



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 567 OF 2015

SAMUEL NDIBA KIHARA.....PETITIONER

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

1. Through a petition filed on 17th December 2015, the petitioner herein, who describes himself as an adult of sound mind and a resident of Nairobi sued the respondent herein, the Attorney General of the Republic of Kenya, seeking the following orders:

a. A declaration that the petitioner's fundamental rights and freedom were violated.

b. A declaration that the petitioner is entitled to the payment of damages, and compensation for the violation of his rights.

c. General damages, exemplary damages and moral damages for torture for the petitioner.

d. Any further orders, writs, directions as the court may deem appropriate.

e. Costs of the suit plus interest

2. The petitioner's case is that that on 8th May 1986 at about 5pm, two special branch police officers attached to Kiambu police station arrested him at Karai Bar within Nairobi and detained him, incommunicado, in various police stations within Nairobi and its environs for 28 days during which period he was beaten, tortured and kept in deplorable conditions in violation of his constitutional rights, freedom and protection under Section 72(2)(a) and 729(2)(b) of the repealed Constitution and Chapter 4 of the current Constitution. He further alleges that he was threatened that he would be killed if he did not plead guilty to the charges levelled against him and that on 11th June 1986, he was charged in the Nairobi High Court with the offence of neglect to prevent a felony contrary to Section 392 of the Penal Code and was fined KShs. 5,000 which he paid on 13th June 1986.

3. He further states that owing to the conditions in which he was detained, his physical, psychological, economic and political life was negatively affected and that he still suffers from torture trauma, immense loss of earnings and damages. He also states that he was a businessman and thus lost his earnings for the period that he was in custody.

4. The petitioner further claims that at the time of his arrest, he had a fractured leg that was in a plaster cast, but that he was during the period of his incarceration denied access to medical treatment that led to the said leg being deformed thereby affecting his ability to engage in sexual intercourse that has led to his many broken marriages on the basis of sexual malfunction which has further affected his right to marry and sire children.

5. During the hearing of the petition, the petitioner testified that he languished in police custody for a period of 28 and that it took the intervention of Dr. Khaminwa SC, who applied for habeas corpus before he could be presented in court on the said charges of failing to prevent a felony. On cross examination, he explained that he was not formally booked in any police station following his arrest and that his business associates witnessed the said arrest.

6. He confirmed that the instant petition was filed at least 32 years after the arrest incident but explained that there was no time limit for claims for compensation for torture. He further testified that he did not have any medical records in support of the claim of torture or proof of the claim that he was a businessman prior to his arrest or that his children dropped out of school due the collapse of his business empire.

7. Mr. Uvyu, learned counsel for the petitioner submitted that the petitioner had, through the affidavit in support of the petition and oral evidence presented during the hearing established that his Constitutional rights under Section 72(2) and (3) of the old constitution had been violated as he was not only not given the reasons for his arrest, but he was also not presented in court within 24 hours from the time of his arrest.

8. Counsel submitted that the petitioner's testimony that he was tortured, in contravention of Article 74(1) of the old Constitution was not controverted by the respondents who did not tender any evidence during the hearing. For this argument, counsel relied on the decision in the case of **David Gitau Njau & 9 others vs Attorney General [2013] eKLR** wherein Lenaola J. (as he then was) in awarding the petitioners damages for the violation of their constitutional rights, held that even though there was no medical proof of torture, the petitioners' evidence was cogent and that there was no reason to doubt it.

9. On the issue of whether or not the petition is time barred, counsel submitted that there is no time limit within which a petitioner claiming a violation of his fundamental rights should lodge his claim.

Respondent's case

10. The respondent filed grounds of opposition in response to the petition in which it listed the following grounds:

1. That the petitioner has not demonstrated to court of any breach of either the Constitution or any law on the part of the respondent.

2. That the petitioner was found guilty and fined kshs 5,000/- way back in the year 1986 in the chief Magistrates Court which fine was duly paid by the petitioner.

3. That the petitioner has never appealed against the verdict of the court since 1986 and has not demonstrated to court on reason for the inordinate delay in filing the matter in this court.

4. That petition lacks merit and there is no iota of evidence on the alleged infringement of the petitioner's constitutional rights.

5. That the petition herein is defective, incompetent, and a gross abuse of the court's process.

11. Mr. Sekwe, learned counsel for the state submitted that the petitioner did not demonstrate that the respondent breached any law or the Constitution. Counsel argued that by dint of the provisions of **Section 107 of the Evidence Act**, where one alleges that his rights have been violated, he has the onus of tendering evidence to that effect. For this argument, counsel cited the decision in the case of **Anarita Karimi Njeru vs. Republic** where the court stated that one ought to bring forth evidence to prove the violation of a right as it is not enough to merely plead it.

12. Counsel asserted that in this case, the petitioner simply alleges the violation of his rights and does not put forth evidence to support his allegation and that the reference to the provisions of the Constitution deemed to have been infringed without any evidence of the manner of infringement ought to be disregarded.

13. Counsel observed that despite the petitioner's claim that he was incarcerated and held incommunicado for 28 days, no other witness testified to confirm the petitioner's claims and that the claims remain mere allegation without any cogent evidence in support thereof. Counsel further argued that the petitioner's claim that he was tortured was not proved as he did not tender any medical report to that effect. Counsel cited the decision in the case of **Nguku vs Republic [1985] KLR 412** and **Kirugi and Another vs Kabiya and 3 Others [1987] KLR 347**, wherein the court stated that:

"The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof."

14. On the petitioner's claim that he suffered immense loss of earnings and damages for the period of the incarceration, counsel submitted that no evidence was placed before the court to substantiate such a claim and that they therefore remain mere allegations. Counsel maintained that the petitioner ought to have at the very least tendered certificates proving the existence of the said business, statements of accounts and valuation reports showing how much profit he used to make and any losses incurred if any.

15. On the claim that the petitioner was charged in the Nairobi high court with the defective charge of 'Neglect to Prevent a Felony' contrary to section 392 of the Penal Code, counsel noted that the petitioner did not lodge an appeal against the conviction and the subsequent punishment meted out by the court but in fact adhered to the court's judgment and paid the fine imposed by the court. It was submitted that the right to appeal is a right available to all Kenyans who are aggrieved by a court's judgment and that the petitioner could therefore not express his innocence by mere words as he had an opportunity to prove his innocence at the time of judgment but instead chose to sleep on the said right.

16. Counsel urged the court to align itself with the decision of Justice Warsame (as he then was) in **Paul Kiplagat Birgen & 25 others vs I.E.B.C [2011] eKLR** where the court stated;

"... I think the application in its entirety is without merit. It is misdirected; it is like a rudderless plane wandering in the sky without any direction. I cannot direct parties to the routes to follow in achieving their rights if any. This Court must abandon these lost and directionless litigants. In the event they find their compass, this Court would be in a position to consider relevant

questions, and give adequate and compelling answers.”

17. On the claim for general, exemplary and moral damages, counsel submitted that the same could only be payable where the claim was proved or substantiated.

Analysis and determination

I have considered the pleadings filed herein, the parties’ submissions and the authorities that they cited. The main issues for determination area:

a) Whether the petitioner’s claim is viable having been filed more than 29 years from the date of the cause of action.

b) Whether there was a violation of the petitioners rights and;

c) Depending on the answer to (b) above the remedies available to the petitioner if any.

18. The petitioner listed various acts in petition, and the supporting affidavit, which he claimed amounted to violation of fundamental rights and freedoms. He claimed that his right not to be subjected to torture, cruel, inhuman and other degrading treatment as envisaged under Section 74(1) of the repealed Constitution was violated during the detention period. The said Section 74(1) of the repealed Constitution stipulates as follows:

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

19. The petitioner stated that during his incarceration, he was stripped naked, subjected to through beating, kicked around, taunted and locked up naked in filthy water - logged solitary cells for days on end in a failed attempt to extract a confession from him over his alleged involvement in the activities of a proscribed political grouping. He stated that the inhuman and degrading treatment continued for 28 days from the time of his arrest on 8th May 1986 till 11th June 1986 when he was taken to court at 10pm on a trumped up charge of neglect to prevent a felony contrary to section 392 of the Penal Code. He further stated that he pleaded guilty to the said charge, under duress, as the police had threatened to kill him if he denied the offence after which a fine of Kshs. 5,000/= was imposed on him.

20. Black’s Law dictionary, 10th edition, defines torture as follows:

The infliction of intense pain to the body or mind to punish, to extract a confession or information, or to obtain sadistic pleasure.

21. The European Court of Human Rights has defined torture and inhuman treatment in the **Greek Case 1969 Y.B. Eur. Conv. on H.R. 186 (Eur. Comm’n on H.R)** in the following terms;

“The notion of inhuman treatment covers at least such treatment as deliberately causes suffering, mental or physical, which, in the particular situation is unjustifiable. The word “torture” is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be de-grading if it grossly humiliates him before others, or drives him to an act against his will or conscience.”

22. The issue of what amounts to torture and cruel, degrading treatment has also been defined in **Samwel Rukenyia Mburu vs Castle Breweries, Nairobi HCC 1119 of 2003**, per Visram J (as he then was) as:

“Prohibition against torture, cruel or inhuman and degrading treatment implies that an “action is barbarous, brutal or cruel” while degrading punishment is “that which brings a person dishonour or contempt”

23. Guided by the above definitions I find that that in the circumstances of this case, the petitioner was under a duty to prove, on a balance of probabilities, that he was subjected to torture, cruel and degrading treatment contrary to Section 74(1) of the repealed Constitution. My finding is that while it was not disputed that the petitioner was arrested and arraigned for an offence for which he pleaded guilty, was convicted and sentenced to a fine, the claim that he was incarcerated for 28 days during which period he was tortured was not proved by any other evidence other than the petitioner’s supporting affidavits and sworn testimony. This court takes judicial notice of the fact that there were numerous reports of torture of suspects and detention without trial of suspected dissidents during the single party Moi regime of the 1980s. This is however not to say that every person arrested and charged with any criminal offence during the said period was a dissident or was subjected to torture and the burden of proof was on the petitioner to show that his fundamental rights were violated. I say so in view of the fact that in the instant case, and bearing in mind the fact that the petitioner pleaded guilty to the offence for which he was charged and was subsequently convicted on his own plea of guilty, which conviction has not been overturned on appeal/review one cannot tell, with certainty, that the charges were trumped up as the petitioner seemed to suggest. Needless to say, the burden is always on the claimant to prove his case to the required standards. See **Kirugi & Another vs Kabiya & 3 Others [1987] KLR 347**

24. The petitioner claimed that his detention was illegal, without any justifiable cause and amounted to a violation of the fundamental rights to personal liberty as enshrined under Section 72 of the repealed Constitution which stipulates as follows:

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

(a) in execution of the sentence or order of a court, whether established for Kenya or some other country, in respect of a criminal offence of which he has been convicted;

(b) in execution of the order of the High Court or the Court of Appeal punishing him for contempt of that court or of another court or tribunal; (c) in execution of the order of a court made to secure the fulfilment of an obligation imposed on him by law;

(d) for the purpose of bringing him before a court in execution of the order of a court;

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

(f) in the case of a person who has not attained the age of eighteen years, for the purpose of his education or welfare;

(g) for the purpose of preventing the spread of an infectious or contagious disease; Protection of right to personal liberty. 20 of 1987. 4 of 1988, s.5. Rev. 2009] Constitution of Kenya 57

(h) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community;

(i) for the purpose of preventing the unlawful entry of that person into Kenya, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Kenya or for the purpose of restricting that person while he is being conveyed through Kenya in the course of his extradition or removal as a convicted prisoner from one country to another; or

(j) to such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within Kenya or prohibiting him from being within such an area, or to such extent as may be reasonably justifiable for the taking of proceedings against that person relating to the making of any such order, or to such extent as may be reasonably justifiable for restraining that person during a visit that he is permitted to make to a part of Kenya in which, in consequence of the order, his presence would otherwise be unlawful.

(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 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. 58 Constitution of Kenya [Rev. 2009

(4) Where a person is brought before a court in execution of the order of a court in any proceedings or upon suspicion of his having committed or being about to commit an offence, he shall not be thereafter further held in custody in connection with those proceedings or that offence save upon the order of a court.

(5) If a person arrested or detained as mentioned in subsection (3) (b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall, unless he is charged with an offence punishable by death, be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

(6) A person who is unlawfully arrested or detained by another person shall be entitled to compensation therefor from that other person.

25. Having regard to the aforesaid provisions of 72 of the repealed Constitution it is clear that it was a requirement that an arrested person be produced in Court within twenty four hours where he was suspected of committing a normal criminal offence and within fourteen days where the offence was punishable by death. The Constitution was also clear that it was upon the respondents to show that they complied with this constitutional requirement. The reason for limiting one's liberty through arrest was for purposes of producing him or her in Court to be dealt with in accordance with the law, thereby checking on arbitrary arrest and unlawful detention of people in violation of their human rights to liberty.

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

27. In the instant case, however, I find that no material was placed before me to prove that the petitioner was held in police custody for 28 days or that he was tortured during his incarceration. While this court did not expect that the police could have issued the petitioner with a certificate of detention, if at all such a document exists, and even though courts have held the view that medical proof of torture is not

mandatory in claims for violation of constitutional rights, I still find that in the circumstances of this case, the petitioner could have at least tendered the evidence of any other witnesses, especially the witnesses he mentioned to have witnessed his arrest. It is worthy to note that the petitioner claimed that as a result of the torture that he was subjected to by the respondents he became impotent and is no longer able to engage in sexual intercourse. He added that his leg also got deformed after the detention. My take is that the petitioner could have easily proved the above allegations through a doctor's report.

28. It did not escape this court's attention that the petitioner testified that following his long period of detention, Dr. Khaminwa SC came to his rescue and applied for his release. This court takes further judicial notice of the fact that Dr. Khaminwa SC is still in active legal practice before our courts. I therefore find that if indeed the said counsel participated in securing the petitioner's release from detention as he alleged, then nothing would have been easier than for the petitioner to at least present the said counsel's affidavit to effect.

29. Furthermore, the petitioner also alleged that his thriving business suffered huge losses and had to shut down following his long detention in custody. Once again, no evidence was presented in the form of bank statements or financial records to prove this allegation.

30. Having regard to the instances that I have highlighted hereinabove, it is easy to conclude that the petitioner's claim was doubtful as it was not supported by cogent evidence even where such evidence could have been easily secured. I therefore find that the petitioner's claim that his fundamental rights and freedoms were violated was not proved to the required standards. I further find that it was not enough for the petitioner to merely claim that his rights under the Constitution were violated, he was under a duty to present evidence to prove such violation more so considering that he did not appeal against his conviction and sentence. I am guided by the decision in the case of **Annarita Karimi Njeru v Republic** (supra) in which it was held that a party alleging violations of the Constitution must at the very least indicate the constitutional basis for the violation, the manner in which the same was done and the remedies sought.

31. My above findings on the issue of violation of rights would have been sufficient to determine this petition, but I am still minded to address the issue of the delay, by the petitioner in filing this petition, having been filed 29 years from the date of the cause of action. My take is that even though this is an issue that was not canvassed by the parties in their pleadings or during the hearing of the petition, it is an important and glaring issue which this court cannot ignore. The question which then arises on whether this court can entertain a petition filed 29 years down the road.

32. The answer to the above question can be discerned from the different positions taken by various courts on whether a petition for enforcement of fundamental rights, filed several years after the date of the cause of action, should be entertained. The position adopted by the courts is that the question of delay in institution of cases are to be determined on a case by case basis the main consideration being the justification or the reasons advanced for filing suits after such extended delays. In the case of **Maurice Oketch Owiti -vs The Attorney General** (supra) the court observed as follows after analyzing previous decisions over the question of delay:-

“It is evident from the above cited authorities that courts have expressed dissatisfaction in the filling of petitions alleging violations of fundamental rights and freedoms after a considerable length of time has lapsed since the alleged violations occurred. The principle that emerges is that a court must examine each case and gauge the length of time taken before presenting such petitions, and the reason for the delay. A court is also entitled to consider whether justice will be served by permitting a respondent, whether an individual or the State in any of its manifestations, to be vexed by an otherwise stale claim.”

33. From the outset, however, it must be noted that the Constitution does not set a time limit within which a claim based on violation of fundamental rights and freedoms may be instituted. This position is based on the fact that a claim under the Constitution is neither a claim in tort nor contract so as to require the application of the Limitation of Actions Act (Cap 22 Laws of Kenya). On this point, I am guided by the decision of Hayanga J. in the case of **Dominic Arony Amolo** [2003] eKLR wherein the learned judge observed as follows:

“I therefore, think and I so hold that Section 3 of the Constitution excludes the operation of Cap 22 with regards to claims under fundamental rights and further that fundamental rights provisions cannot be interpreted to be subject to the legal heads of legal wrongs or causes of actions enunciated under the Limitation Act, Cap 22.”

34. This court takes judicial notice of the fact that following the advent of the new Constitution 2010, numerous cases have been filed in court by parties seeking redress in violations that were committed during previous regimes especially the Moi Regime of the 1980's by claimants who felt aggrieved by the atrocities of the past regimes. Courts have therefore been grappling with the lingering question on the issue of limitation of time in regard to such suits and have made findings some of which I will highlight in this judgment as follows:-

35. In the case of **Ochieng Kenneth K' Ogutu vs Kenyatta University & 2 others** **Petition No. 306 of 2012**, the court observed as follows:-

“[35] As I conclude this matter, I will address the issue of delay in filing this petition. The respondent has argued that the petitioner is guilty of inordinate delay and I am inclined to agree with it. The events complained of took place more than 12 years ago. There is nothing before the court that explains or justifies the delay in coming to court to vindicate his rights. The petitioner's counsel submitted that he was so traumatized that he could not come to court before, but I can see no basis for this submission. While the petitioner alleges that he was arrested and charged, and that he served 15 days before his fine was paid, I cannot see any basis for alleging that he was so traumatized that it has taken him 12 years to recollect that he had a claim against the respondents. While the reason for delay in cases such as those involving the Nyayo House torture cases may be acceptable, at least for a time, that they were not able to file claims because of the politically repressive climate then prevailing, there is no such justification in this case. Even had I found that the facts demonstrated a violation of the petitioner's rights (which I have not), I would have had difficulty in excusing the 12 years' delay in this matter.”

As regards the effect of such delays the court noted thus:

“[36] There is great danger that parties are abusing the constitutional protection of rights to bring claims before the court whose sole aim is enrichment rather than vindication of rights. A delay of 10 years or more before one comes to court to allege violation of rights is clearly not justifiable. As Nyamu J observed in Abraham Kaisha Kanzika and Another vs Central Bank of Kenya (supra): “ Even where there is no specified period of limitation it is proper for the court to consider the period of delay since the accrual of the claim and the reasons for the delay. An applicant must satisfactorily explain the delay. In this case a delay of 17 years is inordinate and it has not been explained. The prosecution of the claimant took 6 years and although he gives this as the reason for the delay he has not explained the balance of eleven years.”

The court thereafter concluded that:

“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 cases ignore the enforcement of their rights under the general principles of law in order to convert their subsequent grievance into a “constitutional issue” after the expiry of the prescribed limitation periods.”

36. In the case of Joan Akinyi Kabasellah & 2 Others vs Attorney General Petition No. 41 of 2014, the court held :

“[24] Nonetheless, I take into account the views of the court with regard to limitation in respect of claims for enforcement of fundamental rights. In a line of cases such as Dominic Arony Amolo vs Attorney General, Nairobi High Court Misc. Civil case No. 1184 of 2003 (OS) [2010] eKLR, Otieno Mak’Onyango vs Attorney General and another, Nairobi HCCC No. 845 OF 2003 (unreported, courts have consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights.

[25] I note also the sentiments of the court in James Kanyita vs Attorney General and Another, Nairobi Petition No. 180 of 2011 that “ 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 state claim.”

[26] In the present case, I am satisfied that no prejudice has been occasioned to the respondent by the filing of the present claim.”

37. In the case of Joan Akinyi Kabasellah & 2 Others vs Attorney General Petition No. 41 of 2014, the court held :

“[24] Nonetheless, I take into account the views of the court with regard to limitation in respect of claims for enforcement of fundamental rights. In a line of cases such as Dominic Arony Amolo vs Attorney General, Nairobi High Court Misc. Civil case No. 1184 of 2003 (OS) [2010] eKLR, Otieno Mak’Onyango vs Attorney General and another, Nairobi HCCC No. 845 OF 2003 (unreported, courts have consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights.

[25] I note also the sentiments of the court in James Kanyita vs Attorney General and Another, Nairobi Petition No. 180 of 2011 that “ 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 state claim.”

[26] In the present case, I am satisfied that no prejudice has been occasioned to the respondent by the filing of the present claim.”

38. The issue of delay in filing a petition was also considered in the case of Joseph Migere Onoo –vs- Attorney General Petition No. 424 of 2013 wherein he court held:-

“[39] The principle that emerges from the cases cited above is that a court must always consider whether the delay in filing a petition alleging violation of constitutional rights is unreasonable and prejudicial to a respondent’s defence.

[40] In the present case, the acts complained of took place some 29 years ago, and the petition was filed 27 years after the alleged events. No explanation has been proffered for the delay, or to explain or justify the institution of proceedings at this point in time. The petitioner contended himself with maintaining that there is no limitation in petitions such as this.”

39. The common principle that runs through the above decisions is that while there is no time limit within which a petition alleging a violation of constitutional rights can be instituted, courts have however frowned upon the filing of such cases after the lapse of a considerable length of time and emphasized the need to examine each case and be satisfied that a reasonable explanation has been made for such delays. In essence, therefore, the mere fact that the Constitution does not impose a time limit for the filing of cases seeking the enforcement of constitutional rights does not give litigants the *carte blanche* to sit on their laurels for years on end only to institute claims long after the occurrence of the events complained about. Of critical importance is that there must be a plausible justification for the delay.

40. Turning to the present case, I note that the petitioner did not offer any explanation whatsoever for his failure to file petition earlier than the year 2015, 29 years after the cause of action arose and 5 years after the promulgation of the Constitution. I am therefore not convinced

that the petitioner would have been entitled to any redress from this court even assuming that he had proved that his fundamental rights and freedoms were violated.

Disposition

41. Having regard to my findings and observations in this judgment, I find that the instant petition is not merited and the order that commends itself to me is the order to dismiss it with no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 15th day of March 2019

W. A. OKWANY

JUDGE

In the presence of:

No appearance for the parties

Court Assistant – Ali