [2020) eKLR*** in which W. Korir J, held thus (paragraph 58)

"[58] …Indeed this Petition relates to events that occurred during the presidency of Mzee Jomo Kenyatta. The Petition has been brought about forty five years after the deceased was allegedly arrested and detained… In the circumstances of this case, it is not too late to peer into the past and correct the injustices that may have occurred in our history. I therefore reject the Respondent's assertion that this petition is time barred." *(Emphasis added)*

20. The Respondents in response state that it is on record that the Petitioner did not seek justice for alleged violation because they had fear of the former president Moi's regime; lacked confidence in an *"emasculated judiciary during the Moi era"* and lacked resources for litigation. The Petitioners, even after the change of regime in 2002 claimed to still not to have confidence that the courts had the independence to dispense justice. Even after the promulgation of the new Constitution in 2010, the Petitioners waited another 5 years to come to this Honourable Court. The Respondents urge that these purported excesses do not lead to in excisable delay. They further contend that no adversity or compelling reasons was cited by the Petitioners and urging this is a clear case of forum shopping by the Petitioners.

21. It is Respondents positon that this Petition is not merited and terms it as a sheer display of excellent indulgence and negligence as the Petitioners set on their rights for 33 years before they filed the subject Petition in 2015. The pleadings clearly proved that cause of action arose in 1982. The courts in this country time and again have dealt with issues similar to the present petition and there are plethora of jurisprudence on this issue of undue delay as far as constitutional petitions vis-à-vis violations of human rights is concerned.

22. I agree indeed in constitutional related matters, the general rule is that there is no limitation of time set for filing constitutional petitions. However that notwithstanding , for purposes of fair trial as provided under ***Article 50 of the Constitution*** it is expected that one should not advertently delay commencement of a suit such that the other party is compromised in putting forth a plausible defence. Further in my view any delay must be explained fully for purposes of establishing whether it can be excused by the Court and it is the burden of the delaying party, in this case, the Petitioners to put forth a plausible explanation as to why the delay should be considered inadvertent.

23. The Respondents sought reliance in the decision of the Court of Appeal which dealt with similar issue of laches in the case ***of Daniel Kibet Mutai & 9 others v Attorney General, Civil Appeal (Eldoret) No. 95 of 2016, [2019] eKLR*** where it is noted, on the issue of laches:

"[47] Again this is an issue that has been addressed by the High Court and we are in agreement with the approach taken by the High court (Mativo, J) in addressing a similar issue in Edward Akong'o Oyugi & 2 others v Attorney General [2009] eKLR in which the learned judge stated as follows:

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

81. The Respondents counsel's contention is that this suit is barred by the doctrine of latches. The doctrine of laches is a legal

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

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

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

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

85. In considering whether delay in inordinate, the court has a discretion, to be exercised judicially upon a consideration of all the facts; enquiry, relevant considerations may include the period of the delay, and the explanation offered and any possible prejudice to the Respondent. I have already addressed prejudice. The period is five years after 2010. The reasons cited are inability to secure employment after being released from prison forcing them to travel oversees to look for employment and also obtain treatment for the various health conditions and complications inflicted upon them by the cruel torture and inhuman circumstances they were subjected to during arrest, interrogation and detention. All the Petitioners suffered serious injuries and developed life threatening health conditions which kept them busy. They are and continue to be on medication. To me, the delay has been sufficiently accounted for. They have provided a good and sufficient cause for the delay. I find that the explanation is reasonable.

[48] Unlike the petitioners in the above quoted case, who provided explanation for the delay in filing their petition, the appellants herein did not give any reasons in their affidavits, for the delay in filing their petition. Instead, an attempt was made by the appellants' advocate to explain the delay in the written submissions. But of course, written submission are mere arguments postulated by counsel, which cannot pass for proven facts. Moreover, assuming that we were to take judicial notice of the fact that the appellants could not bring their claim during President Moi's regime, there is no explanation given as to why the claim was not field immediately after he impugned President Moi left power after the 2002 elections.

[49] In* Peter M. Kariiuki v Attorney general *(supra), the Court in addressing a delay of 23 years in bringing a claim similar to that of the appellants stated as follows:

We have already adverted to the fact that the appellant field his constitutional petition some twenty three (23) years after his conviction by the court martial. We agree with the trial court that this claim was not time barred. However, the consequence of the appellant's delay in lodging his claim was some level of prejudice to the respondent who contended that the matters complained of by the appellant had taken place a while back and many of the actors were not longer available as witnesses. We have already emphasized that he right to a fair trial must be accorded to both the appellant and the respondent.

In Kamlesh Mansuklal Damji Pattni & another v Republic (supra), the High Court noted that the Constitution did not set a time limit within which applications for enforcement of fundamental rights should be brought. Nevertheless, the court added that, like all other processes of the court, it is in public interest that such applications be brought promptly or within a reasonable time, otherwise they may be considered an abuse of the process of the court. We respectfully share that view, with the rider that where there has been delay which is likely to prejudice a respondent, the applicant should account for the delay."

24. The Court of Appeal went ahead to agree that the delay of 30 years was not explained and held that the appellants claim was properly dismissed on that point alone.

25. The Respondents in the instant Petition contend that there were no perceptible reasons offered by the Petitioners to merit a delay of 33 years. It is doubtful whether there could exist any reasons whatsoever to merit such a delay by anyone. The Respondents contend that the unfathomable advertent delay disadvantaged them in putting up a more plausible defence. In fact, it is contended that the Respondents' case was prejudiced by the fact that the Courts Martial proceedings were destroyed pursuant to ***Section 114 of the Armed Forces Act (now repealed) and Rule 97 of the Armed Forces Rules of Procedure***. Further, it is averred that any member of the Kenya Armed Forces (now Kenya Defence Forces) that would have been witnesses of the events of the attempted 1982 coup are either retired or deceased. It is contended that in the spirit of ***Article 50 of the Constitution*** no party should be subjected to hardships litigating on a matter especially from the opposite party; as this beats the principle of fair trial. The Respondents urge that such inordinate delay should not go without consequence and urges the court to take judicial notice to the fact that as early as 2003, person aggrieved by acts of *"Moi era"* approached Courts for redress pertaining to alleged violations of their constitutional rights and fundamental freedoms which was prior to the promulgation of the current Constitution.

26. In the case of ***Gilbert Guantai Mukindia v Attorney General, Petition No. 118 of 2014, (2019) eKLR, the Court observed:***

"28. While it is the law that constitutional petitions are not strictly saddled by the statutes of limitation specially where violation of rights are alleged with persisting damage to the individual, it is also good law that even constitutional litigation ought to be presented with some promptitude so that evidence is not lost on account of passage of time. That is critical because expeditious disposal of legal disputes is the other way to underscore the mantra that justice delayed is justice denied. Where, however, there is admitted delay like in this case, where it took the petitioner a period in excess 32 years to bring the petition, it behoves such a petitioner to offer an explanation for the delay. Such explanation must be to the satisfaction of the court as plausible [1]. In Lt Col Peter Ngari Kagume & 6 others vs Attorney General [2016] eKLR, the Court of Appeal observed

"…the learned trial judge correctly observed that none of the appellants proffered any explanation for the delay of 24 years in coming to court. Whichever way one looks at it in the circumstances of this appeal, the delay spanning 24 years was inordinate. The appellants slept on their rights. We are unable to find fault in the findings made by the learned judge that in absence of a plausible explanation for delay, the suit amounted to abuse of the court process. On this ground also, the appeal would fail."

29. In this matter the delay between the date of release, October 1982, to the 20th March 2014, when the Petition was filed, spans some 32 years or thereabouts. The only explanation given by the Petitioner is that while the retired President Moi was in power as the president it was impossible to file the petition. It is not made clear what made it impossible to file such a petition during the Moi presidency. It could have been of help to say the courts would not accept the petition or that the courts then would not accord much regard to such petition or just that the petitioner's like would be in danger. That was purely the onus of the petitioner to disclose his difficulties but he opted to be less than candid on that aspect. While I would accept the reasoning by the courts in Harun Thungu Wakaba vs Attorney General Misc Application No. 1411 of 2004, Okwengu J, as well as Jennifer Muthoni's case (supra) that the political atmosphere before 2002 was difficult for litigation for the enforcement of rights and freedoms. I however taken notice that there was no fundamental and determinant shift in those political conditions after the 2002 elections. Based on that appreciation and while I would accept the delay between 1982 to 2002, a better explanation was expected for the delay of another 12 years between 2002 and 2014. For the reason that no explanation was given at all the court is left with no option but to find that the Petitioner slept on his rights. That slumber has justified the complaint by the Respondent that it has been prejudiced in it defence in that it is unable to get any witnesses and documents which may be of help in its defence. That to me is the rationale for the need for promptitude in litigation which parliament has sought to address by the various periods of limitation in various statutes including Limitation of Actions Act and Public Authorities Limitations Act.

30. On that point I do find that this petition was brought after inordinately undue delay which delay has not been explained and that failure is fatal to the petition. I would dismiss the petition on that score event at this early stage."

27. The Respondents contend that the Petition was lodged o*n* 27th August 2015 a period of 33 years delay. Looking at the body of the Petition there is no single paragraph explaining the reasons for the delay. However the Petitioners in the supporting affidavits have deponed that they were scared of the Government of former president Moi and contend that they even feared contemplating filing a suit to challenge the violations of their rights during president Moi's tenure. They further deponed following the change of Government in 2002 they still did not have confidence that the Judiciary had the independence to dispense justice in their claims and only after promulgation of the Constitution of Kenya, 2010 and the vetting of Judges and Magistrates serving under the former constitution is when they gained confidence to institute this Petition.

In ***Hezron Ndarera Onchiri v Attorney General, Petition No. 372 of 2016, [2020] eKLR*** Justice W. Korir while dismissing the Petition due to inordinate delay stated:-

"13. It should be observed from the outset that the Petitioner has not offered any explanation in his pleadings for the delay in filing the petition. His attempt to do so through submission adds no value because submission are not pleadings. See – Daniel Toroitich Arap Moi v. Mwangi Sephen Muriithi & another [2014] eKLR.

14. Even assuming that the explanation offered in the submission was to be accepted by the court, I would still find the explanation unconvincing. As correctly submitted by the Respondent, the late President Moi left power in 2003 and this petition was filed thirteen years later. The democratic space was greatly expanded after the promulgation of the 2010 Constitution. The Petitioner did not explain why it took him over five years from 2010 to file his petition.

15. The petitioner also submitted that he was a party to two other cases. There was no explanation about the outcome of those cases and no explanation was offered as to why the Petitioner sued again having sued the Respondent earlier.

16. An unexplained delay in filing a constitutional petition can be a ground for the dismissal of the petition. A pelathora of authorities speak to that point. Apart from the authorities cited by the respondent, other decisions on the issue are Lt. Col. Peter Ngari kagume & 7 others v. Attorney General [2009] eKLR; Kanitta Nderitu v Attorney General & another [2013] eKLR; Joseph Migere Onoo v Attorney General [2015] eKLR; and Nairobi High Court Petition No. 16 of 2018 Alphonse Kipkemoi Somongi v The Hon. Attorney General.

17. In the circumstances of this case, I find myself in agreement with the Respondent that there has been unexplained inordinate delay in this matter thereby denying the Respondent an opportunity to put up a plausible defence. For that reason alone the petition should be dismissed."

28. In a situation where a Petitioner has delayed a filing Petition within a reasonable time, the need to explain inordinate delay is not only necessary requirements but must be given even if there is in fact no limitation of time for filing a constitutional petition as evidenced by myriads of authorities. In the case of ***Lt. Col. Peter Ngari Kagume & 7 others v. Attorney General, Constitutional App. 128 of 2006, [2009] eKLR,*** Justice Nyamu dismissed the petition and held that the Petitioners were guilty of inordinate delay in the absence of any explanation on the delay and that the Petition was a gross abuse of the court process.

29. The point was even made more succinctly in ***Abraham Kaisha Kanzika alia Moses Savala Keya T/A Kapco Machinery Services and Milano Investments Limited vs. Governor Central Bank of Kenya and 2 others, Misc. Civ. App. No. 1759 of 2004, [2006] eKLR*** where the Court observed thus:

> ***"… In my view failure by the constitutional court to recognize general principles of law including, limitation expressed in the Constitution would lead to legal anarchy or crisis. It would also trivialize the Constitutional jurisdiction in that applicants would in some case ignore the enforcement of their rights under the general principles of law in order to convert their subsequent grievances into a 'constitutional issue' after the expiry of the prescribed limitations periods…"***

30. In the instant Petition the case of action arose in 1982. The petition was not filed until the Petitioners got the confidence to file the suit to challenge torture inflicted on them. The petitioners further argue they do not have regular means of income since they were dismissed from the Air Force. I find that the Petitioners have given plausible explanation for delay for a period of 13 years since charge of the Moi's Regime. Further there is plausible explanation for delay of 5 years since the promulgation of the ***Constitution of Kenya 2010***.

31. I find that though there is no limitation period for filing proceeding to enforce fundamental rights and freedoms, the court in considering whether or not to grant reliefs sought in a constitutional petition for enforcement of fundamental rights and freedoms, is entitled to consider whether there has been inordinate delay in filing a Petition and consider further whether there is plausible explanation for delay and whether justice will be served by proceeding on with the matter.

32. The Court record clearly show that all petitioners gave sworn explanation for the delay in coming to court ranging from genuine fear of the *"Moi Regime"*, lack of confidence in what Petitioners referred to as an emasculated judiciary during the Moi Regime, lack of means to meet legal fees and costs for filling the Petition and bonforce brought by 2010 Constitution for righting post rights violations. I find the process leading to the promulgation of the Constitution of Kenya, 2010 is inextricably intertwined with the national quest for righting past injustices that include gross violations of fundamental rights such as articulated in the instant petition. So is the urgent Building Bridges Initiative. Consequently, the instant processes and the buoyancy that the new Constitution has given to the people of Kenya. Therefore, viewed in the context of the country's mood to right past injustices, the instant Petition is on time and properly before the Court. Indeed, in ***Zipporah Seroney & 5 others v. Attorney General (supra)*** this Court appreciated the coming into being of the 2010 Constitution as a valid impetus for filing old claims thus (paragraph 58);

> ***"58] …It is, however, appreciated that the window for redressing violation of rights was provided when the 2010 Constitution came into force. The petition was filed in 2013 about three years after the promulgation of the Constitution of Kenya, 2010. There was therefore no inordinate delay in the filing of the Petition."***

33. In the instant Petition during the hearing, ***DW1 Major Frankline Oyese Omuse*** contention that the Respondents were prejudiced by the delay in filing the Petition was not demonstrated to be candid or true. DW1 was not a competent witness for the Respondents in the circumstances of the petition as he conceded, that he was not a soldier at the material time and therefore did not interact with the petitioners. Secondly, the respondents did not allege that they could not secure witnesses who served in the armed forces, in the police and the prison service at the material time, who have direct evidence regarding the petition. Thus, the replying affidavit of DW1 and his oral evidence are not an adequate rebuttal of the detailed account of the joint military, prisons and police departments in the commission of the complaints of the petitioners.

34. In view of the findings herein above, I find that the Petitioners have demonstrated that they are not guilty of inordinate delay and the Petition is not time barred by limitation of actions. The Petition was after promulgation of the Constitution of Kenya 2010. I find that this was not an inordinate delay in the filing of the Petition.

B. WHETHER THE PETITIONER HAVE PROVED THE ALLEGATIONS OF VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS?

35. The Respondents urge that the Petitioners herein failed to prove the allegations of violation of their fundamental rights and freedoms. It is Respondents contention that the allegation of torture, inhumane and degrading treatment are merely enumerated. The Petitioners it is averred have failed, in the Petition, Supporting Affidavits and oral testimony to demonstrate when, how and who allegedly violated their fundamental rights and freedoms. Further it is stated that by their own words, void of any corroboration and documentary evidence the Petitioners claim to have been tortured and inhumanely treated by government agents whom they have not identified.

36. The Respondents further aver that Courts are bastions of justice and for that purpose they can only be oved by facts and evidence, not just word of mouth and mere allegations. If courts were to be moved by anyone's word of mouth, the society would be treading on a dangerous course since every soul would be motivated to just come to Court and institute malicious suits.

37. It is further the Respondents case that the allegation of torture and the resultant harm was never shown to this Honourable Court nor was there corroboration by medical evidence. The Petitioners failed absolutely to tender adequate evidence to prove that their fundamental rights and freedoms were violated, that they were tortured and treated inhumanely and degradingly. They also failed to tender adequate evidence to prove when the allegation were committed only mentioning 1982. The Petitioners need to be have been more specific. On the alleged perpetrators, the Petitioners did not point out the specific *"members of the Kenya Armed Forces (now Kenya Defence Forces)"* that allegedly violated their fundamental rights and freedoms.

38. The rule of evidence is clear that *"He who alleges must prove"*. The maxim has been grounded in law under ***Section 107 of the Law of Evidence***. The same was enunciated by justice Majanja in ***Evans Otieno Nyakwana v. Cleophas Bwana Ongaro, Civil Appeal (Homabay) No. 7 of 2014, (2015) eKLR*** when he said that:

> ***"…As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially***

asserts the affirmative of the issue. That is the purport of section 107 (1) of the Evidence Act (Chapter 80 of the Law of Kenya), which provides:

"107. (1) 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 exists…"

39. Further, Justice Juma in ***Susan Mumbi vs. Kefala Grebedhin, Nairobi HCCC No. 332 of 1993*** stated:

The question of the court presuming adverse evidence does not arise in civil cases. The position in civil cases is that whoever alleges has to prove. It is the plaintiff to prove her case on a balance of probability and the fat that the Defendant does not adduce any evidence is immaterial."

40. The Constitution does not define ***"torture"*** or ***"inhuman"*** or ***degrading punishment"*** In ***Black's Law Dictionary, 8th Edition "Inhuman treatment" is defined in reference to family law as 'physical or mental cruelty so severe that it endangers life or health' while "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.'***

41. ***Article 1 of the United Nation on Convention against Torture, and other Cruel, Inhuman and Degrading treatment or punishment***, adopted by the UN General Assembly in 1984 defines torture as follows:-

"…any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purpose 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 to 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 public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

42. The issues under this sub-heading are subject of prayers (i) to (iv) of the Petitioner's Petition where the Petitioners pray for; ***(i) A declaration that the brutal arrest, cruel, inhuman, degrading and extreme ill-treatment inflicted on the petitioners on being taken into custody; the cruelties, violence, brutalities, deprivation of basic necessities of life and the extreme, inhuman and degrading prison conditions that the petitioners were held in incommunicado pre-trial detention and in prisons serving sentences constituted violations of the fundamental rights and freedoms of the petitioners to human dignity, equal protection and benefit of the law and prohibition against torture, cruel, inhuman and degrading treatment contrary to sections 70(a), 74(1) and 77 of the former Constitution (now Articles 27(1), 28 and 29(c) and (d) of the Constitution of Kenya, 2010) and Article 7 of the Intentional Covenant on Civil and Political Rights (ICCPR).***

43. The Petitioners in support of the prayers herein above rely on the sworn affidavits and oral evidence adduced before this Court. The Petitioners gave evidence directed at the manner of their arrest, how they were treated and the conditions they were subjected to while in pre-arraignment detention and in prison while serving their respective sentences.

44. I find that from the Petitioners detailed affidavits and oral evidence it is evident that upon their arrest by Kenya Army and police officers, they were subjected to standardized torture and ill-treatment. They were severely beaten up, stripped naked and transported to custody while naked. On arrival in the detention facilities they were again brutally beaten up and detained totally incommunicado. They were all held in solitary confinement in waterlogged cells or in overcrowded cells with fulltime noisy insane prisoners or in totally dark or permanently lit cells. While in custody, they were denied basic need i.e. food, drinking or bathing water, sleep, toilet facilities and medical attention. They were frequently moved from one detention facility to another while naked and subjected to endless interrogations, physical and mental assaults and coerced to confess to planning the failed coup.

45. The Respondents have not controverted the Petitioners evidence on their arrest, torture and ill treatment as narrated to this Court by the Petitioners. I therefore find the Petitioners evidence to be credible.

46. The narration of arrest, physical, mental assault and the extreme conditions of detention of the petitioners amounted to violation of the integrity and security of the persons of the petitioners specifically torture, cruel, inhuman and degrading treatment and/or punish contrary to ***Sections 70(a) and 74(1) of the former Constitution. Section 70(a) of the repealed Constitution of Kenya*** guaranteed that:

"70. Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place or origin or residence or other local connection, political opinions, color, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely – (a0 life, liberty, security of the person and he protection of the law the provisions of this Chapter shall have effect for the purpose of affording protection to those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

47. ***Section 74 of the repealed Constitution*** further secured the right of the security and integrity of the person by specifically prohibiting the inflictions of torture, inhuman or degrading punishment or other treatment, thus;

"74 (1) No person shall be subject to torture or to inhuman or degrading punishment or other treatment. (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in Kenya on 11th December, 1963."

48. In the instant Petition the Petitioners though they gave evidence and did not produce medical reports exhibiting effects of torture and ill-treatment, the absence of medical evidence does not in itself defeat, the Petitioners' claims; in light of their elaborate sworn evidence of brutalities meted on them and the debilitating conditions of detention which was not factually or specifically rebutted by the Respondents. It is common ground that none of the Petitioners even interacted with ***DW1 Major Frankline Oyese Omuse*** at the time of their tribulations founding the complaints herein. Indeed, on cross-examination, DW1 stated that he joined the armed forces in March 2003 – more than 20 years since the event giving rise to the causes of action herein. The replying affidavit of DW1 cannot therefore be an adequate answer to the petition and detailed assertions of unlawful detention without trial, torture and ill-treatment of the petitioners.

49. From the definition of torture as stated herein above, under ***Article 1 of the Convention Against Torture*** entails only the intentional infliction of severe physical and/or mental pain or suffering – not injuries, the absence of medical treatment occurred. Indeed, this was the holding of this Court in the celebrated case of ***Harun Thungu Wakaba v. Attorney General [2010] eKLR***, where the Court held thus (paragraphs 34, 37 and 38);

> ***"[34] …I have also found an apt definition from Article 1 of the Un Convention against Torture, and other Cruel, Inhuman and Degrading Treatment or Punishment, adopted by the UN General Assembly in 1984. Article 1 defines torture as follows:***
>
> ***"torture" means 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."***
>
> ***[37] It will be noted that none of the plaintiffs provided any medical evidence in support of the allegation that they were tortured or injured. While the medical evidence would have provided appropriate corroboration to the plaintiffs' allegations, the absence of the medical evidence is not critical, particularly because the plaintiffs' affidavits were not controverted. Therefore, the question is whether the various acts to which each of the plaintiff was subjected to, as deponed to in the respective affidavits qualify to be torture or inhuman or degrading treatment within the meaning of the definition provided in Article 1 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.***
>
> ***[38] A perusal of the affidavits sworn by the plaintiffs, reveal that there was actual infliction of severe physical pain, caused by the plaintiffs being physically assaulted, sometimes in intimate and sensitive areas, using various articles. The exposure of the plaintiff to pressurized water, hot and cold air, as well as the confinement naked in a dark waterlogged cell, were all actions which endangered health. The incessant interrogation and the denial of sleep were all mental or psychological infliction of pain. The infliction of this physical and psychological pain was done at Nyayo House which was a government institution. It was also carried out by government officials. Further, the infliction of the pain was done during the course of interrogation with a view to obtaining information or a confession from the plaintiffs. Thus, all the ingredients of the definition of torture as contained in Article 1 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment were present. The actions described in the affidavits would constitute infringement of the right to protection against inhuman treatment as provided under Section 74(1) of the Constitution."*** *(Emphasis added)*

50. I find that the above reasoning has been consistently been followed by this Court in subsequent similar cases i.e ***Jennifer Muthoni Njoroge & 10 others (supra)*** at paragraph 12 and ***David Gitau Njau & 9 others v. Attorney General (supra)***, Lenaola J, (as he then was) where it was held thus (paragraph 45);

> ***"[45] …At the hearing, the Petitioners gave specific details under oath relating to how they were arrested, tortured and how they were moved from one detention prison to another. The fact that the Respondent or any witness on his behalf did not deny these allegations under oath indicates that the allegations are true. I therefore have no reason to doubt the veracity of the testimony of the Petitioners. I also find notwithstanding that none of the Petitioners produced any documents or medical evidence in support of the allegation that they were detained for 8 months, tortured or injured in the hands of the Respondents. It is true that medical evidence would have corroborated the Petitioners evidence and would have been enough to establish the Petitioners' allegations, but, to my mind, the absence of such evidence is not fatal because of what I have said above; that their averments of facts were not specifically or in any way contradicted by the Respondent.*** *(Emphasis added)*

51. The courts have distinguished the necessity for medical reports in personal injury claims from claims of torture and ill-treatment. In rejecting the argument that the Petitioners had not proved their claims of torture and ill-treatment in the case of ***Peter Mauki Kaijenja & 9 others v Chief of Defence Forces & Another (supra)***, Mativo J, held thus (paragraph 86);

> ***"[86] …In this case, we are not essentially dealing with personal injuries but with inhuman treatment, torture, harassment and the mental and physiological effects of such actions to the victims."***

52. This Court takes judicial notice of the difficulties in obtaining medical or other evidence in the harsh conditions under which torture occurs and the circumstance under which sometimes rights to fundamental freedoms in the Bill of Rights are denied, violated or infringed or threatened during the time of torture. In the case of ***Jennifer Muthoni Muthoni Njoroge & 10 others v. Attorney General, (Supra)*** this Court held as follows (paragraph's 11 and 12);

> ***"[11] …When one is arrested and tortured mercilessly, where is the opportunity to take photographs of the tortures, get medical reports to show the injuries inflicted and where is the opportunity to call eye witnesses"***
>
> ***[12] One James Opiyo has been named as the leader of the torture squad at Nyayo House at the material times. Would be it be***

expected that the Petitioners should politely call Opiyo and ask him to call his juniors to testify of their actions"

Obviously not…."

53. I find the narrative of the debilitating treatment meted out against the Petitioners as per their affidavits and oral evidence and conditions of the prison detention, in my view, to amount to torture and ill-treatment, thus it is cruel, inhuman and degrading treatment or punishment. In the case of ***David Gitau Njau & 9 others V. Attorney General (supra)***, whose facts are almost verbatim the facts in this petition, this Court, Lenaola J (as he then was), upheld the Petitioners' claim of the torture and ill-treatment holding thus (paragraph 49);

> ***"[45] …At the hearing, the Petitioners gave specific details under oath relating to how they were arrested, tortured and how they were moved from one detention prison to another. The fact that the Respondent or any witness on his behalf did not deny these allegations under oath indicates that the allegations are true. I therefore have no reason to doubt the veracity of the testimony of the Petitioners. I also find notwithstanding that none of the Petitioners produced any documents or medical evidence in support of the allegation that they were detained for 8 months, tortured or injured in the hands of the Respondents. It is true that the medical evidence would have corroborated the Petitioners evidence and would have been enough to establish the Petitioners allegations, but, to my mind, the absence of such evidence is not fatal because of what I have said above; that their averments of facts were not specifically or in any way contradicted by the Respondent."*** *(Emphasis Added)*

54. Similarly in ***Denish Gumbe Osire v Cabinet Secretary, Ministry of Defence & another (Supra),*** involving another colleague of the petitioners herein, this Court, Lenaola, J, (as he then was) held thus: (paragraph 63);

> ***"[63] …Noting that the Petitioner….was also subjected to intense beatings, incarceration in water logged cells, starvation and promises of food and water if he confessed to participation in the attempted coup, threats of being shot to death, the hitting and squeezing of his testicles using an iron bar band being held in solitary confinement, then I am certain that the threshold expected of any claim of torture, inhuman and degrading treatment was reached and there being no defence to torture, it matters not whether the Respondent has denied the above actions."*** *(Emphasis added)*

55. The torture and ill-treatment are absolutely prohibited under ***Articles 4 and 7 of the International Covenant on Civil and Political Rights (ICCPR)*** (Kenya acceded to the ICCPR without any reservations on 01.05.1972) and ***Article 2 of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*** (Kenya acceded to the Convention without any reservations on 21.02.1997). Indeed, the absolute prohibition of torture is a ***jus cogen***, a peremptory norm of customary international law. In the instant Petition I find that there is no factual evidence from the Respondents of contrary treatment of the Petitioners. In view of the absolute prohibition of torture and ill-treatment, the Petitioners are entitled to prayers sought under prayers (i) of the Petition.

56. Under prayer (ii) stated herein above, is directed at the inordinately long, unlawful, illegal and unconstitutional period of pre-arraignment detention.

57. The Respondents contend that the Petitioners failed to discharge their burden of proof bestowed upon them. The Respondent rely on the case of ***John Cheruiyot Rono vs- Attorney General, Petition No. 536 of 2015,*** where the Court observed that:

> ***"32. The burden of proving violation of a right or freedom enshrined in the Constitution rests on the person alleging the violation: See Matiba v. Attorney General [1990] KLR 666. Such burden is to be discharged on a balance of probabilities by the Petitioner showing that the right existed and that it has been violated and the manner of such violation…***
>
> ***34. With regard to torture, the Petitioner made wild and unsubstantiated claims that he was beaten and forced to sleep in dark soggy or waterlogged cells. Both the retired Constitution as well as the Constitution 2010 sought and seek to ensure the protection of physical integrity of the individual. There was however, no supportive evidence on this claim and I will not consider it any further as nothing presented to the court fell close to showing that there was prohibited torture which is abasically, an infliction of physical suffering or threat to inflict such suffering meted to the Petitioner. One may blame it on lapse of time but yet against the burden was on the Petitioner. I am unable to find that the Petitioners right to freedom form torture was violated for lack of evidence."***

58. The Respondents further aver that the Petitioners were rightfully arrested on reasonable suspicion of having participated in the attempted 1982 coup. During the entire proceedings, the Petitioners never demonstrated that there was unjustified and or unreasonable force employed when they were arrested.

59. It is further contended by the Respondents the Petitioners, being members of the Kenya Armed Forces (now Kenya Defence Forces), were subject to the Armed Forces Act (now repealed) and were therefore tried by lawfully constituted Courts Martial as was provided for in the said Act at Part VIII. The Petitioners have made allegations of coercion to plead guilty without giving particulars of the purported coercion. The Petitioners have made allegations of a counsel who supposedly misled them to plead guilty for favourable rulings in their trials, however, the said counsel has not been identified.

60. It is further stated that the Petitioners, details regarding their arrest and alleged illegal pre-arraignment confinement are scanty and not in any way clear. It is contended that their failure to annex a committal sheet, if any, to corroborate their prayers in the Petition and further justify their allegations is wanting. It is further contended that the Petitioners further allege that they were not accorded an opportunity to be heard, defend themselves or appeal their convictions thus their trials were unfair. It is stated that from their own pleadings and oral testimony, the Petitioners admit that they were tried and entered pleas of guilty and thereafter sentenced to imprisonment. The Respondents urge that in their humble opinion, is a full hearing.

61. The Respondents further state that the Petitioners were informed of their right to appeal but chose not to exercise the said right apart from the 2nd, 3rd and 9th Petitioners. The rest of the Petitioners saw it right to serve their full terms in prison and thus acquiesced to the whole process of their detention through to their trials, convictions and sentencing. It is Respondents contention that it is therefore outrageously perplexing that the Petitioners now come to this Honourable Court after such under delay of 33 years in the pretext of a constitutional petition to "appeal" their prosecution at the Courts Martial. The Respondents further urge that the committee appointed to review the Courts Martial findings and sentences in the trials of ex-Kenya Air Force personnel did not quash the convictions of the Petitioners. The committee reduced the 1st, 2nd, 4th (now deceased), 6th and 9th Petitioners' prison terms. This only goes to prove that the Petitioners' arrests, detainment, trials, convictions and sentencing were carried out lawfully.

62. The Respondents aver that the allegations that the Petitioners were subjected to inhuman treatment in prison is neither here nor there. It has been ruled that Kenyan Prisons are generally in deplorable states and that does not amount to inhumane treatment for a prisoner to serve his lawful term in the same situation amid the government's efforts to improve standards.

63. In the matter the Petitioners deponed and testified that they were held in pre-trial detention of between 64 and 144 days. It is apparent that, following the failed coup, the former Constitution was suspended de facto as regards the Petitioners. Due process of the law particularly prompt arraignment of suspects before the court martial within the stipulated period under the former Constitution or the Armed Forces Act was ignored.

64. It should be noted that despite the grave gravity of the Coup attempt, it is a fact that the coup was suppressed and the government restored on the same day. Therefore, the armed forces must be held to have taken a deliberate decision to treat the petitioners outside the law by failing to respect their rights under the Constitution and the Armed Forces Act in holding them in detention without trial for the said periods. Even during the state of emergency in the colonial time, such conduct was severely deprecated by the Court of Appeal in the case of ***Njuguna s/o Kimani & 3 others v R (1954) 21 EACA 316*** where the Court held that (page 319);

> ***"The notion that the police can keep a suspect in unlawful custody and prolong their questioning of him by refraining from formally charging him is so repugnant to the traditions and practice of English law that we find difficulty in speaking of it with restraint."***

65. I find that this censure applies with equal force to the armed forces and to any other state security agency in independent Kenya bearing in mind at the time of arrest of the Petitioners the Coup was suppressed and government restored on the same day. There was no more threat to justify keeping of Petitioners in unlawful custody for such a prolonged period without trial.

66. Upon perusal of the Replying Affidavit of ***Major Frankline Oyese Omuse*** I find that he did not give any reasons for the inordinately long and unlawful pre-trial detention of the petitioners. However, in his oral evidence, while impliedly conceding to the inordinate delay in arraigning the petitioners, he ascribed the delay to investigations and empanelling of the court marital by the Chief Justice and the commanding officers. He also purported to defend the delay from unlawfulness on the basis that the Armed Forces Act authorized periodic detention of suspects for 8 days with written reasons by the detaining officers to the commanding officer.

67. Notwithstanding DW 1 explanation for such an inordinate delay, it is noteworthy that DW did not lead any evidence as to when investigations started and/or concluded, when the court marital was empanelled or produce any written reasons by the detaining officers for the long detention of the petitioners to justify the unlawful detention.

68. This Court notes that this court and Court of Appeal have determined the permissible pre-trial detention of military officers under the former Constitution and the repealed Armed Forces Act. In ***David Gitau Njau & 9 others v. The Attorney General (supra),*** Lenaola J, (as he then was) found clear nexus between the provisions of ***Section 48 and 72 of the repealed Armed Forces Act*** and the constitutional requirement for prompt production of suspects in Court.

69. In ***Peter M. Kariuki V The Attorney General [2014] eKLR***, the Court of Appeal also held that the provisions of ***Section 72(3) of the former Constitution*** on prompt arraignment of suspects in court applied to the military. The Court expressed itself, thus (page 20);

> ***"The second issue relates to Mr. Kamau's submission that under the former Constitution, the constitutional rights in respect of which members of the armed forces could seek redress were limited to protection of the right to life (s.71), protection from slavery and forced labour (S.73) and protection from inhuman treatment (S.74). In Mr. Kamau's view, the appellant could not allege violation of any other constitutional rights and the trial court had erred in entertaining his complaints relating to hose other rights….The relevant provision was Section 86(2) which related to interpretation and savings. The section provide:***
>
> ***"In relation to a person who is a member of a disciplined force raised under any law in force in Kenya, nothing contained in or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in contravention of any of the provisions of this Chapter other than Sections 71, 73 and 74." We do not understand the above provision to deny members of the armed forces all rights under that constitution save those guaranteed under Sections 71, 73 and 74 ….As we have demonstrated, contrary to the suggestion implicit in the respondent's submission, the provisions of the Armed Forces Act relating to courts martial did not entail blanket derogation form guaranteed constitutional rights. Instead those provisions closely mirrored the principles and values of the Bill of Rights in the Constitution. We find the argument totally bereft of merit."*** *Emphasis added)*

70. I find that by keeping the petitioners herein in detention without trial for a period of between 64 and 166 days, the respondents violated the petitioners' fundamental rights to personal liberty and due protection of the law. Indeed, by ***Article 9 of the ICCPR***, the petitioners were entitled to be brought before a court of law in order for the court to exercise judicial power over their detention and accord them a trial. ***Article 9(3) of the ICCPR*** provides that:-

> ***"9(3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release…."***

71. In the case of ***Peter Tonny Wambua & 17 others v Attorney General [2017] eKLR*** where the Petitioners were held in pre-trial detention in similar circumstances as the petitioners herein, this Court found the detention unlawful holding thus (paragraphs 91 and 92);

> ***"[91] In the present case, the Respondent made no effort to explain why the Petitioners were incarcerated for long periods without being taken to any Court including the Court Martial. In their evidence, the Petitioners were held between 25 days and over 200 days and were thereafter either released without any charge or charged and convicted at the Court Marital…. [92] …..without an explanation as to why they were kept in custody from 1st August 1982 until proceedings at the Court Martial or until eventual release without charge, the Petitioners have proved that they were unlawfully detained and I so find.*** *(Emphasis added).*

72. I find in the instant Petition that the prolonged pre-trial detention of the Petitioners was, per se, a violation of their fundamental rights to "human dignity, freedom from cruel, inhuman and degrading treatment and/or punishment and the protection of law including the right to a fair trial guarantee by ***Sections 70(a) 74(1) and 77 of the former Constitution***. It cannot in my view be gain said that holding a person incommunicado in detention without trial for periods between 64 and 166 days in uncertainty about their status and in the debilitating conditions described by the Petitioners is not a violation of human dignity and it does not amount to torture and ill-treatment. Indeed, the ***UN Committee on Human Rights in General Comment No. 7 on Article 7 of the ICCPR (on prohibition of torture)*** has underscored incommunicado and solitary detention as incidents of torture and/or cruel, inhuman and degrading treatment contrary to the protected dignity of a human being. Paragraphs 1 and 2 of the General Comment notes thus;

> ***"1..The Committee notes that it is not sufficient for the implementation of this article to prohibit such treatment or punishment or make it a crime ….Among the safeguards which may make control effective are provisions against detention incommunicado, granting, without prejudice to the investigation, persons such as doctors, lawyers and family members access to the detainees. ….2. As appears from the terms of this article, the scope of protection required goes far beyond torture as normally understood. It may not be necessary to draw sharp distinctions between the various prohibited forms of treatment or punishment. These distinctions depend on the kind, purpose and severity of the particular treatment….Even such a measure as solitary confinement may, according to the circumstances, and especially when the person is kept incommunicado, be contrary to this article …For all persons deprived of their liberty, the prohibition of treatment contrary to article 7 is supplemented by the positive requirement of article 10(1) of the Covenant that they shall be treated with humanity and with respect for the inherent dignity of the human person."*** *(Emphasis added)*

73. In view of ***Section 70(a) of the former Constitution***, the Petitioners were entitled to equal protection of law at all times. Although, the expounded fundamental right to protection of the law under ***Section 77 of the former Constitution*** was restricted to protection in the context of a criminal trial, I find "the Protection of the Law" guaranteed by ***Section 70(a)*** was not merely a preamble to the restrictive ***Section 77*** but rather a substantive fundamental right of the individual.

74. On prayers (iii) directed at the period of continued imprisonment in arbitrary deprivation of the right to remission of sentence for under ***Section 46 of the Prison Act***. It is contended that the 1st, 3rd, 5th 6th and 7th Petitioners were deprived of their respective periods of remission of sentence and they served calendar terms of their sentences. It is stated that he Petitioners were denied remissions as follows; the ***1st Petitioner 2 years and 2 months*** (see paragraph 24 of his supporting affidavit), the ***2nd Petitioner 16 months*** (see paragraph 25 of his affidavit), the ***5th Petitioner 1 year 8 months*** (see paragraph 21 of his supporting affidavit), the ***6th Petitioner 12 months*** (see paragraph 29 of his supporting affidavit) and the ***7th Petitioner 12 months*** (see paragraphs 29 and 32 of his supporting affidavit) the 3rd , 6th and 7th adduced their respective certificates of rehabilitation in support of their claim for deprivation of remission of sentence.

75. The 3rd, 6th and 7th Petitioners gave evidence in support of their allegation of being denied remission thus shifting the onus of explaining the deprivation of the remission on the prison authorities who are represented in this petition by the 2nd respondent the Hon. Attorney General. However, as the record exhibits, there was no specific response from the respondents to his claim.

76. ***Section 46 of the Prison Act*** expressly provides for the right of a prisoner to remission of sentence on admission to prison which he can only lose on cause. ***Section 46 of the Prisons Act*** provides thus;

> ***"46(1) Convicted criminal prisoners sentenced to imprisonment, whether by one sentence or consecutive sentences, for a period exceeding one month, may by industry and good conduct earn a remission of one third of their sentence or sentences: Provided that in no case shall— (i) any remission granted result in the release of a prisoner until he has served one calendar month; (ii) any remission be granted to a prisoner sentenced to imprisonment for life or for an offence under section 296(1) or 297(1) of the Penal Code or to be detained during the President's pleasure. (2) For the purpose of giving effect to the provisions of subsection (1) of this section, each prisoner on admission shall be credited with the full amount of remission to which he would be entitled at the end of his sentence if he lost no remission of sentence. (3) A prisoner may lose remission as a result of its forfeiture for an offence against prison discipline, and shall not earn any remission in respect of any period— (a) spent in hospital through his own fault or while malingering; or (b) while undergoing confinement as a punishment in a separate cell. (3A) A prisoner may be deprived of remission— (a) where the Commissioner considers that it is in the interests of the reformation and rehabilitation of the prisoner; (b) where the Minister for the time being responsible for internal security considers that it is in the interests of public security or public order. (4) Notwithstanding the provisions of subsection (1) of this section, on the recommendation of the Commissioner, the Minister may grant a further remission on the grounds of exceptional merit, permanent ill-health or other special grounds. Remission of part of sentence of certain prisoners. 21 of 1966, 2nd Sch., L.N. 124/1964, 8 of 1968, Sch., L.N.59/1970, 10 of 1981, Sch., 18 of 1986, Sch. Cap. 63. CAP. 90 22 Prisons [Rev. 2009 (5) The Minister shall have power to restore forfeited remission in whole or in part.*** *(Emphasis added)*

77. Under ***Rule 95(1), 96 and 97 of the Prison Rules*** are also on point and they provide as follows:

> ***"95. (1) A prisoner shall be entitled to release on the day after he has completed the period of his sentence less any remission which he has earned…….. 96. The officer in charge shall ensure that the remission system is explained to all prisoners on admission, and, when for any reason remission is forfeited, the officer in charge shall ensure that a prisoner is made fully aware of such forfeiture. 97. A record shall be kept for each prisoner earning remission showing the sentence, the remission allowed and any forfeiture of remission. The earliest possible date of release shall be recorded as well as the latest possible date of discharge."*** *(Emphasis added)*

78. The Petitioners contention has not been responded to and remain uncontroverted by the 2nd Respondent on behalf of the Prison Authority. I find that the Petitioners Nos 1, 3, 5, 6 and 7 have demonstrated breach of the above-mentioned provisions of the Prisons Act by arbitrary deprivation of remission of the 1st, 3rd, 5th, 6th and 7th Petitioners and I find that they were subjected to an unlawful detention contrary ***Section 72(2) of the former Constitution. Section 72(6)*** provided a cause of action and the right to a remedy for such unlawful detention thus;

> ***"72(6) A person who is unlawfully arrested or detained by another person shall be entitled to compensation therefore from that other person."*** *(Emphasis added)*

79. The Court of Appeal has affirmed that arbitrary deprivation of remission of sentence is a deprivation of personal liberty. In the case of ***David Oloo Onyango v Attorney General [1987] eKLR***, where the appellant was denied remission of sentence by the Commissioner of Prisons without being heard or given an opportunity to be heard, the Court of Appeal declared the Commissioner's decision null and void and underscored that remission of sentence is a right to liberty of the prisoner which could not be taken away without cause and due process, holding thus (per Nyarangi JA, at pages 1, 3, 4, 5, and 6);

> ***"Upon his admission into prisons, the appellant was entitled under section 46(2) of the Prisons Act, Cap 90***
>
> ***"to be credited with the full amount of remission to which he would be entitled at the end of his sentence if he lost no remission of sentence." …. Mr K Murungi made much of the point, and properly made much of the point, that the Commissioner's decision has resulted in substantial loss of liberty.***
>
> ***The commissioner's decision was an administrative act. Nevertheless rules of natural justice apply to the act in so far as it affects the rights of the appellant and the appellant's legitimate expectation to benefit from the remission by a release from prison some 20 months earlier than if he had to serve the full sentence of imprisonment…… I would say that the principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly. In this instant case, reasonable people would expect the commissioner to act fairly in considering whether or not to deprive an inmate of his right of remission earned in accordance with the provisions of the Prisons Act…… and in my judgment, the Commissioner could not act fairly and be seen to have acted fairly without giving an inmate an opportunity to be heard before imposing loss of the liberty and in this case, it is substantial loss of liberty…… It is improper and not fair, that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial results in substantial loss of liberty leaves the appellant and other concerned guessing about what matters could have persuaded him to decide to deprive an inmate of remission…. To urge that the Commissioner can act subjectively and get away with it is in my judgment to urge that Courts should retreat from their position as custodians of the rights of inmates."***

80. In the case of ***Stephen Nderu Njuguna v The Hon. Commissioner of Prisons & anther [2011] eKLR***, this Court, Mwera J, found the denial of remission of sentence to the plaintiff actionable holding thus (page 5 to 6);

> ***"In this case which the court considered as based on the tort of unlawful extended detention in prison, reference was made to Rule 95 of the Prison Rules on calculation of remission, particularly sub-rule 5. "95. (1) …..(5) Whenever a capital sentence is commuted to a sentence of imprisonment for a term of years, the sentence so commuted shall, for the purpose of remission be deemed to have commenced at the date the sentence of death was passed." The date of commutation form the death to the prison term of 6½ years was wef. 15.12.99. That is the date that the 1st defendant ought to have considered remission and date of release of the plaintiff. The release probably could even be earlier than 14.6.06. The date the plaintiff held on. Probably it may as well not have been necessary to bring up the sentence regarding the handling charge. But be that as it may.***
>
> ***Having considered the circumstances of this case, the time of the unlawful continued confinement in prison, the plaintiff is awarded a global sum of sh. 2 million plus costs and interest."***

81. Similarly in case of ***Daniel Kibet Mutai & 9 others v. Attorney General [2019] eKLR***, where the High Court had dismissed the appellants' claim for remission, the Court of Appeal held thus (paragraph 55 and 56);

> ***"[55] Our understanding of Section 46(1) is that except for prisoners sentenced to life imprisonment, or sentenced under Section 296(1) or sentenced under the president's pleasure all convicted prisoners may by industry and good conduct earn remission of their term of imprisonment, as section 46(2) indicates that each prisoner is to be credited upon admission with full amount of remission that he would be entitled to if he did not lose any remission of sentence. Subsection 3 and 4 lists the circumstances in which a prisoner may lose or be deprived of the remission.***
>
> ***[56]Therefore, the use of the word "may" in 46(1) does not connote a discretion to give or not to give remission, but the fact that remission is not absolute as it may be lost in certain circumstances. The 2nd appellant, 7th appellant, and 8th appellant swore that***

they were not given any remission and each served their full term of imprisonment. The reason why the appellants lost their remission was a matter that was specially within the knowledge of the Prisons Department. In the absence of a replying affidavit from the respondent, there was no justification given for the denial of the remission. Remission was a legal right that the 2nd 7th and 8th appellants were entitled to enjoy, and contrary to the finding of the learned Judge the denial meant that the appellants were unlawfully deprived of their freedom."

82. I find that the 1st, 3rd, 5th, 6th and 7th Petitioners are entitled to prayer No. (iii) of the Petition.

83. Prayer (iv) is directed at dismissal of the Petitioners from service of Armed Forces consequent to arrest, detention and subsequent conviction and sentence on account of guilty plea at Court Martial.

84. The Petitioners contend that although ***Section 102 of the Armed Forces Act*** provides for dismissal as part of sentence for an officer sentenced to imprisonment, the convictions of the Petitioners by the court marital are vitiated by the unlawful pleas of guilty exhorted pursuant to severe torture and ill-treatment inflicted on the Petitioners in the cause of the inordinately long unlawful pre-trial detention as demonstrated by the Petitioners.

85. The Petitioners urge that indeed, in the case of ***Peter M. Kairuki v Attorney General (supra),*** such inordinately long, unlawful pre-trial detention under torture was the foundation on which the Court of Appeal found the trial of the appellant to have been vitiated. The Court observed thus (page 9);

"Before the court marital was an accused person who had been held incommunicado, without access to a lawyer for well over 147 days. He had less than ten hours in total, and in a prison setting, to instruct his lawyer and prepare his defence…"

86. The Petitioners contend that the instant case is worse as narrated in the instant Petition, as it is contended that the Petitioners found military counsel on the ready with instructions for them to plead guilty to all charges.

87. In the instant Petition it is urged that it is instructive that as the certificates of service issued by the 1st respondent to the Petitioners exhibit dismissal from service, was in fact not the actual cause for the discharge of all the petitioners from the armed forces. From the 1st Petitioner, his certificate of service indicates the cause of his discharge from service was *"disbandment of Kenya Air Force"* (see page 16 of the petition) while for 2nd, 5th, 6th and 9th Petitioners, their certificates indicate the cause of discharge as ***"services no longer required."*** (see pages 28, 61, 73 and 105 of the petition). The Petitioners therefore, contend that the 1st 2nd, 5th, 6th and 9th Petitioners were, in law, discharged for redundancy. It is asserted by Petitioners that only the certificates of the 3rd and 8th Petitioners indicated cause of discharge as dismissal while the 7th Petitioner did not exhibit his certificate.

88. It is therefore contended save for the 3rd, 7th and 8th Petitioners, ***Section 102(6) of the Armed Forces Act*** cannot be a defence to the discharge from service of the 1st, 2nd, 5th, 6th and 9th Petitioners though the manner of discharge is not the main issue here. The Petitioners deponed in their affidavits in support of the Petition, as a result of their dismissal from the armed forces, their special careers as soldiers came to an end, they did not secure other jobs and became destitute depending on the charity of their families and well-wishers for survival. Indeed, they have cited their impecunious status as a reason for delay in coming to court.

89. The Petitioners therefore contend that the unlawful termination of the Petitioners' peculiar and specialized careers as soldiers that left them without any means of livelihood was a violation of the petitioners' fundamental rights to life and human dignity. It is trite law that the right to life not only encompasses the prohibition against unlawful taking away of actual life but includes the deprivation of the rights that facilitate the means through which a person's life is sustained in dignity i.e. the right to human dignity and means of livelihood. In the case of ***Takawira Biggie v The Minister of Police, Case No. A3039/2011, the South Gauteng High Court***, citing the Constitutional Court of South Africa held that (page 13, paragraph 40);

"…In S v Makwanyane & Another, 1995 (3) SA 391 at para 327, Justice O'Regan stated that: "*The Right to life was entwined with the right to dignity, human being with dignity, without dignity human life was substantially diminished, without life there could be no dignity."* [Emphasis added]

90. The Respondent counters the Petitioners submission on the issue and submit that the discharge of the Petitioners from service was lawful as the applicable law, to wit ***Section 103 of the Armed Forces Act (now repealed)***, provided for various sentences and punishments for service personnel including dismissal from service. Further, the ***Armed Forces Act (now repealed)*** at ***Section 176 (g)*** empowered the competent service authority to discharge service members if for any reason the member's service are no longer required. The Respondents urge therefore they discharged their duties procedurally, fairly and with strict adherence to the laws. In the instant matter there is no dispute that ***Section 176 (g) of the Armed Forces Act (now repealed)***, empowered the competent service Authority to discharge service members if for any reason the member services are not required. The Petitioners have not shown how ***Section 176(g) of the Armed Forces Act (now repealed)***, was violated and that their services were still required to justify their contention. They have not shown their discharge was an unlawful discharge from service. I find the Petitioners have failed to prove their discharge from services was unlawful.

91. On the issue of unlawful dismissal as raised by the Petitioners it is noted that is an enclave of the Employment and Labour Relations Court and as such the best forum to address that issue is the said court. The Petitioners were well aware that an employment claim could not survive by application of the doctrine of limitation of actions and thus decided to sneak it into a Constitutional Petition.

92. In view of the findings herein above I find that prayer (iv) of the Petition is not only improper but is before the wrong Court and must fail. I decline to grant the same.

C. WHETHER PETITIONERS ARE ENTITLED TO DAMAGES AND WHAT IS THE QUOTUM?

93. In awarding damages the Court should apply the principles laid out in various similar cases and which parties herein has sought reliance on. In the case of ***Jennifer Muthoini Njoroge & 10 others v The Attorney General (supra) and Peter Tonny Wambua & 17 others v Attorney General (supra)*** offer guiding principles in this regard.

94. Considering the criteria in awarding damages in the instant Petition, and considering the torture inflicted on each of the Petitioner herein, the length of time each was unlawfully held in custody, the relevant decided cases, and what would amount to a fair and reasonable award, I find that it would be fair and reasonable to award to each Petitioner a global award of damages for the interrelated violations of the fundamental rights against human dignity, torture, cruel, inhuman and/or degrading treatment or punishment, unlawful deprivatisation of liberty, the protection of law and the right to life/livelihood while factoring-in the aggravating circumstances of the violations.

95. On the issue of question of damages I find that the principles laid out in the case of ***Lt. Col. Peer Ngari Kaguma & others v. Attorney General (supra)*** applicable as stated at page 37 where it was stated that:-

> ***"…If there is any remedy in addition to damages, that other remedy should usually be granted initially and damages should only be in addition if necessary to afford just satisfaction."***

96. In the case of ***Peter M. Kariuki v. Attorney General (supra)***, the Court of Appeal awarded the appellant general damages of kshs.15,000,000/= for violations of his constitutional rights (torture, unlawful pre-arraignment detention of 147 days and violation of the right to a fair trial). Further in case of ***Denish Gumbe Osire v Cabinet Secretary , Ministry of Defence & another (supra)*** this Court awarded a global sum of Kshs.10,000,000/= for pre-trial detention of 86 days and torture. Also in the case of ***Captain (Rtd) Frank Mbugua Munuku v Kenya Defence Forces & Another (supra)***, this Court awarded the petitioner global damages in the sum of Kshs.7,000,000/- for torture and detention without trial for 8 months.

97. In the case of ***David Gitau Njau & 9 others v Attorney general (supra)*** the petitioners were awarded uniform damages of Kshs.5,500,000/= for similar violations as the instant petition. Further in the case ***Peter Tony Wambua & 17 others (Supra),*** this Court awarded damages of Kshs.5.2M to the 1st Petitioner (for detention and torture for 212 days), Kshs. 5.75M to the 11th Petitioner (for detention and torture for 228 days), Kshs.6.1M to the 14th Petitioner (for detention and torture for 244 days) and kshs.5.25M to the 15th Petitioner (for detention and torture for 230 days). The violations were for a period of approximately 6 to 8 months.

98. The Respondent urges this Court in considering the quotum to consider the reckoning of Justice Lenaola in the recent case of ***Charles Gachathi Mboko v. Attorney General, HCCC 833 of 2009, [2014] eKLR***, where the Learned Judge stated,

> ***"…that the court has been lenient on parties that seek redress for violation of fundamental rights in past political regimes, that it indulges in being abused by parties that have slept over their rights and give no serious explanations for the delay. Thus, the content that the court in awarding the Petitioner takes account that the authorities he relies on were awarded in 2004 – 2009, the Petitioner should have taken steps to seek redress for his alleged violations without inordinate delay."***

99. The Respondents urge that the Petitioners have cited exorbitant damages to be paid to them. I note the Petitioners though are entitled to damages they are bound to mitigate the basis upon which such higher awards should be awarded to them.

100. The Petitioners herein seek an award of global damage ranging from Khss.15,000,000/= to Kshs.8,000,000/=. The amount sought by each of the Petitioners is with all respect exorbitant in view of the fact that there are no serious mitigating factors to justifying an exorbitant award. The Petitioners are taking into account of inflation since the time of the decisions relied upon were made, notwithstanding the decisions relied upon were made between 2004 – 2009, when the Petitioners should have taken steps then to seek redress for the alleged violations without inordinate delay. I find that it would be unfair and unjustified to award an exorbitant award on basis of inflation, when the inordinate delay occurred due to late filing of the Petition by the Petitioners.

101. ***The upshot is that the Petitioners Petition succeeds and I proceed to make the following orders:-***

> ***a) A declaration be and is hereby issued that the brutal arrest, cruel, inhuman, degrading and extreme ill-treatment inflicted on the Petitioners on being taken into custody; the cruelties, violence, brutalities, deprivation of basic necessities of life and the extreme, inhuman and degrading prison conditions that the Petitioners were held in incommunicado pre-trial detention and in prison serving sentences constituted violations of the fundamental rights and freedoms of the Petitioners to human dignity, cruel, inhuman and degrading treatment contrary to sections 70(a), 74(1) and 77 of the former Constitution (now Articles 27(1), 28 and 29(c) and (d) of the Constitution of Kenya, 2010) and Articles 7 of the Intentional Covenant on civil and Political Rights (ICCPR).***
>
> ***b) A declaration be and is hereby issued that the period of between 64 and 166 days that the respective Petitioners were detained in pre-arraignment incommunicado detention between 01.08.1982 and 13.01.1983 when they were arraigned before the Court Marital constituted periods of arbitrary, unlawful and illegal detention in violation of the Petitioners' fundamental rights to inherent human dignity, equal protection and benefit of the law, personal liberty and fundamental freedom from servitude and from torture, cruel, inhuman and/or degrading treatment or punishment contrary to sections 70(a), 73(1), 74(1) and 77 of the former Constitution (now Articles 27(1), 28, 29(c) and (d) and 30(1) of the Constitution of Kenya, 2010) and Articles 7 and 9(3) of the ICCPR.***
>
> ***c) A declaration that the dismissal of the petitioners from the Armed Forces was vitiated by the unlawful pleas of guilty exhorted at the Court Martial pursuant to severe torture inflicted on the Petitioners in the cause of the inordinate unlawful pre-trial***

detention and the dismissals were unlawful inhuman and cruel deprivation of the Petitioners' means to a meaningful livelihood in violation of their 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 ormer Constitution (now Articles 26(1) and (3), 28 and 29(f) of the Constitution of Kenya, 2010) and Article 6(1) of the ICCPR and Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICSECR) not proved and is denied.

d) The Petitioners are each awarded damages consequential to the declaration of violations of fundamental rights and freedoms of the Petitioners in prayers (i) to (iii) above as follows:-

i) 1st Petitioner Kshs.8,000,000/=

ii) 2nd Petitioner Kshs.8,000,000/=

iii) 3rd Petitioner Kshs.7,000,000/=

iv) 4th Petitioner Kshs.7,000,000/=

v) 5th Petitioner Kshs.7,000,000/=

vi) 6th Petitioner Kshs.7,000,000/=

vii) 7th Petitioner Kshs.7,000,000/=

viii) 8th Petitioner Kshs.6,000,000/=

ix) 9th Petitioner Kshs.5,000,000/=

e) Costs to the Petitioners.

f) Interest on all monetary awards from the date of judgement.

Dated and Signed at Nairobi on this 4th day of February, 2021.

Delivered Electronically at Nairobi on this 25th day of February, 2021.

……

J. A. MAKAU

JUDGE