REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

PETITION NO. 12 OF 2013

IN THE MATTER OF THE CONSTITUTION OF KENYA (NOW REPEALED) SECTION 72(1), (2), (3), (6) AND SECTION 74

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICELS 22 AND 23

GEORGE KARIUKI WANJAU…….…….....……PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL…….....……..RESPONDENT

JUDGEMENT

INTRODUCTION

1. The Petitioner is a farmer and a resident of Ngashura Kiamaina in Nakuru County. According to the Petitioner, in the year 1992 police officers raided and searched his house and thereafter arrested him without informing him of the reason for his arrest and was detained for a period of 11 days at Menengai Police Station where he claims that while in detention he was tortured through physical beatings by police officers.

2. The Petitioner claims that he was later transferred to Kericho Prison where he was further detained for five days before he was arraigned at the Kericho Law Courts where the charge sheet was read to him and he learnt that he was charged with the offence of being in possession of an illegal firearm contrary to Section 4(1) of the Firearm Act. He was released on bond after 4 months and was later acquitted when the case was transferred to Nakuru.

3. The Petitioner further claims that on 7th November, 1993, he was arrested on his farm on allegations that together with others, they had raided Bahati Police Station and robbed two constables of their rifles. He was taken to the Nakuru Provincial Police Headquarters where he was tortured with physical beatings which resulted in him losing four of his teeth. He further claims that he was forced to sleep in a waterlogged cell and was detained for 3 months after which he was released without any charges being preferred against him.

4. He claims that his right to protection of his right to personal liberty and protection against inhumane treatment was breached and that during his detention he lost 2,500 chickens.

5. In his Petition dated 17th April, 2013, the Petitioner seeks the following orders:-

(i) A declaration that his constitutional rights aforesaid were infringed.

(ii) General damages for breach of his fundamental rights and freedoms.

(iii) General damages for the loss of his 2,500 chicken.

(iv) Costs of this Petition.

The Respondent opposed the Petition through grounds of opposition dated 20th November, 2014 as hereunder:-

(i) The Petition is fatally and incurably defective.

(ii) The application is bad in law and an abuse of the court process.

(iii) The Petitioner has failed to lay a basis for the claim.

(iv) The application lacks merit.

Petitioner's case

6. The Petitioner filed a sworn affidavit and also testified under oath. The Petitioner averred in his Affidavit and in court that in the year 1992 the police came to his home carried out a search where they found nothing but they proceeded and arrested him. He was accused by the police of having a firearm which he denied and was taken to the CID for 2 days where he was assaulted. He was later transferred to Menegai Police Station where he was held for 9 days and thereafter he was transferred to Kericho Prison and placed in remand.

7. He averred in his Affidavit that he was taken to court on the 5th day after his transfer to Kericho Prison where he was charged with being in possession of a firearm. The Petitioner further swore and averred that he was given bond after four months in custody. Later the case was transferred to Nakuru and he was eventually acquitted.

8. The Petitioner stated under oath and averred in his Affidavit that on the 17th November, 1993, he was arrested again at his home on the charge that he and 15 others including Koigi Wamwere had raided Bahati Police Station and robbed two police constables of their rifles. He averred in his Affidavit that he was taken to Nakuru CID Provincial offices where he was tortured by been physically beaten so he could admit that he had participated in the raid and to implicate Koigi Wamwere.

9. In his sworn statement in court he stated that as he was being beaten, he tried to escape and he fell on a table and lost 4 teeth and that the police never treated him. He was detained at Nakuru G.K prison where he was placed in a cell which was waterlogged and was not allowed to see his people. He further claimed under oath that at one time he was taken to Lakeview in the Nakuru National Park where, together with other arrested people, he was ordered to strip naked and to lie on the ground and was assaulted.

10. As proof of the torture he underwent, the Petitioner during hearing submitted a report by Amnesty International (Exh No. 1) where his name was included as a victim of political torture. He swore that he could not read but he had been interviewed by human rights people. He also produced a newspaper cutting of the Daily Nation of 13/1/1994 (Exh No. 3), showing a photograph of himself and others with whom he was arrested including are Koigi Wamwere.

11. The Petitioner maintained that he had been held in detention for 3 months after which he was released without any charges being preferred against him. As a result of his detention he lost 2500 chicks which he had bought as there was no one to care for them and was further forced to sell his shamba so as to repay a loan he had taken with Agricultural Finance Corporation (AFC) which he could not service while in custody. He reasoned that the arrests were politically instituted and that his constitutional rights and fundamental freedoms under Section 72 and 74 of the Constitution (repealed) were infringed and prayed that the court grant him damages.

12. In cross-examination by Mr. Kirui, learned State Counsel for the Respondent, the Petitioner stated that his troubles started in 1992 but he did not bring his case earlier of the losses he incurred. He stated at the time of his arrest only his wife was at home as he did not live with his children who were grown up and claimed that his neighbours saw him being arrested. He also stated that he did not go to hospital when he was assaulted as he was in custody and that he only lost his four (4) teeth and was not injured anywhere else.

13. The Petitioner further said that when he was first taken to court he did not have an advocate but only got advocates later. He claimed that his earlier advocates being Paul Mwite, Mirugi Kariuki, Kamau Kuria and Kagucia, kept all his court documents and it was their responsibility to attach them to the Petition.

Respondent's case

14. The Respondents closed their case without calling any witnesses. Mr. Kirui learned State Counsel informed the court that he was unable to get the police officers involved and to trace the documents as the alleged violation took place in 1992 which was a long time ago.

Submissions

15. The Petitioner filed his written submissions dated 22nd August, 2017 on the 23rd August, 2017 while the Respondent filed its written submissions dated the 20th November, 2017 on the same day. Parties proceeded to highlight their submissions on the 29th January, 2018.

Petitioner's submissions

16. Mr. Karanja, learned counsel of the Petitioner relied on his written submissions and the Supporting Affidavit. The Petitioner submitted that there was no unreasonable delay in filing the Petition as there was no provision in the repealed Constitution that provided for a limitation of time to file a claim based on fundamental rights and freedoms. He relied on the case of **Dominic Arony Amolo Vs Attorney General Hc Misc Application No. 494 of 2003.** It was further submitted that the Petition was not instituted earlier because the regime that had violated his constitutional rights was still in power.

17. On whether the Petitioner's constitutional rights were violated, it was submitted that he was charged with an offence that did not carry the

death penalty and therefore he was to be arraigned in court with 24 hrs of his arrest as per Section 72(3) of the repealed Constitution. Reliance was placed on the case of **Albanus Mwasia Mutua vs Republic Criminal Appeal No. 120 of 2004.** He was instead held in custody for fourteen (14) days before he was arraigned in the Kericho Law Courts and charged with being in possession of a firearm and was only informed of the charges preferred against him when the charge sheet was read to him in court.

18. The Petitioner further submitted that his right not to be subjected to torture and other cruel and degrading treatment under Section 74 of the repealed Constitution were violated while he was in custody for four months in Kericho and three months in Nakuru. It was submitted that while in Nakuru he was beaten leading to the loss of his four teeth and was kept in a cell that was flooded. Further, he along with others were tortured at Nakuru National Park when they were undressed and canned by the police officers. Reliance was placed on the case of **David Gitau Njau & 9 Others Vs Attorney General [2013] eKLR.**

19. It was further submitted that the Petitioner was subjected to brutality and torture and that records were not easily accessible making it difficult for the Petitioner to bring the evidential material expected of him.

20. On whether the Petitioner was entitled to the reliefs sought, it was submitted that the Respondent failed to tender evidence in support of the Respondent's case and therefore the Petitioner's case remained unchallenged and that answers in cross examination could not lay a basis for the Respondent's case and therefore the Petitioner's claim was uncontroverted.

21. The Petitioner further submitted that a constitutional court is concerned to uphold or vindicate the constitutional rights contravened and where the person wronged suffered damage, the court should award him damages to vindicate the constitutional right and depending on the circumstances of the case. That a party whose constitutional rights were found to have been violated was entitled to a compensation of damages, the quantum of which was in the discretion of the court.

22. For the torture and unlawful incarceration, the Petitioner submitted that he was entitled to general damages for violation of his constitutional rights to the tune of KShs.6, 500,000/-. He relied on **Harun Thungu Wakaba Vs The Attorney General Misc App No. 1411 of 2004** and **Rhumba Kinuthia VS Attorney General H.C Misc. Application No. 1408 of 2004**.

Respondent's submissions

23. Mr. Kirui, learned counsel for the Respondent submitted that they had a challenge to get officers who were involved then to file a Replying Affidavit as it was a long time ago. It was further submitted that there had been an inordinate delay in filing the Petition as the violation happened in the year 1992 which was over 20 years ago. It was submitted that a delay of more than 10 years was not justified as the government regime that purportedly carried out the illegal acts had left office in the year 2002 a whole 11 years before the Petition was filed. He prayed that the Petition be dismissed.

24. Counsel submitted that the Petition as drawn was vague and unsupported by evidence as the Petitioner had failed to produce any evidence of the month or day he was arrested such as the occurance book report or number, the criminal charges preferred by way of a charge sheet or court proceedings, or any medical evidence on the torture he suffered and that the Petition was a fishing expedition. It was further submitted that a party claiming torture must corroborate and provide substantial evidence in support of its claim. Reliance was placed on the case **Kirugui & another Vs Kabiya and 3 others [1978] KLR 347.**

25. On the issue for damages it was submitted that special damages must be specifically pleaded and proved and that the Petitioner had failed to prove the loss of 2,500 chickens as there was no evidence and that he had not made an express claim but left it to the court to decide. Reliance was placed on the case of **Hahn V Singh Civil Appeal No. 42 of 1983 [1985] KLR 716.** It was further submitted that the prayer for compensation for Ksh.6,500,000/- was unjustified and inordinately high as the Petitioner failed to prove his case. The Respondent and relied on the case of **Miguna Miguna Vs The Attorney General Petition No. 16 of 2010** in which only Kshs.1.5 million was awarded.

Petitioner's response to the Respondent's submission

26. Mr. Karanja for the Petitioner in reply to the Respondent's submissions submitted that there was no limitation to the violation of constitutional rights. He further submitted that the Petitioner could not remember the exact dates due to the age of the Petitioner who was around 81years of age. Counsel additionally submitted that the there was no denial that he had been arrested and that the Petitioner had been detained with others who had been compensated.

Determination

27. I have considered the pleadings, written submissions and authorities relied on by the parties together with the sworn testimony of the Petitioner. There are only two issues for determination. The first is whether the Petition is time barred and the second is whether the Petitioner has proved the infringement of his constitutional rights by the State.

Whether the Petition is time barred

28. It is the Respondent's contention that this Petition should be dismissed for inordinate delay as the alleged violation took place over 20 yeras ago and further that there had been a change of government in 2002 and therefore the Petitioner had failed to explain the delay in filing for the past 11 years.

29. It is now trite that there is no limitation to a claim for breach of fundamental rights and freedoms as there is no known law that place limitation of time. This was the position as held in the case of **Dominic Arony Amolo v the Attorney General HC Misc. Applic No.494 of 2003** that a claim for enforcement of the Bill of Rights does not fall within any known cause of action as known to the Limitation of Actions

Act (Cap 22 Laws of Kenya).

30. However despite there been no limitation of time in a claim for enforcement of rights and freedoms under the Constitution, a party is required to justify why there was a delay in bringing the issue to court. In **James Kanyiita Nderitu v Attorney General and another, Nairobi Petition No.180 of 2011 [2013] eKLR** where the court stated thus:-

> ***"Although there is no limitation period for filing proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under section 84 of the Constitution, is entitled to consider whether there has been inordinate delay in lodging the claim. The Court is obliged to consider whether justice will be served by permitting a respondent, whether an individual or the State in any of its manifestations, should be vexed by an otherwise stale claim."***

31. The Petitioner's contention was that the delay in filing the Petition was that government that had violated his rights was still in power. However there was a change in regime in the year 2002 when a new government came into power and it took the Petitioner over 11 years before he came to this court which delay has not been explained. During the same period of 11 years other individuals whose fundamental rights and freedoms had been breached, such as Koigi Wamwere, whom the Petitioner claimed to have been detained with, sought redress from the court.

32. In **Njuguna Githiru v Attorney General Pet 204 of 2013[2016] eKLR** where Lenaola J (as he then was) made observations relevant to the present Petition thus:-

> ***"Having so said however, it is imperative for a Petitioner to demonstrate some justification for prolonged delays in instituting claims especially in light of the fact that the avenues and mechanisms for addressing such violations were already in existence after the change of the alleged oppressive regime of governance. I say so because as early as the year 2003, persons aggrieved by the acts of the Moi Regime approached the courts for redress pertaining to alleged violations of their constitutional rights and fundamental freedoms. These include Stanley Waweru Kariuki vs Attorney General, Petition 1376 of 2003;Gitari Cyrus Muraguri vs Attorney General, Miscellaneous Case No. 1185 of 2003 (OS); Harun Thungu Wakaba vs Attorney General, Nairobi, Miscellaneous Application 1411 of 2004; Rumba Kinuthia vs Attorney General; Nairobi HCCC 1408 of 2004, Mugo Theuri vs Attorney General, HC Misc. Civil Case No 565 of 2005; David Njuguna Wanyoike vs Attorney General, Petition No. 729 of 2006; Oduor Ong'wen and 20 Others vs Attorney General, Petition No. 777 of 2008; Charles Gachathi Mboko vs Attorney General, Civil Case No. 833 of 2009 (O.S.); James Omwega Achira vs Attorney General, Petition 242 of 2009; Mwangi Mathenge vs Attorney General, Petition 240 of 2009; and Koigi Wamwere vs Attorney General, Petition 737 of 2009 among many others. The foregoing further indicates that the cases alleging violations by the oppressive regime have been filed from 2003 onwards and even before the promulgation of the Constitution of Kenya, 2010. Transitional justice cannot however be a matter ad infinitum or a process without end as the Petitioner seems to have argued."*** **(**Emphasis mine)

33. The cases above show that the change of Government in 2002 activated litigation from persons whose constitutional rights had allegedly been violated. It is clear that the Petitioner is guilty of inordinate delay which he has failed to justify. The consequence of such inordinate delay is that records that would be adduced as evidence cannot be traced as was the case with the Petitioner's documents who claimed that his advocates at the time kept all his documents. Similarly the Respondent claimed it was unable to trace documents regarding the Petitioners detention and did not produce anything as evidence. Another consequence of inordinate delay is that witness cannot be traced or their recollection of events would not be clear and they may have forgotten some of the details of the said happenings. The Respondent claimed that he was unable to trace any of the officers that were involved in the detention of the accused persons.

34. However the court cannot turn a blind eye to the historical context of the breach of fundamental rights and freedoms enshrined in the constitution where it was difficult to file cases of this nature before the promulgation of the Constitution 2010 and that the court cannot ignore the transitional justice as was held by Mativo J in **Eliud Wefwafwa Luucho & 3 others vs Attorney General (2017) eKLR** that:-

> ***"These Petitions were filed on 7th April 2016, almost 7 years after the promulgation of the 2010 constitution. I appreciate that 7 years is a long period of time and the delay has not been explained, but considering the prevailing political situation prior to the promulgation of the 2010 constitution which made it impossible for victims to file cases of this nature in court and bearing in mind the dictates of transitional justice, and in particular the need to uphold and strengthen the rule of law, and to hold the perpetrators of violations of human rights accountable, and the need to provide victims with compensation, and the need to effectuate institutional reform, I find that it would be unfair to uphold the defense of limitation in the circumstances of the present case."***

35. Further in the case of **Gerald Juma Gichohi & 9 others v Attorney General Petition No. 587 of 2012 [2015] eKLR** Lenaola J (as he then was) stated that:-

> ***"I reiterate my sentiments above and would add that it is true that the State today in a reconfigured Kenya, cannot shut its eyes from the failings of the past neither can it claim innocence for the excess of past regimes. It must pay the price for its historical faults and I must also agree with the Petitioners submission that the instant Petition should be approached in the context of transitional injustices especially now that there is a new dispensation under the Constitution 2010. Time is ripe for addressing past injustices that included gross violations of fundamental rights and freedoms as witnessed in the past and the citizenry must not fault the Courts for doing justice, albeit belatedly because delayed justice is indeed justice denied."***

36. In **John Muruge Mbogo v Chief of the Kenya Defence Forces & another [2018] Pet No. 603 of 2013 eKLR** Mwita J rendered himself on the subject of limitation thus:-

> ***"I am acutely aware that delay to initiate human rights violation claims may be prejudicial to the respondents. That is why the***

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

37. I agree with the reasoning in the above cited cases. Additionally, I have considered the circumstances of the Petitioner. He presented himself to the court as aged, illiterate and vulnerable. I therefore take the position that although there has been an inordinate delay in the filing of the Petition, it ought to be heard on its merits and in the interest of justice.

Whether the Petitioner's fundamental rights were breached

38. As I have already stated hereinabove, the Petitioner was unable to provide relevant documentation and was unable to call other witnesses to validate his claims. However the Petitioner was clear and though he could not remember exact dates narrated with clarity what he had experienced. Further he did not deviate from his testimony during cross examination and stood firm on what had happened to him and I found him to be a credible witness.

39. As stated hereinabove the Respondent did not file a Replying Affidavit and only relied on the Grounds of Opposition and the written submissions filed. It is now trite that where a Respondent fails to file a Replying Affidavit the facts deponed by the Petitioner remain uncontroverted. This was the position held in the case of **Wachira Weheire v Attorney- General Miscellaneous Civil Case 1184 of 2003 [2010] eKLR** where it was held that:-

"We note that the Defendant did not file any affidavit in response to the affidavits filed by the plaintiff. Thus, the facts deponed to by the plaintiff under oath stood unchallenged."

Similarly in the case of **Harun Thungu Wakaba v Attorney General [2010] eKLR** the court held that:-

"It is evident from the record that the defendant has not filed any affidavit in response to any of the affidavits filed by the plaintiff. In Misc. Case No.1408 of 2004 Rumba Kinuthia vs the Attorney General, Wendoh J. considering a similar Constitutional Reference, in respect of which no replying affidavit was filed, stated: "Despite the fact that the applicant made very serious allegations against the defendant, government agents, servants and police officers, no affidavit was filed in reply, so that all the facts deponed to by the applicant in his affidavit are what the court will take as representing the correct factual position."

"I am in entire agreement with this position. Indeed, the scenario herein is distinguishable from that dealt with by Nyamu J. in Constitutional Application No. 128 of 2006 Lt. Col. Peter Ngari Kagume & others vs Attorney General, where one side alleged and the rival side disputed and denied, thereby casting the burden on the one alleging to prove the allegations. No replying affidavits having been filed by the defendant herein, the factual position put forward by the plaintiffs in their affidavits stand unchallenged. Thus, further proof of those facts is not required." *(Emphasis mine)*

40. I find that the Respondent did not deny the allegations of the Petitioner under oath nor did they adduce any evidence and therefore the Petitioner's allegations are largely uncontroverted. The only question to be answered then is whether the Petitioner's fundamental rights were violated.

Right to liberty

41. **Section 72** of the repealed Constitution states:-

(1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases:

(a)……...

(b) ……..

(c) …….

(d) ……..

(e) Upon reasonable suspicion of his having committed or being about to commit a criminal offence under the law of Kenya.

(2) A person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.

(3) 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 of law as soon as is reasonably practicable, and where he is not brought before a court within 24 hours of his arrest or from commencement of his detention, or within 14 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 the subsection have been complied with . . .”

42. The Petitioner alleged that in the year 1992 he was arrested and detained for 2days at the Nakuru CID headquarters then he was transferred to the Menengai Police Station where he was held for 9days. Thereafter he was transferred to Kericho Prison where he was held for 5 days before he was finally arraigned at the Kericho Law Court with being in possession of a firearm. He further alleged that at the time of his arrest he was not informed of the reason of his arrest and only knew of the reason of his arrest when he was arraigned in court.

43. **Section 72 (3) (b)** of the repealed Constitution provided that a person who had been arrested must be produced in court within 24 hours of his arrest, except where he is held on suspicion of having committed a capital offence, in which case he should be produced in court within 14 days. In the first instance the Petitioner was charged with possession of a firearm which is not a capital offence and was only produced before court after 16days. In the case of **Albanus Mwasia Mutua v Republic Criminal Appeal No. 120 of 2004** the Court of Appeal held that the burden of proving that such a 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.

44. The Respondent had not provided any reasonable reason for the delay or any evidence to justify the failure to comply with Section 72(3) (b) of the repealed Constitution. I find that there was violation of the plaintiff’s right to personal liberty as the plaintiff should have been produced in court within 24 hours as provided under Section 72(3)(b) of the Constitution.

Protection from inhumane treatment

45. Section 74 (1) of the repealed Constitution provides:-

“No person shall be subject to torture or to inhuman or degrading punishment or other treatment.”

46. Torture has been defined in the ***Black’s Law Dictionary*****, 9th Edition,** as ***“the infliction of intense pain to the body or mind to punish, to extract a confession or information, or to obtain sadistic pleasure”.***

It further defines inhumane treatment as ***“Physical or mental cruelty so severe that it endangers life or health”.***

Article 1 of **The United Nations Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment** defines the term *‘torture’* as:

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

47. The Petitioner alleged that when he was remanded he was beaten severally leading to the loss of his teeth, he was further taken to Nakuru national Park where he was undressed and canned; and that he was further kept in a waterlogged cell for 2 days while at Menengai Police Station. It is trite that in order to prove torture a claimant has to avail evidence such as medical reports or evidence of other witnesses as was held in the case of **Peter Ngari Karume & 7 Others vs Attorney General No.128 of 2006** where Nyamu J as he then was held that:-

“Turning to the alleged violation as aforementioned, it is incumbent upon the Petitioners to avail tangible evidence of violation of their rights and freedoms. I have gone through the Petitioners’ affidavits which have horrifying allegations. The Respondent has denied all those allegations. The allegations of violations could be true but the court is enjoined by law to go by the evidence on record. The Petitioners’ allegations ought to have been supported by further tangible evidence such as medical records, witnesses’ or rather oral evidence capable of being subjected to cross examination to test its veracity. The Petitioners did not provide such evidence except the averments of what transpired to them.”

“It is most probable that in the prevailing circumstances then, the Petitioners were subjected to physical beating, torture, detention without trial among other violations but the court is deaf to speculation and imaginations and must be guided by evidence of probative value. When the court is faced by a scenario where one side alleges and the rival side disputes and denies, the one alleging assumes the burden to prove the allegation. I have gone through the entire court record and there is absolutely nothing to support the allegations made by the Petitioners.”

48. The Petitioner has relied on a report of Amnesty International which stated that “*Amnesty International medical delegates who examined him in early 1995 stated that their findings were consistent with the allegations of torture.”* However a report on torture which states a conclusion without any medical evidence is not the equivalent of a medical report by a medical practitioner. Further, the court cannot rely on the impartiality of the said report as the Petitioner had stated during cross examination that he had had an interview with “human rights people” and the same cannot be adduced as medical evidence of torture. Further, the Petitioner told the court in oral testimony that he had

had to replace his four (4) teeth with artificial ones. Again, there was no medical report to link the loss of teeth to the acts of the Respondents' agents. Without concrete evidence therefore, the court cannot find that the Petitioner was tortured. I agree with the exposition of Mwita J. in **David Irungu Mwangi v Attorney General Petition 226 of 2016 [2018] eKLR** that:-

> ***"Torture is not an easy claim to prove especially where the events complained of took place some distant period in the past and there in no benefit of a medical record to assist the court comes to a conclusion. If the Petitioner still feels the effects of the torturous acts he says he was subjected to, a medical report would have been helpful and more so if it was done immediately he was released from incarceration, to show that the treatment he complains of was the cause of this bodily suffering. In the absence of this vital evidence, it would be difficult for this court to find in favour of the Petitioner in so far as torture is concerned."***

49. However I believed the Petitioner's oral testimony that he was kept in a waterlogged cell for two days and further that he was taken to Nakuru National Park where he was ordered to strip naked and was caned all which while not torture amounts to other treatment as provided for in Section 74(1) of the repealed Constitution. In the case of ***John* Muruge Mbogo v The Chief of the Kenya Defence Forces & another [2018] eKLR,** the court interpreted Section 74(1) of the repealed Constitution thus:-

> ***"No person shall be subjected to torture or to inhuman or degrading punishment or other treatment" In my respectful view, the section used a disjunctive word "or" followed by "Other treatment" which meant torture, inhuman or degrading punishment or other treatment were prohibited. The words "or other treatment" used in section 74(1) being a constitutional provision conferring fundamental rights, should be given a broad, liberal and flexible interpretation to include any such treatment that is unusual to human beings and is intended to humiliate a person for sadistic pleasure. Stripping the Petitioner naked in public, forcing him to walk on his knees on concrete floors and keeping him in waterlogged cells, was such "other treatment" that was outlawed by section 74(1) of the repealed Constitution."***

50. From the foregoing I find that the Petitioner being subjected to strip naked and be locked in a waterlogged cell amounted to inhumane treatment in violation of Section 74(1) of the repealed Constitution and a violation of his constitutional rights.

Damages

51. Having found that the Petitioner's rights were violated it follows that damages are merited. In **Jennifer Muthoni Njoroge & 10 Others V Attorney General [2012] eKLR,** Lenaola J (as he then was) set the criteria for awarding damages in a similar case and stated that:-

> ***"In awarding damages therefore, I shall use the following criteria***
>
> ***(i) the torture inflicted on each Petitioner,***
>
> ***(ii) the length of time the Petitioners were held in unlawful custody.***
>
> ***(iii) the decided cases on the subject or matter,***
>
> ***(iv) what is fair and reasonable in the circumstances of each case, and I have chosen to give a lumpsum in each case."***

52. I have considered awards in the following comparable cases in which the amounts ranged between Kshs.1.5 million and 3.5 million: **Jennifer Muthoni Njoroge & 10 Others V Attorney General [2012] eKLR; Gerald Juma Gichohi & 9 others v Attorney General [2015] eKLR; Njuguna Githiru v Attorney General [2016] eKLR;** and **David Irungu Mwangi v Attorney General [2018] eKLR.**

53. The Petitioner herein was held for a period of sixteen (16) days before being arraigned in court, further he was subjected to inhumane treatment where he forced to sleep in a waterlogged cell for two nights and was forced to undress and canned. In view of the foregoing and bearing in mind the above principles I award the Petitioner a sum of Ksh. 1,500,000/- as general damages for violation of his fundamental rights.

54. The Petitioner has not proved his claim that he had 2,500 chickens as he claimed or that the said chickens died during his detention and as such the prayer sought for special damages fails.

55. In the end, I allow the Petition dated 17th April 2013 and make the following orders:-

> ***(i) A declaration be and is hereby issued that the Petitioner's constitutional right to liberty and freedom from inhuman or degrading treatment were violated.***
>
> ***(ii) The Petitioner is hereby awarded general damages of Kenya Shillings One Million Five Hundred Thousand only (Kshs.1.5 million) for violation of his fundamental freedom and rights aforestated.***
>
> ***(iii) The Petitioner shall have costs of this Petition.***

Orders accordingly.

Judgement signed

.....

R.LAGAT KORIR

JUDGE

Judgment delivered, dated and signed at Nakuru this 21st day of February, 2019

.....

JANET MULWA

JUDGE

In the presence of:

.....Court Assistant

.....For the Petitioner

.....For the Respondents