



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO. 291 OF 2003 (O.S)

BERNARD MUHILANA SHIMANYULA.....PLAINTIFF

VERSUS

- 1. THE HON. ATTORNEY GENERAL**
- 2. THE COMMISSIONER OF POLICE**
- 3. CHIEF INSPECTOR MWANGANGI**
- 4. POLICE CONSTABLE SAMBAMBA**
- 5. POLICE CORPORAL RESENE TAIB**
- 6. POLICE CONSTABLE MUTWIWA**
- 7. POLICE SERGEANT KAVIVIA**
- 8. POLICE SERGEANT PHILIP WABUKA.....DEFENDANTS**

J U D G M E N T

1. By an Originating Summons dated the 11/7/2003 brought under Sections 65 (2) & (3), 72, 74, 77, 84, & 123(8) of the Kenya Constitution, (repealed), Section 3 of the Judicature Act, Rule 11 of the Kenya Constitution (protection of fundamental rights and freedoms of the individual practice and procedure rules 2001, the Plaintiff seeks for orders that:

a) A declaration that the assault causing grievous bodily harm perpetrated on the Plaintiff by the 4th, 5th, 7th and 8th Defendants on the night of 3/8/2001 at Shauri Yako Estate Mombasa was a gross violation of the Plaintiff's fundamental rights under S.74 of the Constitution of Kenya not to be subjected to torture or to inhuman or degrading punishment or other treatment.

b) A declaration that the arrest of the Plaintiff by the 4th, 5th, 7th and 8th Defendants and the subsequent incarceration of the Plaintiff by the 3rd Defendant at Nyali Police Station Mombasa between the 3/8/2001 and the 6/8/2001 was in violation of the Plaintiff's fundamental right under S.72 of the Constitution of Kenya not to be deprived of his personal liberty save as may be authorised by law.

c) A declaration that the confinement of the Plaintiff by the aforementioned 3rd Defendant at Nyali police station during the aforementioned period while being deprived of urgently needed medical attention was a violation of the Plaintiff's fundamental right under S.74 (1) of the Constitution of Kenya not to be subjected to torture or to inhuman or degrading punishment or any other treatment.

d) A declaration that the further incarceration of the Plaintiff by the 3rd Defendant at Nyali Police Station between August 13 and August 17 without any explanation as to why he was being held was a violation of the Plaintiff's fundamental right under S.72(2) of the Constitution of Kenya to be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.

e) A declaration that the 3rd Defendant failed to comply with S.72(3) of the Constitution of Kenya in that the Plaintiff was not brought before a Court as soon as practicably possible.

f) A declaration that the 3rd Defendant failed to comply with S.72(5) of the Constitution of Kenya in that he did not release the Plaintiff either unconditionally or upon reasonable condition as to secure the Plaintiffs attendance of his trial before the Court.

g) A declaration that the Plaintiff is therefore entitled to the compensatory relief provided for under S.72(6) of the Constitution of Kenya as against the 3rd Defendant, and by dint the 1st Defendant.

h) A declaration that by ignominiously arraigning the Plaintiff before the Senior Resident Magistrate Court in Mombasa on 17/8/2001 and maliciously and falsely charging the Plaintiff with the offence of possessing tools used for burglary contrary to S.308 (1) of the Penal Code (Chapter 63 Laws of Kenya) in Senior Resident Magistrate Criminal Case No. 2653 of 2001, the 3rd Defendant violated the Plaintiff's right under Section S.74(1) not to be subjected to torture or to inhuman or degrading punishment or other treatment.

i) A declaration that by instituting and maintaining the aforesaid SRMCC No. 2653 of 2001 for a purpose other than that which it should have been instituted to achieve, the 3rd Defendant abused the criminal process in contravention of the Plaintiff's right under S.77 of the Constitution of Kenya.

j) A declaration that the 8th Defendant violated the Plaintiff's right under Section 77 of the Constitution of Kenya by giving false testimony in Court against the Plaintiff on 4/3/2002.

k) An order for general damages under S.84 of the Constitution of Kenya in enforcement of the Plaintiff's fundamental rights and freedoms violated by the Defendants jointly and severally as shown above

l) An order for exemplary damages for callous and reprehensible behavior.

2. The Originating Summons is premised on the grounds set out therein and accompanied by a supporting affidavit sworn on 8/7/2003 by the Plaintiff. It is was deponed in the said affidavit, inter alia, that on 3/8/2001, the 4th, 5th, 6th, 7th and 8th Defendants (Hereinafter called the Defendants) while on patrol duty, attacked and assaulted the residents of Shauri Yako estate alleging that one of them by the name "Hamisi" was hiding a gun. The Plaintiff states that without any provocation, the Defendants brutally assaulted him leaving him unconscious, and because of the assault, he sustained grievous injuries to his left eye, which led to the loss of vision in his left eye. The Plaintiff was arrested, and illegally and wrongfully detained at Nyali Police Station between 3/8/2001 and 6/8/2001 while being deprived medical attention and/or police bond in order for him to seek treatment and the 3rd Defendant never informed him of the offence he had committed as required under Section 72 (2) of the Constitution.

3. The Plaintiff states that it was due to pressure from the members of the public, that the 3rd Defendant allowed some armed police officers to escort him to the Coast General Hospital where he was admitted and kept under police guard. He was admitted on the 6/8/2001 until 13/8/2001 when he was discharged from hospital. However, the 3rd Defendant still directed that he be detained for a further four days at Nyali Police Station and all his complaints on assault by the Defendants were ignored, and he was never issued with a P.3 form.

4. The Plaintiff states that he was finally arraigned in Court on the 17/8/2001, maliciously charged in SRMCC No. 2653 of 2001 for possession of burglary tools contrary to Section 308 (1) of the Penal Code. He was released on bond, but his efforts to obtain a P3 form proved futile prompting him to seek help from Christian Lawyers Legal Centre in Mombasa but to no avail as the letter written by Mr. Kamau Advocate on the 27/8/2003 to the OCPD (Mombasa) did not yield any fruit.

5. The Plaintiff states that his case was referred to the International Justice Mission and on the 5/9/2001, in the company of Mr. Kamau advocate; he was issued with a P3 form at the Nyali police station, and advised by **Mr. Oluoch** to attend an identification parade scheduled for the 13/10/2001, which was bungled as neither the Defendants nor **Mr. Oluoch** showed up.

6. The Plaintiff states that SRMCC No. 2653 of 2001 commenced on the 4/3/2002 and the 8th Defendant who was the sole prosecution witness named the 5th and 7th Defendants as having been in the squad of police officers who were on patrol during his assault. On the 10/6/2002, the charge sheet was amended to the offence of preparing to commit a felony, contrary to Section 308(2) of the Penal Code (Cap 63 Laws of Kenya) but after his case was presented to the 1st Defendant by the Director of International Justice Mission on the 23/8/2002. The 1st Defendant through the Coast Province State Counsel **Mr. Patrick Gumo** on the 23/10/2002 withdrew the said SRMCC No. 2653 of 2001. However, no investigations into his assault or prosecution of the perpetrators of his assault were ever undertaken.

7. The Plaintiff states that his rights under the Constitution were grossly violated by the 1st Defendant's officers, and that prior to the breaches by the Defendants, he used to be a machine attendant. However, because of lack of sight in his left eye, his earning capacity has diminished, the quality and enjoyment of his life has been greatly undermined, he has developed diabetes and he is not able to access any special treatment because he is poor. Consequently, he prays compensation for the permanent disability that he suffered.

8. On cross-examination by **Mr. Makuto** Learned Counsel for the 1st Defendant, the Plaintiff confirmed that he was assaulted by more than one police officer at night. He had no torch, and that his eye was injured during the assault as per the treatment notes contained in his list of documents. The Plaintiff as his own witness confirmed that the P3 Form issued to him was filled on 5/9/2001 and it stated that the injuries he sustained were five weeks old at the time of examination. He further confirmed that the charge of being in possessing of house breaking equipment was a mere front to deflect attention from his assault.

9. PW2 **Fredrick Mmbolo Wiraka** adopted his Affidavit sworn on the 28/1/2019. In the said Affidavit, it is averred that at the time of the incident, the Plaintiff (PW1) was a neighbor to PW2, and on 3/8/2001 at 1900 hours, while sitting at his front porch, he saw a contingent of police officers surrounding houses belonging to the residents of Shauri Yako village. Further, PW2 states that he was arrested together with

one **Felix Ingosi**, and while heading towards PW1's house, he saw a group of policemen armed with clubs and whips ruthlessly beating up the Plaintiff, while he lay flat on the ground bleeding profusely and later on bundled PW1 into a waiting pick-up.

10. PW2 states that since the security lights were on, he was able to identify three of the police officers who assaulted the Plaintiff, and he can positively identify them if he saw them again. Further, PW2 states that at the police station, he saw a police officer named **Musa** who came out of another vehicle, and PW2 overheard him commend an officer named **Ruto** for a job well done.

11. PW2 testified that he was locked up by an officer known as Baraza for allegations of robbery and possession of narcotic (bhang). The said police officer demanded Kshs. 10,000/= to secure his release. PW2 testified that they demanded medical attention for the Plaintiff, and after about two days, their demands to have the Plaintiff taken to hospital was heeded to by an officer named Bernard who took the Petitioner to hospital where the Petition was admitted.

12. On cross-examination, by **Mr. Makuto** PW2 confirmed that he had no evidence that he was the Plaintiff's neighbor, but he saw police officers beating the Plaintiff, although he does not remember the shirt the Plaintiff had on, when they were arrested and accused of being in possession of a gun.

Response

13. The Originating Summons was opposed by a Replying Affidavit sworn on 20/9/2003 by **David Mwangangi**, who was then OCS Nyali Police Station. The deponent avers that on the 3/8/2001, he deployed the 4th to 8th Defendants to oversee security matters at Shauri Yako slums within Kongwea, where there had been various reports of muggings, burglaries and other similar criminal offences.

14. In the course of their duties the 4th to 8th Defendant arrested various persons including the Plaintiff herein, who looked suspicious and was carrying a polythene bag containing a panga, an axe and a somali sword. The Plaintiff dropped the bag and took off, while the police officers pursued him in conjunction with the members of the public suspecting that the said weapons were to be used in preparation to commit a felony. Unfortunately, the Plaintiff tripped, fell and got injuries on his left eyebrow, and was thereafter arrested by the police officer together with members of the public. A copy of the O.B was annexed and marked "M(a)"

15. The deponent avers that some of the suspects arrested on the 3/8/2001 were charged in Court, but the Plaintiff was not presented before Court because by 4/8/2001, he had not been interrogated, and he had an injury that required medical attention. Further, the deponent avers that the Plaintiff had informed him that he sustained his injuries when he fell down while escaping apprehension by the police officers who were hot in pursuit, and at no time did he complain that the injuries were inflicted by any of the arresting officers.

16. The deponent directed the Plaintiff to be taken to the hospital before he could be charged. The Plaintiff was hospitalized at the Coast General Hospital up to the 13/8/2001, when he was discharged and brought back to the police station where he was interrogated as a robbery suspect for a series of robberies, which had occurred at Shauri Yako slums. An identification parade could not be conducted as the deponent could not get people with injuries on the left eye brow so as to have the Plaintiff identified. It was therefore resolved that the Plaintiff was to be charged with possession of instrument of house breaking contrary to Section 308 (1) (c) of the Penal Code, which charge was later amended to a charge of preparation to commit a felony. The prosecution later entered a plea of *nolle prosequi*.

17. The deponent confirmed that on the 5/9/2001, the Plaintiff in the company of his advocate complained of assault by the police officers, and was duly issued with a P3 form. A file was opened for a complaint against a police officer, and Inspector Muturi, the then Deputy O.C.S was tasked with the investigations into the complaint.

Submissions

18. On the 10/12/2019, this Court directed that the Originating Summons herein be dispensed with via written submissions. The Plaintiff's submissions were filed on 21/1/2020, while the Defendants' submissions were filed on 2/6/2020. Both Counsel for the Plaintiff and the Defendants reiterated the contents of their respective affidavits in support of their respective cases.

19. **M/s. Mukoya** Learned Counsel for the Plaintiff submitted that the 4th-8th Defendants, who were the arresting officers, did not file any Affidavit to controvert the Plaintiff's narration of what transpired at Shauri Yako slums on the 3/8/2001. Consequently, the Affidavit sworn by the 3rd Defendant on those issues is hearsay evidence.

20. Counsel submitted that the 3rd Defendant was unable to explain why the Plaintiff was held for 8 days instead of 24 hours as provided in law. Counsel further submitted that the 4th to 8th Defendants beat up the Plaintiff and injured his eye thereby infringing on the Plaintiff's rights guaranteed under Section 74 (1) of the Constitution(repealed) which provides that a person should not be subjected to torture or to inhuman and/or degrading treatment. Counsel submitted that under Section 77(1) (b) of the Constitution, the Plaintiff ought to have been informed, as soon as was reasonably practical in a language he understood the offence he was being charged with, which was not done in this instance.

21. On damages awardable, Counsel relied on the P3 Form, treatment notes, Medical Report by **Dr. Ajoni Adede** and the finding in **Wachira Weteire vs. AG, Misc Civil Case No. 1184 of 2003** to seek for an award of Kshs. 4,000,000/= as general damages and Kshs. 6,000,000/= as exemplary damages.

22. **Mr. Makuto** Learned Counsel for the Defendants submitted that during the proceedings in Mombasa Chief Magistrate Court Criminal Case No. 2653 of 2001, the Plaintiff did not state that police had assaulted him. Counsel submitted that it is true that the Plaintiff suffered laceration to the left eyebrow and total Hyphaema. The Hyperemia was resolved on conservative management and the Plaintiff was asked to attend an eye clinic, but there is no proof that the Plaintiff actually attended an eye clinic.

23. **Mr. Makuto** further submitted that the Plaintiff did not identify the officers who assaulted him. Consequently, the Plaintiff failed to prove his case on a balance of probabilities, and that the Plaintiff never controverted the contents of the Defendants' Replying Affidavit on what transpired.

Determination

24. I have considered the Originating Summons, the viva voce evidence adduced, and the opposing affidavits and rival submissions. Two issues arise for determination; first, whether the Plaintiff's constitutional rights were violated and, second; what reliefs should be granted.

25. From the pleadings and submissions, and According to PW1, on the 3/8/2001, the police officers brutally attacked him for no reason and without any provocation. He was arrested and held until 6/8/2001, when he was escorted to the Coast General Hospital where he was admitted but remained under police guard. The Plaintiff was discharged on the 13/8/2001 and taken to the Nyali Police Station where he was detained until 17/8/2001, when he was produced before a Magistrate Court in Mombasa and charged in Mombasa SRMCC No. 2653 of 2001 with possession of burglary tools contrary to Section 308 of the Constitution. The question is whether the Plaintiff's arrest and confinement was lawful.

26. PW1's evidence was corroborated by that of PW2, **Fredrick Mbolo Wiraka**, a neighbour to the Plaintiff. PW2 confirmed that he saw the Plaintiff being brutally beaten outside his house, while he was lying flat on the ground, bleeding. Further, PW2 testified that although it was dark, the security light were on and he could see and could identify three of the officers who brutally attacked the Plaintiff, arrested them, and took them to Nyali police station where they were detained for two days before the Plaintiff could get any medical attention.

27. It is noteworthy that the 4th to 8th Defendants never called evidence to rebut the account of what transpired as narrated by the Plaintiff. In fact, Counsel for the Defendants relied on the Affidavit sworn by the 3rd Defendant who was the OCS at Nyali police station during the alleged detention of the Plaintiff. In the said Affidavit, the 3rd Defendant confirmed that he deployed the 4th to 8th Defendants on the 3/8/2001 to oversee security matters at Shauri Yako slums and that he personally checked up on the arrested persons, the Plaintiff included, and he confirmed that the Plaintiff had injuries on his left eyebrow, injuries to his knees and blood stains on his trouser. The Defendant's case is that the Plaintiff fell down while escaping apprehension by the police officers, and that at no time was the Plaintiff injured by the arresting officers. On what transpired during the arrest of the Plaintiff, the 3rd Defendant relied on the version of events as told him by Sergeant **Philip Mavuka** who is the 8th Defendant.

28. In my view, the admissibility of the 3rd Defendant's averments must be weighed against the provisions of Section 33 of the **Evidence Act (Chapter 80 of the Laws of Kenya)**, which deals with statements by persons who cannot be called as witnesses, and lays out the kind of statements that constitute exceptions to the hearsay rule by providing as follows:

"Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases –

- a) **relating to cause of death;**
- b) **made in the course of business**
- c) **against the interest of maker**
- d) **an opinion as to public right or custom**
- e) **relating to existence of relationship**
- f) **relating to family affairs**
- g) **relating to a transaction creating or asserting, etc., a custom**
- h) **made by several persons and expressing feelings."**

29. In my view, the averments by the 3rd Defendant with regard to what happened to the Plaintiff during his arrest and the alleged interrogation can at best be described as hearsay because, there is nothing that has been placed before the Court to show that the 4th to 8th Defendants were incapable of swearing to the events that are deponed to in the 3rd Defendant's affidavit. Further, it is not alleged that the 4th to 8th Defendants are deceased, or that they could not be found to make the averments of fact that the 3rd Defendant purports to make on their behalf, or that for any other reason they could not swear affidavits themselves to place before the court the evidence that they wish to rely on in their defence to the alleged violation of the Plaintiff's constitutional rights. In any event, the averments by the 3rd Defendant with regard to what happened to the Plaintiff does not fall within any of the exceptions allowed by section 33 of the Evidence Act set out above. Consequently, I find and hold that the 3rd Defendant has no capacity to depone matters of facts and events that happened when he was not there. Therefore, the Plaintiff's account on his brutal assault by the 4th to 8th Defendants remains uncontroverted.

Whether the Plaintiff's constitutional, rights were violated

30. The Plaintiff was arrested on 3/8/2001 but was not produced in Court or dealt with in accordance with the law until 6/8/2001 when he was admitted at the Coast General Hospital up to 13/8/2001 when he was discharged and taken back to Nyali Police Station, where he remained up to the 17/8/2001 when he was arraigned in Court and charged with the offence of being found in possession of instruments of house breaking contrary to Section 308 (1) of the Penal Code.

31. Section 70 (b) of the repealed Constitution guaranteed the right to life, liberty, security of the person and the protection of the law so long as that right did not jeopardize the right of others. **Section 72(3)** provides as follows:

“A person who is arrested or detained –

(a) for the purpose of bringing him before a Court in execution of the Order of a Court; or

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a Court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with”.

32. The Plaintiff was charged with an offence that did not carry the death penalty. Consequently, under the provisions of the Constitution as set out above, he should have been charged in court **within 24 hours of his arrest**.

33. The burden of proving that the Plaintiff was brought to Court as soon as was reasonably possible as required under Section 72(3) (b) of the repealed Constitution was on the 3rd Defendant. In justifying the arrest, the 3rd Defendant averred that the Plaintiff was a robbery suspect, and therefore he could be held for a period of 14 days during investigation. In my view, no evidence was led by the 3rd Defendant to demonstrate that there was reasonable belief that the Plaintiff had committed a capital offence to warrant his detention for more than 24 hours. Further, the arresting officers never gave their testimony on oath. Consequently, I find and hold that there was violation of the Plaintiff’s constitutional rights when he was detained beyond the period allowed in law, and there was no attempt to justify that violation. In **Albanus Mwasia Mutua vs. Republic Criminal Appeal No. 120 of 2004**, the Court affirmed that where an accused person is not arraigned in Court within 24 hours of his arrest, the burden of proving that the person arrested has been brought before a Court as soon as is reasonably practicable rests upon any person alleging that the provisions of the section have been complied with.

Protection from Torture and other Cruel and Degrading Treatment

34. In **Republic vs. Minister for Home Affairs and others Ex parte Stanze [2007] eKLR** the Court stated thus;

“Torture means inflicting of intense pain to the body or mind; to punish, to extract confession or information or to obtain sadistic pleasure. It means infliction of physical founded suffering or the threat to immediately inflict it, where such infliction or threat is intended to elicit or such infliction is incidental to means adopted to elicit, matters of intelligence or forensic proof and the motive is one of military, civic or ecclesiastical interest. It is a deliberate inhuman treatment causing very serious and cruel suffering “inhuman treatment” is physical or mental cruelty so severe that it endangers life or health. It is an intentional act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack or human dignity.”

35. The Plaintiff testified that his right not to be subjected to torture and other cruel and degrading treatment protected under Section 74(1) of the Constitution was violated by the 4th to 8th Defendants. The Section 74 (1) states as follows:

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

36. The Plaintiff claimed that he was physically attacked and assaulted by the 4th to 8th Defendants and as a result of that assault, he suffered irreparable loss of sight in his left eye and he continues to suffer pain and diminished prospects of gainful employment. The Plaintiff produced a P3 Form dated 5/9/2001, and a medical report from Gama Medical Clinic by **Dr. Ajoni Adede** dated 22/01/2019 which indicates that his left eye has collapsed inwards and the black part is destroyed (corneal rapture and there is nil perception of light). Therefore, the Plaintiff has 50% permanent partial disability due to blindness on his left eye.

37. It is clear pursuant to evidence herein that the Plaintiff suffered physical injuries in the hands of the defendants. The Medical Report indicates the nature and extent of that injury, which in this case is 50% permanent disability to his visionary powers as a result of the ensuing blindness in the left eye.

38. In **Harun Thungu Wakaba & Others vs. Attorney General, Miscellaneous Application No.1411 of 2004**, the Court held that the actions of being stripped naked, assaulted with leather whips, broken chairs, metal bars, slaps, kicks and blows and being kept in a dark cell, were all acts of torture which are in violation of the right to protection from inhuman treatment as provided under **Section 74(1)** of the **Constitution**.

39. The Plaintiff has proved that he was assaulted by the 4th to 8th Defendants acting in their official capacity and in their course of duty, and their actions, fall within the definition of torture as set out above. Not only is torture prohibited by the Constitution but, the repealed **Police Act at Section 14A** also expressly prohibits police officers from subjecting any person to acts of torture, cruel, inhuman or degrading

treatment. I therefore find and hold that the Plaintiff was subjected to torture, inhuman and degrading treatment in contravention of his rights as provided for under **Section 74** of the **Constitution**

Appropriate Reliefs

40. The issue now is the quantum of damages payable. The Plaintiff prayed for general damages of Kshs. 4,000,000/- and exemplary damages of Kshs. 6,000,000/-.

41. The reason for granting compensation in cases of breach or violation of rights and fundamental freedoms is not to return a person to the position he was before the violations, but to act as a deterrent against similar violation in the future. See **Pilkington, Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms [1984] 62 Canadian Bar Review 517**, **the purpose of awarding damages in Constitutional matters should not be limited to simple compensation, but such an award ought, in proper cases, to be made with a view to deterring a repetition of breach or punishing those responsible for it or even securing effective policing of the Constitutionally enshrined rights by rewarding those who expose breach of them with substantial damages.**

42. On the award of damages, the court determines what is appropriated based on the circumstances of the case. This was stated in the Court of Appeal in the case of **Gitobu Imanyara & Others vs. Attorney General [2016] eKLR**.

“it seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is “appropriate and just” according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement, which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration. Public policy considerations is also important because it is not only the petitioner's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.”

43. In the present Originating Summons, the Plaintiff was arrested on 3/8/2001, and unlawfully held until 17/8/2001 when he was arraigned before a Magistrate Court. That was a period of 14 days of unlawful confinement. The Plaintiff has suffered a 50% partial permanent disability as he is now blind in his left eye, which was a result of torture by the 4th to 8th Defendants. That kind of damage will never be repaired, and no award would be sufficient to redress the same. In the circumstances, I believe an award of Kshs. 1,500,000/= would be a sufficient statement emanating from this Court pursuant to the declaration that the Plaintiff's rights have been violated.

44. In addition, a sum of Kshs. 1,500,000/= is awarded being damages in compensation for the loss of the Plaintiff's left eye.

45. The Plaintiff also pleaded for exemplary damages. However, as Courts have constantly held, these are not payable where one has challenged violation of rights and fundamental freedoms in the Bill of Rights. (See **Benedict Munene Kariuki & 14 others vs. Attorney General Petition No 722 of 2009, Standard Newspaper Limited & another vs. Attorney General & 4 others [2013] eKLR** and **Kenneth Stanley Njindio Matiba vs. Attorney General [2017] eKLR**

46. In the upshot, this Court finds and holds that the Originating Summons dated 11/7/2003 has been proved on a balance of probability and is allowed in the following terms:

- i. A declaration is hereby issued that fundamental rights and freedoms of the Plaintiff protected under Sections 72(3) (b) and 74(1) of the repealed constitution were violated by the 4th to 8th Defendants who are agents of the 1st to 3rd Defendants.
- ii. The Plaintiff is hereby awarded Kenya shillings 1, 500, 000 as damages for the violation in (i) above
- iii. A further sum of Kshs. 1,500,000/= is awarded to the Plaintiff being General damages for loss of the Plaintiff's left eye.
- iii. The Costs and interest of the Originating Summons shall be for the Plaintiff.

Orders accordingly.

Dated, Signed and Delivered at Mombasa this 5th day of August 2020.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the absence of parties pursuant to notice issued on 30/7/2020.

Mr. Kaunda Court Assistant