REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 16 OF 2018

ALPHONSE KIPKEMOI SOMONGI.....PETITIONER

-VERSUS-

THE HON. ATTORNEY GENERAL.....RESPONDENT

JUDGEMENT

1. The Petitioner, Alphonse Kipkemoi Somongi, moved the court vide a petition dated 13th November, 2017 in which he alleges violation of his rights by State agents following his arrest and incarceration after the 1st August, 1982 attempted coup. He has named the Attorney General as the Respondent. Through the said petition he seeks reliefs as hereunder:-

> **"i. A declaration that the brutal arrest, the cruel, inhuman and degrading treatment inflicted on the Petitioner upon being taken into custody, the extreme, harsh and inhuman conditions that the Petitioner was subjected to in various military police and prison custody constituted violations of fundamental rights and freedoms of the Petitioner, as to human dignity, protection of the law, prohibitions against torture, cruel, inhuman and/or degrading treatment or punishment guaranteed by section 70(a) and 74(1) of the former constitution now provided for under Article 27(1) & (2), 28 and 29(a), (c), (d) and (f) of the Constitution of Kenya 2010.**
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> **ii. A declaration that the pre-arraignment incommunicado detention of the Petitioner in Military, Police and Prison custody and the continued imprisonment in unlawful deprivation of remission of sentence constituted periods of arbitrary and unlawful detention in violation of the fundamental rights of the Petitioner as to human dignity, personal liberty, freedom from cruel, inhuman and degrading treatment and/or punishment by the protection of law including right to a fair trial guaranteed by Section 70(a), 72(1), (3), 74(1) and 77 of the former Constitution (now Articles 27 (1), (2), 29(a), 49(1)(f) and 50(2) of the Constitution of Kenya, 2010).**
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> **iii. A declaration that the Petitioner is entitled to the restoration of his rank, benefits, honors, medals and all decorations appertaining.**
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> **iv. General, exemplary, aggravated and punitive damages consequential to the declarations of violations of the fundamental rights as shall be assessed by this Honourable Court.**
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> **v. A declaration that the Petitioner was dishonorably discharged or dismissed.**
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> **vi. An order that the Petitioner be awarded all their salary arrears and allowances as shall be assessed by this Honourable Court.**
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> **vii. Costs to the petition.**
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> **viii. Interested on all monetary awards."**

2. In his affidavit sworn on the date of the petition, the Petitioner averred that he was enlisted in the Kenya Air Force on 3rd March, 1978 under enrollment number 023380 and was stationed at Eastleigh Airbase, Nairobi. He further deponed that he attended the Armed Forces Training College at Lanet where he underwent basic military training graduating as a junior private. Soon after completing the training he was promoted to a Senior Private and worked well until 31st July, 1982 when he was to resume duties from his annual leave.

3. The Petitioner averred that he was not able to resume duties on the night of 31st July, 1982 as he could not reach his reporting station since there were gunshots everywhere. He took cover at the other end of the field until the following day (1st August, 1982) when he was arrested at around midday by Kenya Army officers. He was interrogated alongside other Air Force members before they were taken to Kamiti Maximum Prison. From there, he was transferred to Naivasha Maximum Prison where interrogations continued. He was then taken back to Kamiti Maximum Prison where he stayed until 28th February, 1983 when he was released.

4. After his release he was given a new number 102191, which was a Kenya Army service number at Kahawa Barracks. He was subsequently dismissed from the Kenya Air Force on 15th January, 1985.

5. It was the Petitioner's case that he sought help from his former advocates in a claim for unfair dismissal through Cause No. 2122 of 2012 **"and later sought to be party and even swore an affidavit in support of the same"** but later discovered that his name **"had inadvertently been omitted from the list of claimants"** as he **"had not been included as a party to Cause No. 2212 of 2012."**

6. The Petitioner testified in support of his claim and told the court that on 31st July, 1982 there was a joint exercise of the Kenya Army, Kenya Air Force and the Kenya Navy at Maralal. At about 9.00pm as he was leaving his house at Embakasi the officers who had gone for the joint exercise arrived. It was then that an officer called Ombogo shot at one Corporal Koech. The officer continued randomly shooting at other officers. It was then that he went to hiding until morning. During the day he remained at the camp where there was total confusion. In the evening they were summoned and taken to Eastleigh. From there they were transferred to Kamiti Maximum Prison. The Petitioner also told the court that he was never charged with any offence neither was he allowed visits by any family member or a lawyer during his arrest and only learnt of the attempted coup after his arrest.

7. The Petitioner averred that he has approached this court timeously and properly because as soon as he discovered that he had not been included in E&LRC Civil Case No. 2212 of 2012, he sought to be enjoined in Petition No. 278 of 2016 but his application was disallowed by the court hence the instant petition. It was further his averment that if the prayers he is seeking in the petition are not allowed, he will be greatly prejudiced because at the time of his termination he was only 29 years and had 26 more years to serve his country. He is therefore seeking redress from the court, having been stripped of all his presidential installations and having been discharged from duty. He urged this court to allow the petition.

8. On cross-examination, the Petitioner stated that he had a military identity card but he returned the same when he was discharged from duty as required. He showed a certificate of service which was issued on 16th January, 1985 to the Respondent's counsel and stated that the same was annexed to his affidavit. He explained that the certificate of service had a different number from his initial service number because the Air Force had been disbanded after the attempted coup. He further told the court that at the time of his discharge, he had served the army for 4 years and 363 days. He also told the court that he was earning a salary of Kshs. 600 which rose to Kshs. 1020 and that they would be paid through a booklet which would be returned upon signing for the salary. He told the court that he lost everything including his medals and education certificates during his incarceration. He, however, confirmed that during his interrogation he was never beaten or tortured or court-martialed.

9. In response, the Respondent filed a replying affidavit sworn by Emmanuel Makhoha Wandera on 31st December, 2018. Emmanuel Makhoha Wandera stated that he is a Staff Officer II Records based at the Kenya Defence Headquarters. He averred that the Petitioner was rightfully arrested and remanded for his involvement in the failed coup of 1st August, 1982 but denies that the Petitioner was subjected to torture by being held incommunicado without any access to any person from outside. It was further his averment that the discharge from service of the Petitioner was very much in order and within the law as dismissal was a lawful sentence or punishment under the repealed Kenya Armed Forces Act, Cap 199. Further, that the Petitioners' rights under sections 70(a) and 72(1) of the repealed Constitution were not violated and the Petitioner is therefore not entitled to any compensation.

10. It was further the Respondent's case that the Petitioner's detention, confinement and imprisonment was in a civilian prison and was within the law especially pending the ongoing investigations into his involvement in the aborted coup. The Respondent however denied that it was responsible for the alleged violation of the rights of the Petitioner and further denied all the particulars of the alleged violation of fundamental rights and freedoms of the Petitioner. Further, that the 1969 Constitution was specific on how the fundamental rights and freedoms would apply to members of the armed forces by making an exception under Section 86(4).

11. In conclusion, it was averred that the petition having been filed more than 30 years after the alleged violation of rights is an afterthought, an abuse of the court process and tainted with inordinate delay and the Respondent's court martial proceedings have since been destroyed and critical witnesses have either died or left service. The Respondent therefore urged that the reliefs sought are unjustified, baseless and the same should be dismissed for lack of merit.

12. In his rebuttal, the Petitioner filed a supplementary affidavit sworn on 25th January, 2019. He deponed that the petition before the court is well-framed, sound in law, well intentioned and is not a waste of judicial time and in fact the Respondent has admitted to his arrest and remand on account of his involvement in the failed coup of 1st August, 1982. He averred that the Respondent had failed to demonstrate the lawfulness of his arrest and remand neither have orders that committed him to prison been produced nor has any law that permitted the unlawful detention been cited. He further averred that to this day, he has never been informed of any offence he may have committed that warranted his dismissal neither was he given an opportunity to defend himself as the rules of natural justice dictate.

13. It was the Petitioner's averment that his fundamental rights and freedoms were violated and the Respondent's claim that the said detention, confinement and imprisonment was in a civilian prison is just proof of the unlawful incarceration because arrests are only meant to be made after full investigations have carried out and for purposes of onward presentation before a court of law. He averred that the time limitations provided in the Limitation of Actions Act do not apply to claims for violation of fundamental rights and freedoms.

14. The Petitioner concluded his response by stressing that it was the responsibility of the government to keep records and an assertion that records have been lost cannot be used as a yardstick for denial of justice to a litigant. He therefore prayed for judgement as per the petition.

15. The Petitioner filed submissions dated 25th January, 2019 and supplementary submissions filed on 24th July, 2019. Mr. Mukuna holding brief for Mr. Eshuchi for the Petitioner reiterated a brief background of the claim and submitted that the Petitioner was unlawfully detained without trial by officers of the Kenya Army in violation of his fundamental rights to human dignity and protection of the law under sections 70(a) and 74(1) of the repealed Constitution. He stated that the Petitioner was detained incommunicado for approximately 210 days, completely denied access to legal representation before being released without being charged. Upon his release, he was dismissed from service of the Kenya Air Force, stripped of all ranks and medals and denied his terminal dues. Having been dishonorably discharged from the Air Force, he could not be gainfully employed anywhere as no employer wanted to associate with "a rebel" as he had been branded by the Kenya Army, the Government and the media which further compounded his mental anguish, psychological, economic and social life. He submitted that the Petitioner continues to suffer physical injury, stigma and post-traumatic stress disorder. It was his submission that the Kenya Army officers had no power to detain the Petitioner for 210 days or to withhold his emoluments and salary from 1st August, 1982 up to his anticipated date of retirement from the Kenya Air Force. Further that, they had no authority to deny him his pension and terminal benefits.

16. Counsel for the Petitioner further urged the court to take into account the uncontroverted facts in the present case and judicial notice of the adverse political circumstances that existed prior to the promulgation of the Constitution of Kenya, 2010 which hindered him from filing the present claim against the state. To that end, he cited the case of **Jacob Ntubiri Japhet & 8 others v Attorney General [2016] eKLR** where Lenaola, J (as he then was) held that the court continues to confront the question of prolonged delay in the filing of petitions alleging violation of rights in the Bill of Rights but the jurisprudence continues to vary owing to the uniqueness and peculiar circumstances of each case. He further cited the case of **Jennifer Muthoni Njoroge & 10 others v The Attorney General, Petition No. 340 of 2009** where the court rendered the position that the supremacy of the Constitution rather than any organ of government is what guides the courts and especially the High Court in executing its mandate under Article 165 of the Constitution of Kenya, 2010.

17. Counsel for the Petitioner also cited the Court of Appeal case of **Peter Ngari Kagume & 6 others v Attorney General, Civil Appeal No.255 of 2012** where Okwengu, G.B.M. Kariuki, Azangalala, JJA held that in the absence of a plausible explanation for delay, the suit amounted to abuse of the court process. To that end, he submitted that the prevailing political circumstances prior to enactment of the current Constitution hindered the Petitioner from instituting the present claim.

18. The Petitioner's counsel further cited the case of **Harun Thungu Wakaba v Attorney General, Misc. Aplication No. 1411 of 2004** where Okwengu, J (as she then was) held that a plaintiff's claim should not be defeated because of delay in filing his claim after the change of government. Further, he submitted that the Petitioner together with other Kenya Air Force officers instructed the firm of Agina & Associates Advocates to file a suit on their behalf to secure their interests in the Employment and Labour Relations Court in **Samuel Chege Gitau & 283 others v AG, ELRC Cause No. 2212 of 2012**, **previously 548 of 1995** in which judgement has since been entered. It is the submission of counsel that the Petitioner's name amongst several others was left out and the Petitioner secured alternative representation thereby filing the present suit and the petition is therefore not an afterthought.

19. Counsel for the Petitioner also urged that those who had been arrested on suspicion of having participated in the 1982 aborted coup were labelled traitors and the courts were considered subservient to the whims of the then repressive regime and was impossible to dare imagine that a "traitor" would go toe to toe with the same ultra-powerful repressive regime. To buttress his argument, he cited the case of **Eluid Wefwafwa v The Attorney General, Petition No. 121 of 2016** where the court in addressing the question of limitation in cases of violation of fundamental rights held that courts will be reluctant to shut out a litigant on account of limitation of time unless there are obvious reasons to do so and courts cannot avoid taking judicial notice of the immense difficulties which prevailed at the period of alleged violations making it impossible for aggrieved persons to file cases of this nature against the government.

20. On whether the Petitioner is entitled to compensation, he cited the case of **Benedict Munene Kariuki & 14 others v The Attorney General, Petition No. 722 of 2009; [2011] eKLR** where Majanja J held that exemplary damages are not properly awardable noting the burden of such awards to the innocent tax-payer. He also cited the case of **Gitobu Imanyara & 2 others v Attorney General [2016] eKLR** where the Court in arriving at the amount to award as general damages considered various awards made by domestic courts in claims for violation of constitutional rights and agreed with Majanja, J's position in **Benedict Munene Kariuki** on the issue of award of exemplary damages.

21. In conclusion, counsel urged the court to simply determine whether the Petitioner's rights were violated under sections 72(2)&(3) and 74 of the repealed Constitution and cited the case of **Samwel Rukenya Mburu v Castle Breweries, Nairobi HCCC 1119 of 2003** where Visram, J (as he then was) held that 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 dishonor or contempt."** He submitted that the procedures for arrest and detention are clearly laid down in law and unless there is evidence to show that the Petitioner was lawfully arrested, informed of the charge in a language he understood, presented in court within 24 hours, charged before a court of law, a fair trial undertaken, legal representation afforded to him, his rights and fundamental freedoms protected at all times during the said arrest and incarceration, and at the end of the trial process, a judgement was entered and a committal order issued, his constitutional rights were breached.

22. Ms. Mung'ata appearing for the Respondent filed written submissions dated 26th August, 2019. She identified five issues for determination. On the issue whether the Petitioner sufficiently proved that he was a serving member of the Kenya Airforce, counsel submitted that the Petitioner in his examination-in-chief referred to a document purported to be a certificate of service issued by the Armed Forces but the same did not contain either an official seal or stamp as is required of an official document nor was it marked as an exhibit or produced as evidence.

23. The Respondent's counsel submitted that he who alleges must prove, stating that this legal principle is grounded on Section 107 of the Evidence Act. Counsel cited the case of **Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] eKLR** where Majanja, J held that the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. She also referred to the case of **Susan Mumbi v Kefala Grebedhin (Nairobi HCCC No. 332 of 1993)** where the court stated that it is the plaintiff to prove her case on a balance of probability and the fact that the defendant does not adduce any evidence is immaterial.

24. Counsel for the Respondent contended that in any event, the authenticity of the document which the Petitioner purported to rely on was

questioned by the Respondent's witness who confirmed that certificates of service only come in two colours, red for commissioned officers and green for service men yet the Petitioner's document was yellow in colour. Accordingly, counsel argued that it is an erroneous assumption that all suspects allegedly arrested and detained were members of the armed forces and the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. She therefore submitted that the Petitioner had failed to prove his case on a balance of probability.

25. On the issue of the alleged inordinate delay in filing the claim, counsel asserted that the Petitioner did not give a compelling reason for filing the suit 35 years after the alleged violations occurred. Agreeing that the general rule is that there is no limitation of time set for filing constitutional petitions, counsel urged that for purposes of a fair trial as provided by Article 50 of the Constitution, one should not intentionally delay commencement of a suit such that the other party is compromised in putting forth a defence. She stated that this position was taken by the Court of Appeal in **Monicah Wangu Wamwere v The Attorney General [2019] eKLR** where it found that the delay in filing the claim was not sufficiently explained and could not therefore be cured.

26. Still stressing that unexplained delay is fatal to the Petitioner's claim, counsel cited the Court of Appeal decision in **Wellington Nzioka Kioko v Attorney General [2018] eKLR** where it was held that any delay must not be inordinate and there must be a plausible explanation for the delay. Further, that it was also held in the said case that the logic behind limitation of actions was to enable a person to preserve and adduce the evidence that is necessary to support the claim and also accord the purported wrongdoer an opportunity to address the grievance and if possible remedy it. That way, both parties are spared the agony of losing important evidence or even witnesses as it is important that a person adduces evidence when the memory of the incident complained of is still intact.

27. The Respondent's counsel also cited the case of **Gilbert Guantai Mukindia v Attorney General [2019] eKLR** where P. O. Otieno, J held that the onus is on the petitioner to disclose his difficulties encountered in filing the petition within a reasonable time. Counsel therefore stated that the petition was an afterthought and the advertent delay disadvantaged the Respondent in putting up a more plausible defence. She therefore urged that the inordinate delay should not go without consequence.

28. Counsel further cited the case of **Lt. Col. Peter Ngari Kagume & 7 others v Attorney General [2009] eKLR** where Nyamu, J (as he then was) dismissed the petition and held that the petitioners were guilty of inordinate delay in the absence of any explanation for the delay and that the petition was a gross abuse of the court process. Counsel also relied on the case of **Rawal v Rawal, Mombasa Civil case No. 128 of 1962; [1990] KLR 275** where Bosire, J (as he then was) stated that the effect of any time limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant who may have lost evidence for his defence from being disturbed after a long lapse of time.

29. On whether the Petitioner was tortured, counsel submitted that the Petitioner is on record stating that he was never at any point subjected to torture, inhuman or degrading treatment and that throughout the alleged detention, he was kept in fine conditions, treated with dignity, availed all the necessary facilities and never coerced to give any information. He cited the case of **John Cheruiyot Rono v The Hon. Attorney General, Petition No. 536 of 2015** for the proposition that the burden of proving violation of a right or freedom enshrined in the Constitution rests on the person alleging the violation and such burden is to be discharged on a balance of probabilities.

30. Counsel for the Respondent contended that the Petitioner had not tendered any evidence that the Respondent had, in any manner, violated his rights and fundamental freedoms and had therefore failed to discharge the burden of proof bestowed upon him. To that end, he cited the holding in **Monicah Wangu Wamwere** (supra) that a party who alleges torture must prove severity and suffering, reckless indifference to the possibility of causing pain and suffering and that the act of torture involved a public official. Further, that acts that do not cause extreme pain and suffering to an ordinary person are normally outside the definition of torture. She also relied on the case of **Robert Njeru v Attorney General, Petition No. 261 of 2014** where the court while taking judicial notice of the fact that prison conditions were not pleasant at all in the past and may still be especially as relates to diet, beddings and sanitation, the Petitioner did not claim that the harsh prison conditions were peculiar to him as compared to other inmates.

31. On the question of the alleged unlawful detention in custody, counsel submitted that the Petitioner's details regarding his arrest and alleged confinement are scanty and not clear and his failure to annex a committal sheet, if any, to corroborate his prayers and justify his allegations in the petition does not help his case. In support of this argument, counsel cited the case of **Peter Ngari Kagume** (supra) where it was held that when a party alleges and the rival side disputes, the person alleging assumes the burden of proving the allegation.

32. Counsel for the Respondent also cited the case of **Anarita Karimi Njeru v Republic (No. 1) [1979] KLR 154** where the court observed that it is important for a person seeking redress from the High Court or an order which invokes a reference to the Constitution, to set out with reasonable degree of precision what he complains of, the provisions of the Constitution infringed and the manner in which the rights are alleged to be infringed. She asserted that this position was also emphasized in the case of **Matiba v The Attorney General, Misc. Application No. 666 of 1990.**

33. Still stressing that the Petitioner had not established a case entitling him to compensation, counsel cited the case of **Koigi Wamwere v Attorney General [2012] eKLR** were Mumbi Ngugi, J held that to find that the poor prison conditions amount to torture which entitles the petitioner to compensation, would open the door for similar claims by all those who had passed through the Kenya prison system. Counsel went on to submit that proceedings in public law are special proceedings and as such, the Petitioner has to prove his case beyond a balance of probabilities on the allegations he has brought as was held by the **Lt. Col. Peter Ngari Kagume**.

34. On the claim for award of salary and allowances, counsel submitted that the Petitioner did not adduce any evidence to ascertain his salary or allowances at the time of his alleged discharge from the military as the same would have acted as proof of employment and at the same time guide the court in calculation of special damages. She urged the court to be guided by the decision in the case of **Joseph Nyakeriga Asiago v Gurdex Security Services Limited [2018] eKLR** where it was held that claims for medical expenses and salary arrears are in the nature of special damages and must be specifically proved. In addition, counsel argued that the claim for salary and allowances was made in the wrong forum as such a claim could only be lodged in the Employment and Labour Relations Court. As for quantum of damages, counsel urged the court to be guided by the principles laid down in **Lt. Col. Peter Ngari Kagume** (supra) where it was held that if there is any remedy in addition to damages, that other remedy should usually be granted initially and damages should only be in addition, if necessary, to

afford just satisfaction.

35. In conclusion, she submitted that although the courts have been lenient on parties seeking redress for violation of fundamental rights in past political regimes as was stated in the case of **Charles Gachathi Mboko v Attorney General [2014] eKLR**, the Petitioner having failed to establish a cause of action against the Respondent is not entitled to the reliefs sought. Counsel for the Respondent therefore urged the court to dismiss the petition.

36. I have carefully considered this petition, the response thereto, submissions by the advocates for the parties and the authorities cited. The issues raised in this petition are: firstly, whether the Petitioner's human rights and fundamental freedoms were violated, and secondly, whether there was inordinate delay in filing the petition, and, depending on the answers to the above issues, the appropriate remedy to be granted.

37. The Petitioner's complaint is grounded on the alleged unlawful arrest and detention. This, he claims, violated his constitutional rights and fundamental freedoms. Whereas the Respondent has denied these allegations and stated that the arrest was lawful, it was the duty of the Petitioner to prove that he was a member of the Kenya Air Force. During the Petitioner's testimony in court, he produced a certificate of service but the same was not annexed to his affidavit and neither was it produced as an exhibit. No evidential value can therefore be attached to the same.

38. Although the Respondent denied having a record of the Petitioner's personal file, there was an admission by its witness that some of the records may have been lost during the attempted coup or destroyed later. Whatever the case, the evidence placed before this court by the Petitioner was insufficient to prove on a balance of probability that he was indeed a member of Kenya Air Force. As already pointed out, he did not adduce any documentary evidence in support of his case. It could be true that military officers were not issued payslips at the material time. It could also be true that he lost all his documents during his detention. He however had the option of calling people he served with in the Kenya Airforce as his witnesses. He did not do so.

39. As to the fact of his detention or confinement, the Petitioner alleges that he was arrested on 1st August, 1982 in Embakasi, then held at Kamiti and Naivasha prisons during which period, he was not allowed visitors or even legal representation. His evidence was that he was later released on 28th February, 1983 without being formally charged in court. The repealed Constitution guaranteed every person the right to life, liberty, security of the person and protection of the law. That means everyone was protected from deprivation of his or her liberty without following the law. Section 72(1) also provided that no person shall be deprived of his personal liberty save as may be authorized by law in given cases.

40. The repealed Constitution required that an arrested person be produced in court within twenty four hours where he was suspected of committing an ordinary criminal offence and within fourteen days in the case of a capital offence. It was upon the State to show that the constitutional requirements were complied with. An arrested person was supposed to be produced in court within the applicable time limits or released where there was no evidence to sustain any charges. However, there is nothing placed before the court to support the Petitioner's allegation that he was actually arrested and detained. He admitted in his testimony that he did not have any documents to establish his claim and that he had not made any effort to procure such documents. I wonder if any effort to trace the documents would have been fruitful considering the time that had lapsed between the time of the alleged violation in 1982 and the time of filing the suit in 2018.

41. Whereas this court should have sympathy for victims of State tyranny, it is not possible to allow every claim simply because the claimant has alleged violation of rights by the State. It is incumbent upon the party alleging violation of rights and fundamental freedoms to place some evidence on the table which the court can use to rule in his favour. In the circumstances, I am therefore unable to find that the Petitioner's rights were violated.

42. The other key issue is whether there was inordinate delay in filing the petition. The Petitioner explained the delay by averring at paragraph 17 of his affidavit in support of the petition as follows:-

> **"17. THAT I have wasted no time to approach this Honorable Court for reasons inter alia that:**
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> **a. THAT I have approached Court timeously and properly because as soon as I discovered that I had not been included as a party to the Employment cause and later on the Petition, I approached the firm of M/S Eshuchi & Associates Advocates and sought their help to be enjoined in Petition 278 of 2018 as Petitioner.**
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> **b. THAT upon filing my joinder application, I was advised to petition this Court on my own motion.**
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> **c. THAT I do confirm further, that I also took some time to obtain from my former Advocates and to provide all the necessary documents for my claim, and to instruct my present Advocates, for which, I seek the Court's indulgence."**

43. It is noted that in his testimony the Petitioner merely told the court that 'they' had procured the services of another advocate but his name was inadvertently omitted from the list of claimants. Thereafter, he sought to be enjoined in Petition No. 278 of 2016 but his application was dismissed thereby filing the instant petition.

44. The Petitioner has casually handled the issue of delay. It is observed that E&LRC Petition No. 2212 of 2012 from which he says his name was inadvertently omitted was first filed in 1995. The Petitioner never bothered to explain at what stage his name was dropped and when he discovered that the name had been dropped. He next sought to join Petition No. 278 of 2016 about 21 years after E&LRC Petition No. 2212 of 2012 had been filed. As he did not explain when he discovered his name was missing from Petition No. 2212 of 2012, it is not known how long he took from the time of discovery to the point of attempting to join Petition No. 278 of 2016. It is noted that he offered no explanation for the delay.

45. The Petitioner attempted to explain the delay from the time his application for joinder in Petition No. 278 of 2016 was rejected and the time of filing the instant petition by averring that he took some time to obtain documents from his former advocates. Be that as it may, the fact remains that the Petitioner brought the instant suit 37 years after the alleged arrest and detention. He claims that he could not file his claim immediately after the incident because the political and legal environment was hostile to such a claim. That may indeed be true. However, he has failed to offer any explanation to the satisfaction of the court that there was reason for him not to file the suit from 2003 when a new President came to power.

46. I am in agreement with Majanja, J in the case of **James Kanyiita Nderitu v Attorney General & another [2013] eKLR** when he states that:-

> **"[45.] Before I consider the facts as presented, I must state that it is well established the law concerning limitation of actions cannot be used to shield the State or any person from claims of enforcement of fundamental rights and freedoms protected under the Bill of Rights (See Dominic Arony Amolo v Attorney General Nairobi HC Misc. 494 of 2003 (Unreported), Wachira Waheire v Attorney General Nairobi HC Misc. Civil Case no. 1184 of 2003 (OS) [2010]eKLR, Otieno Mak'onyango v Attorney General and Another Nairobi HCCC No. 845 of 2003 (Unreported)). 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. Just as a petitioner is entitled to enforce its fundamental rights and freedoms, a respondent must have a reasonable expectation that such claims are prosecuted within a reasonable time. The words of Didcott J. in Mohlomi v Minister of Defence [1996] ZACC 20, 1997 (1) SA 124, 129 are apposite in this regard, "Inordinate delays in litigating damage the interests of justice. They protract the disputes over rights and obligations sought to be enforced, prolong the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of those whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken.""**

47. Holding that the petition before him was not merited, Majanja, J concluded that:-

> **"[46.] Whether such a claim should be permitted is a question of fact dependent on the circumstances of each case. In the matter of Lt. Col. Peter Ngari Kagume & Others vs Attorney General, Nairobi Constitutional Application No. 128 of 2006 [2009] eKLR where Nyamu J. considering the issue of delay in filing a suit for the enforcement of fundamental rights and freedoms observed that, "The petitioner had all the time to file their claim under the ordinary law and the jurisdiction of the court but they never did and are now counting on the constitution. None of the petitioners has given any explanation as to the delay for 24 years. In my view the petitioners are guilty of inordinate delay and in the absence of any explanation on the delay; this instant petition is a gross abuse of the court process …. In view of the specified time limitation in other jurisdictions the court is in a position to determine what a reasonable period would be for an applicant to file a constitutional application to enforce his or her violated fundamental rights. I do not wish to give a specific time frame but in my mind, there can be no justification for the petitioners delay for 24 years. A person whose constitutional rights have been infringed should have some zeal and motivation to enforce his or her rights. In litigation of any kind, time is essential as evidence may be lost or destroyed and that is possibly the wisdom of time limitation in filing cases."**
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> **[47.] The petitioner has held his grievance about his arrest and detention since 1985. These facts were known to him throughout the trial and appeal from the conviction. I also note that during the time the petitioner was fighting criminal proceedings, he was also pursuing litigation through his companies in Intercom Services Ltd, Interstate Communications and Services Ltd, Swiftair (K) Ltd, Kenya Continental Hotel Ltd and James Kanyiita Nderitu v Standard Chartered Bank Kenya Limited Nairobi HCCC No. 761 of 1985 (See Standard Chartered Bank Ltd v Intercom Limited and Others CA Civil Appeal No. 37 of 2003 [2004] eKLR which determined the matter). I have perused the pleadings in that case which have been amended several times. In the further re-amended plaint 26th September 2000, the plaintiffs aver at paragraph 14. "As a result of the said breach, the 5th plaintiff in his official capacity as the managing director of the 1st, 2nd, 3rd and 4th Plaintiffs was arrested, charged and prosecuted in the Chief Magistrate's Court at Nairobi Criminal Case No. 1716 of 1985. The accused (5th plaintiff) was subsequently acquitted on appeal."**
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> **[48.] The reason I have cited a part of the plaint in HCCC No. 761 of 1985 is that even at the time the suit was filed, the petitioner as the 5th plaintiff was clearly aware of the facts relating to his complaint. I do not think the petitioner has justified why he waited to lodge this claim after 26 years. In other cases where the period has been excused, the parties have justified the reasons why the case could not be filed for a long period of time."**

48. Similarly, Justice Mumbi Ngugi in **Joseph Migere Onoo v Attorney General [2015] eKLR** held that the petition was barred owing to the fact that it had been filed 27 years after the event. Here the petitioner had filed the suit against the Government of Kenya alleging violations of various constitutional rights, violations which he averred occurred following his alleged arrest and torture in various places in 1986, when he was a student at Egerton University. Dismissing the petition, the learned Judge observed that:-

> **"[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 contented himself with maintaining that there is no limitation in petitions such as this.”

49.The Judge further cited the case of **High Court Petition No. 306 of 2012 Ochieng’ Kenneth K’Ogutu v Kenyatta University and 2 others,** where it was observed that:

“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 traumatised 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 for 15 days before his fine was paid, I cannot see any basis for alleging that he was so traumatised 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.

There is a 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.

In my view failure by a 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.”

50. Again in **Wamahiu Kihoro Wambugu v Attorney General [2016] eKLR**, Mumbi Ngugi, J expressed the following view:-

“46. Then there is the period it has taken the petitioner to file this petition. It was filed on 18th September 2014, more than 28 years after the alleged events. The petitioner alleges that he did not file his claim because there was a repressive government in place. However, as pointed out by the respondents, there have been more than three changes in government in the twelve years or so preceding the filing of the petition. A large number of petitions alleging violation of constitutional rights have been filed as far back as 2003 and 2004 by persons who had been arrested, held in Nyayo House, tortured and jailed. Cases in point include the two decisions relied on by the petitioner in his submissions- that of Mugo Theuri vs Attorney General and Simon Maina Waweru vs Attorney General. The delay may have been as a result of the petitioner’s own doubts about the credibility of his claim. Whatever the reason, however, this is one of the cases in which I would agree with the reasoning of Nyamu J (as he then was) in the case of Lt. Col. Peter Ngari Kagume vs Attorney General (supra) when he stated:

“I do not wish to give a specific time frame but in my mind there can be no justification for the Petitioners delay for 24 years. A person whose constitutional rights have been infringed should have some zeal and motivation to enforce his or her rights. In litigation of any kind, time is essential as evidence may be lost or destroyed and that is possibly the wisdom of time limitation in filing cases.””

51. The cited jurisprudence is not limited to the High Court. In the case of **Wellington Nzioka Kioko v Attorney General [2018] eKLR; Civil Appeal No. 268 of 2016 (Nairobi),** the Court of Appeal in dismissing the appeal held that:-

“We need to look at the logic behind limitation of actions generally in order to place this issue in proper perspective. When a person suffers a wrong at the hands of another and feels the need to redress the wrong, it is reasonable to expect that redress will be sought before the claim gets stale. This enables a person to preserve and adduce the evidence that is necessary to support the claim. It also accords the purported wrong doer an opportunity to address the grievance and if possible remedy it. That way both parties are spared the agony of losing important evidence, or even witnesses. Memory is sometimes transient and it is important that a person adduces evidence when the memory of the incident complained of is still intact. There is also this idea of people moving on in life. If somebody wrongs you, you need to seek redress when the offending act still has an impact on your life, and when the evidence necessary to prove the wrong is still available. There is also the converse situation where the alleged wrongdoer should know that there is a claim against him which he needs to remedy. If a wrong is committed and then the person wronged waits for time on end before even notifying the other party, then a travesty of justice occurs because the claim might be made at a time when the offending party has forgotten about the incident and is no longer in a position to defend himself. There is of course a rebuttable presumption that if you don’t seek redress within a reasonable time, there is a possibility that you have not suffered any loss from the act complained of. That would explain the maxim that equity does not aid the indolent.”

52. A similar position was also taken by the Court of Appeal in the case of **Monica Wangu Wamwere v Attorney General [2019] eKLR; Civil Appeal No. 188 of 2017 (Nairobi)** where it was held that:-

> **"We also note that the Petition was filed 20 years from when the last alleged violation took place. The appellant stated that the reason for the delay was that she did not have faith in the Judiciary under the old constitutional disposition and especially under the Moi regime. The learned Judge took issue with the explanation given for the delay by the appellant. He noted that since 2003 after end of the Moi era, many aggrieved persons approached the courts seeking redress for their constitutional violations. We dare say, that the appellant's famous son Koigi Wamwere filed his case in 2008, before the promulgation of the current Constitution. In any case, the said promulgation took place in 2010 yet the appellant filed her Petition in 2013 and that delay has not and indeed cannot be sufficiently explained. We have no difficulty agreeing with the learned Judge that the delay was inordinate and cannot be cured. It is apparent that the petition was no more than a speculative afterthought."**

53. In my view, the law requires the court before which a matter is placed to consider the facts and circumstances of the case before it in determining whether the case has been brought after inordinate delay, and in doing so, it must bear in mind the explanation given for the delay. In this case, no plausible explanation was proffered. The Petitioner only claimed that his attempts to join other cases of this nature were unsuccessful. He however did not find it necessary to exhibit the applications for joinder so that the court could understand why he did not join those cases. What I have before me is a petition filed over 36 years after the alleged violation of rights. The Petitioner is a victim of the inordinate delay because he could not establish that he was a member of the defunct Kenya Airforce at the time of the 1982 attempted coup. He could not establish incarceration and torture. In the circumstances, I am constrained to find that the Petitioner in this case has failed to establish a violation of his constitutional rights and is also guilty of inordinate and unexplained delay in lodging his petition.

54. Consequently, I find the petition without merit and dismiss it with no order as to costs.

Dated, Signed and Delivered at Nairobi this 31st day of October, 2019.

W. Korir,

Judge of the High Court