



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.115 OF 2018

IN THE MATTER OF ARTICLES 22, 23, 25(a) AND ARTICLE 29 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 25(a) AND 29(c), 29(d) OF THE CONSTITUTION OF KENYA 2010

JANE NDUTA KOIGI.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

Petitioner's Case

1. The petitioner **JANE NDUTA KOIGI** through a petition dated 28th March 2018 brought pursuant to Articles 22, 23, 25(a), 29(a), 29(c), 29(d) and 29(f) and Articles 39 of the Constitution of Kenya 2010 seeks the following prayers:-

a) A DECLARATION that the Petitioner's Fundamental Rights and Freedom were contravened and grossly violated by the Respondent's Special Branch Police Officers and Immigration Officers who were Kenyan Government servants, agents, employees in January 1987 when they stopped her for 2 weeks from leaving Kenya by impounding her Kenyan Passport and threatening to torch her house at Engashura when she attempted and persisted to lawfully fly out of the Country to join her husband **KOIGI WA WAMWERE** in Norway where he was exiled.

b) A DECLARATION that the Petitioner's Fundamental Rights and Freedoms were contravened and grossly violated by the Respondent Immigration Officers on 29th July 1992 when the Petitioner was arrested at Jomo Kenyatta International Airport and detained for 8 hours when she arrived in Kenya from Norway to visit her husband **KOIGI WA WAMWERE** who was held at Kamiti Maximum Security prison.

c) A DECLARATION that the Petitioner is entitled to the payment of damages and compensation for the violations and contraventions of his fundamental rights and freedoms under the aforementioned provisions of The Constitution of Kenya.

d) General damages, exemplary damages and moral damages on an aggravated scale under Article 23(3) of The Constitution of Kenya for the unconstitutional conduct by the Kenyan government servants and agents be awarded.

e) Any further orders, writs, directions, as this Honourable Court may appropriate.

f) Costs of the suit, and interest.

Respondents Case

2. The petition did not file any response to the petition but was allowed to take part during the hearing of the petitioner's case and proceeded to cross-examine the petitioner.

Petitioner's evidence

3. The petitioner gave evidence as PW1. She called no witness but adopted her supporting affidavit sworn on 28th March 2018 together with the exhibits as her evidence in chief. She was cross-examined and closed her case. The Respondent did not call any witness. The petitioner filed submissions on 28th August 2018 whereas the Respondent filed its submissions on 8th April 2019.

Analysis and Determination

4. I have very carefully considered the petition, supportive affidavit, annexures thereto, petitioner's evidence, the counsel rival submissions and from the aforesaid and in view of the prayers sought I find that the following issues arises for determination:-

- a) **Whether the petitioner has established that her fundamental Rights and Freedoms were contravened and grossly violated by the Respondent's Special Branch police officers and Immigration officers who were government servants, agents, employees?**
- b) **Whether the petition is inordinately delayed and whether it should be dismissed?**
- c) **Whether the evidence adduced is admissible?**
- d) **What relief is the petitioner entitled to?**

A) Whether the petitioner has established that her fundamental Rights and Freedoms were contravened and grossly violated by the Respondent's Special Branch police officers and Immigration officers who were government servants, agents, employees?

5. This petition was heard by Hon. Lady Justice Okwany before her transfer to Commercial Division, Milimani. The file was referred to her to do the judgment following her having heard the evidence and the case closed before her. She however declined to do the judgment on the grounds she was already transferred. This division received the file back and as the parties had no objection to this court proceeding to peruse the evidence and submissions on record and do the judgment, I agreed to write the judgment bearing in mind I did not see the parties nor heard the same in their evidence and as such I will not be in a position to comment on their demeanor in this judgment.

6. The petitioner's evidence is found in her supportive affidavit made by Jane Nduta Koigi, sworn on 28th March 2018. The petitioner in her evidence avers, that she is a Kenyan citizen now aged 60 years and a person entitled to enjoyment of her fundamental rights and freedoms of the individual enshrined in the Constitution of Kenya 2010 under Articles 22, 23, 25(a) and 29 of the Constitution of Kenya 2010, which was formerly sections 70 to 83 of the Repealed Constitution. Article 25(a) of the constitution provides that, despite any other provision of this constitution, the rights and fundamental Freedom from torture and cruel, inhuman or degrading treatment or punishment shall not be limited whereas Article 29 of the constitution provides, that every person has the right to freedom and security of the person, which includes right not to be:-

- "a) **Deprived of freedom arbitrarily or without just cause;**
- b) **Detained without trial, except during the state of emergency, in which cause case the detention is subjected to Article 58;**
- c) **Subjected to any form of violence from either public or private sources."**

7. Section 74(1) of the repealed constitution provided that:-

- "a) **No person shall be subjected to torture or to inhuman or dignity, punishment or other treatment."**

The right to freedom of movement was provided under Section 81 of the Repealed constitution of Kenya which provided thus:-

- "1) **No citizen of Kenya shall be deprived of this movement, that is to say, the Right to move freely throughout Kenya, the Right to reside in any part of Kenya and immunity from expulsion from Kenya."**

The equivalent Article 39 of the Constitution of Kenya 2010 provides thus:-

- "1) **Every person has the right to freedom of movement.**
- 2) **Every person has the right to leave Kenya.**
- 3) **Every citizen has the right to enter, remain in and reside anywhere in Kenya."**

8. The petitioner's contention in her affidavit is clear, that her fundamental Rights and Freedom guaranteed under Article 29 of the Constitution of Kenya 2010 (*former*) section 74 of the Repealed constitutional and under Article 39 (*formerly section 81*) of the Constitution of Kenya 2010 were contravened and grossly violated by the special Branch, police officers; and immigration officers who were Government servants, who stopped her from leaving Kenya, by impounding her passport in January 1987 at Jomo Kenyatta International Airport while she was with her 2 sons Wamwere (*4 years*) and Regnia baby, were about to board a plane to join husband thereby stopping her travel. The stoppage persisted for 2 weeks which the petitioner avers was unreasonable, unjustified and contrary to Article 39(1) (2) and (3) of the

Constitution of Kenya 2010 which protected her freedom of movement and residence under the then Article 81 of the Repealed constitution. The special Branch officers threatened to burn her family house at Engoshura in Nakuru County if she continued to persist to the Government to leave the country.

9. The petitioner avers further after being unlawfully, illegally and unreasonably denied safe passage out of the country through threats to burn her house; she dressed like an ordinary Tanzanian peasant woman to conceal her identity and with her 2 children travelled and trekked to Kenya-Tanzania border, sneaked through the border as fugitive. She swore that this was the hardest experience of her life and her young children to leave her country for life in exile in Tanzania for 2 weeks and then to Norway from 1987 to July 1992 and then from 1992 to 1997 for 10 years. She has deponed, that she and her 2 young children suffered loneliness, home sickness, severe winter and different environment in foreign land especially in October 1990 when her husband Koigi Wa Wamwere was abducted by Kenyan Government secret Agents and brought to Kenya whereby he was arraigned in court for an offence of Treason and was incarcerated at Kamiti Maximum Security Prison from 1990 to January 1993.

10. The petitioners further evidence is that between October 1990 and January 1993, when her husband Koigi Wa Wamwere was arrested and was a political prisoner at Kamiti Prison at Kamiti Maximum Security Prison; she suffered mental agony, loneliness, her children and herself could not eat properly or sleep in comfort. That the children kept asking many questions seeking to know when their father was coming back home to Norway from the prison custody in Kenya.

11. The petitioner has sworn that she was arrested at Jomo Kenyatta International Airport and detained for 8 hours when she arrived in Kenya from Norway to visit her husband who was remanded at Kamiti Maximum Prison as evidenced by annexures marked **JNK-2A**, **JNK-2B**, and **JNK-2C**, being exhibits extracted from Sunday Nation dated 2nd August 1982; Target Newspaper dated 1st August 1995 and the Standard Newspaper dated 5th August 1992. The petitioner contends, that was violation of her fundamental Rights and freedom from any form of violence from either the public or private source under Article 29(c); freedom from Torture in any manner whether physical or psychological under Article 29(d) and freedom from being treated or punished in a cruel, inhuman or degrading manner under Article 29(f) of the Constitution of Kenya 2010 (*formerly section 74 of the Repealed Constitution*) and her Freedom of movement and residence under Article 39 of the Constitution of Kenya 2010 (*formerly section 81 under the Repealed Constitution*).

12. The petitioner further avers that during her visit on 29th July 1992, while her husband was in custody at Kamiti Prison she camped at Nairobi Law Courts and **ALL SAINTS CATHEDRAL**, with her mother-in-law **MONICAH WANGU WAMWERE** and other mothers of political prisoners to put pressure on the Government so that her husband Koigi Wa Wamwere could be released back to his freedom. That during such period the Kenya Police would invade the **ALL SAINTS CATHEDRAL** grounds to harass and intimidate peaceful women to vacate and abandon the peaceful protest for release of all political prisoners.

13. The petitioner has deponed that by reason of the matters aforesaid, as per affidavit in support, her physical, psychological and economic and political life was messed up as she was tortured and her fundamental Rights to freedom of movement and freedom from inhuman degrading treatment were grossly violated for being the wife of **KOIGI WA WAMWERE**.

14. The petitioner further has sworn she did not have personal confidence with the Judiciary with a view to pursue her redress for Human Rights violations and it is only now that she feels confidence and in any case she avers there is no constitutional limitation to face a Human Rights violation case.

15. The petitioner further avers that the special branch police officers and immigration officers at Jomo Kenyatta International Airport were entitled to arrest the petitioner on suspicion of committing a cognizable offence, that they had no lawful, legal or statutory power to stop her from joining her husband, or thereafter to torch her house of Engashura in Nakuru in 1987 when she attempted to lawfully fly out of the country to join her husband in Norway when he was exiled. The petitioner further contend whereas the Special Branch Police Officers had powers to arrest and charge the petitioner with a criminal offence before a competent court of law as per Article 77(1) of the Repealed Constitution, they had no lawful, legal or statutory power to impound the petitioner's passport and detaining her on 29th July 1990 at Jomo Kenyatta International Airport for 8 hours. The Respondent violated her right to person liberty as provided under Section 72(1), 72(3) and 72(5) of the Repealed Constitution and her freedom of movement to enter Kenya under Article 39 of the Constitution of Kenya 2010 (*former*) Section 81 of the Repealed Constitution).

16. The petitioner has further sworn whereas the Special Branch Police Officers had power to arrest the petitioner's husband they had no lawful, legal or statutory power to bar the petitioner from communicating with her husband **KOIGI WA WAMWERE** who was in Remand custody for charge of Treason. Thus she contends was a violation of her Fundamental/Rights and freedom from any form of violence from either the public or private source under Article 29(c); freedom from Torture in any manner whether physical or psychological under Article 29(d); and freedom from being treated or punished in a cruel, inhuman or degrading manner under Article 29(f) of the Constitution of Kenya 2010.

17. The Respondent herein did not file any response to the petitioner's petition and the supporting affidavit despite having been afforded an opportunity to do so before the hearing. The Respondent opted to attend hearing and cross-examined the petitioner and subsequently filed submissions raising issues as per the submissions. The failure to file a response or Replying affidavit is a fatal omission on the Respondent's part as they cannot purport to raise objections or issues to which they have not pleaded and given notice to the petitioner. In law the petitioner's unchallenged evidence is deemed as factual, unchallenged and sufficient proof of the petitioner's case in absence of pleadings and evidence on part of the Respondent.

18. The Respondent submissions are that as the petitioner alleges violation of human right, then she must be able to state with precision, the right that has been violated and the connection between the actions of the Respondent and the right that has been violated. It is further submitted the claim on torture of the petitioner is vexatious; incompetent and an abuse of the process of the court. The pleadings by the petitioner are also challenged as not pleaded in a precise manner and the constitutional provision said to have been violated or infringed are said not to have been disclosed and so is the manner of infringement (**see Anarita Karimi Njeru vs Republic (No. (1979) KLR 154** where the court stated:-

“if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

19. The principle in **Anarita Karimi Njeru vs. Republic (supra)** was enshrined by the Court of Appeal in **Mumo Matemo vs. Trusted Society of Human Rights alliance [2014] eKLR**, where it stated that:

“...the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle”

20. I have had the opportunity of looking at the petition and the supporting affidavit as well as the manner of pleadings therein, from the face of the first page to the last page, and do not agree at all with the Respondents submission. I find the petitioner in her petition has complied to the letter with the principle set out in the **Anarita Karimi Njeru vs Republic (supra)** case. The petition is set out with a reasonable degree of precision, that of which she complains of, the provisions said to be infringed and the manner in which they are alleged to be infringed are clearly spelled out and set out in the petition.

21. The position as regards failure to file response to the pleadings and failure to adduce evidence is well settled in the case of **NRB Milimani Hcc No. 1243 of 2001 Trust Bank Ltd vs PARAMOUNT UNIVERSAL BANK LTD & 2 OTHERS (2009) eKLR** where it was held at page 10 as follows:-

“The 2nd and 3rd Defendants closed their Cases without calling Witnesses. It is trite law that where a Party fails to call evidence in support of its Case, that Party’s pleadings remain mere statements of fact since in so doing the Party fails to substantiate its Pleadings. The 2nd Defendant’s and 3rd Defendant’s Defence were unsubstantiated and remained mere statements. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged. In AUTAR SINGH BAHRA AND ANOTHER VS RAJU GOVINDJI HCCC NO. 548 OF 1998 (UR) Mbaluto J held:-

which causes pain, humiliation and mental trauma corrodes the concept of human dignity.”

and

“The Petitioner’s Fundamental rights and freedoms are inherent and not granted by the State. Consequently, they are to be respected, upheld and promoted so as to promote Constitutionalism.”

24. I find from the petitioners uncontroverted affidavit and from her oral evidence and cross-examination by the Respondent during the hearing of the petition, the petitioner’s unchallenged affidavit has adduced probative evidence that she was subjected to both physical, psychological suffering on various occasions as clearly stated in her affidavit evidence. She was subjected to severe mental pain and suffered mental trauma while her husband was in custody at Kamiti Prison, while she camped at Nairobi Law Courts and at All Saints Cathedral with her mother-in-law Monicah Wangu Wa Wamwere and other mothers of political prisoners to put pressure on the Government so that her husband **KOIGI WA WAMWERE** could be released back to his freedom. It is not disputed or challenged that during such period the Kenyan police would invade the Cathedral grounds to harass and intimidate peaceful woman to vacate and abandon the peaceful protest for release of all political prisoners. I find the physical suffering, the humiliation, the mental pain and mental trauma; the petitioner was subjected to by the Respondents servants and agents, cannot be described otherwise that a torture and inhuman treatment in its many facets.

25. From the above I am satisfied that the petitioner has established that her Fundamental Right and Freedom, were contravened and grossly violated by the Respondent’s Special Branch Police Officers and Immigration Officers who were government servants, agents and employees.

B) Whether the petition is inordinately delayed and whether it should be dismissed?

26. The Respondent as pointed out did not file any Response to the petition or grounds of opposition or any Replying affidavit pointing out its opposition of the petition and on what grounds to enable the petitioner file a response but only filed submissions raising a number of issues; one of which is an issue of delay in filing the petition. This petition was filed on 28th March 2018, a period of after 27 years after the cause of action, which the Respondent urges it amounts to inordinate delay. In support of that preposition the Respondent relies on the case of **Wellington Nzioka Kioko vs AG (2018) eKLR**, where the Court of Appeal held that:-

“On the issue of delay, the learned Judge found that the petitioner was filing his claim 33 years after the cause of action relied on, She considered several persuasive decisions of the High Court for instance Wamahiu Kihoro Wambugu vs A.G .Petition No. 468 of 2014; Mugo Theuri vs. A.G, Ochieng’ Kenneth Kogutu vs Kenyatta University and 2 others, High Court Petition No. 306 of 2012, and several others. The common thread running through those decisions is that whereas there is no time limitation in respect of constitutional petitions, the delay must not be inordinate and there must be plausible explanation for the delay. The learned Judge found that no justification for the delay of over 3 decades had been given in this matter. Can the Judge be faulted for 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.

For instance in a case like the one before us where the appellant was complaining about hallucinations, is it possible that you can hallucinate for over 30 years over the same thing and not find the need to seek redress sooner? It would also be prejudicial to the respondent to drag them back 3 decades in matters they may have presumed were long gone and buried”.

27. The Respondent further referred to the case of **Stephen Njoroge Vs Attorney General & another [2019] eKLR** where the learned Judge held that:-

“The court of Appeal itself has, however held in Wellington Nzioka Kioko vs Attorney General [2018] eKLR (CA No 268 of 2016), which is binding on his court, that one has to explain the delay in bringing such a claim. I have perused the petition and the supporting affidavit. They do not explain why the petition was filed in 2017 when the infringements took place in 1991, about 26 years later. Had the petitioner explained the delay, the decision would perhaps have been different. For that reason this petition fails and is dismissed with no order as to costs.”

28. Further the Respondent relies on the case **High Court Petition No. 306 of 2012 Ochieng’ Kenneth K’Ogutu vs. Kenyatta University and 2 Others**, where the Learned Judge opined as follows:

“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 for 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."

29. In the case of **James Kanyita Nderitu vs. A.G and Another, Petition No. 180 of 2011;**

"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."

30. In the case of **Joyce Nakacwa vs Attorney General and others Constitutional Petition no. 2 of 2001 [2020] ugcc** it was held that:-

"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 case."

31. From the authorities relied upon by the Respondent it turns out, that although there is no limitation period for filing proceedings to enforce fundamental right and freedom to consider whether or not to grant relief is entitled to consider whether there has been inordinate delay in lodging the claim. The court is required also to consider whether justice will be served by permitting a Respondent to be vexed by an otherwise stale claim. The reason for delay should be given.

32. I agree with the petitioner's submission, that the Constitution of Kenya 2010 and even the former constitution do not limit the time line for filing constitutional Reference and Human Right case founded on violation of fundamental right and freedom but that in itself is not a licence for filing any inordinately delayed petition without offering any plausible explanation for delay for consideration by court as court has in a number torture cases expressed themselves on this issue. The petitioner in urging that there is no limitation period envisages in the former and current constitution in urging that if there was any strong intention to limit the period for litigation over fundamental rights and freedoms, the drafters of the new constitution as well as the Kenyan citizens during public participation before the referendum could have simply and expressly provided for a limitation period and also expressly excluded past violations. In The Constitution of Kenya 2010 especially in Chapter Four titled the Bill of Rights.

33. It is further submitted by the petitioner that the reason why all Nazis (1930s-1940s) and perpetrators of past violations of Human Rights in Argentina (1970s-1980s), Cambodia (1976-1979) and Rwanda (1994) and Mau Mau cases in British Courts are still being pursued in National Courts in their respective countries is because there is no specific law that limits the period to institute cases involving violation of fundamental freedoms/ Human rights. **Further, the doctrine that there cannot be a limitation Period for filing cases founded on violation of Human Rights and Fundamental Rights has remained unshaken for the last 70 years.**

It is submitted that **Amnesty laws** have been struck down by Constitutional Courts in Argentina, Chile & Brazil because of the Supremacy of the Doctrine that there is no limitation to seek redress for past violations of Human Rights/ Fundamental Rights and Freedoms.

34. It is further submitted by the petitioner that **TRANSITIONAL JUSTICE** is defined as a Judicial Process where in a period of constitutional transition from past authoritarian system characterized by bad constitutional system, the victims of past Human Rights abuses are facilitated to get reparation, redress and compensation. This ensures victims are indemnified of their pain and hurt and justice is done to them. **TRANSITIONAL JUSTICE** ensures the historical injustice and wounds of the victims are healed through legal redress. The public officers in future inevitability avoid repeat of the Human Rights abuse. There is hope for a peaceful future, respect for Human Rights and Rule of Law.

35. I find from the local authorities, that the common thread running through the decisions is that where there is no limitation in respect of constitutional petitions, the delay must not be inordinate and there must be plausible explanation for the delay. I have considered the petition and affidavit in support and especially paragraph 11 of the supportive affidavit where the explanation for delay is given as the petitioner did not have personal confidence with the judiciary with a view to pursue her redress for Human Rights violations but it is now that she feels she freely has confidence and in view of the new constitution. I find that in the instant petition though the delay is inordinate, it is not without explanation.

36. The instant petition was filed on 28th March 2018 almost 8 years after promulgation of 2010 constitution. I do agree and appreciate 8 years of waiting is an inordinate delay however the delay here in has been explained and considering the prevailing political situation prior to promulgation of 2010 constitution which made it practically impossible for further victims to file suits of this nature in court; coupled with apprehension that courts were against the victims of torture and lack of confidence in court's then and bearing in mind the dictate of transitional justice, and the need to uphold and strengthen the rule of law and to hold the perpetrators of violations of human rights

accountable and also bearing in mind the need to provide victims of torture with compensation and need to effectuate institutional reforms, I find that it would be wrong, unjust and unfair to uphold the submission on issue of limitation in the circumstances where there is inordinate delay and in which a plausible explanation as to the case of delay is given. In view of the aforesaid I decline to uphold the Respondent's submission that there was inordinate delay without plausible explanation in filing the petition for reasons I have stated herein above.

c) Whether the evidence adduced is admissible?

37. The Respondent submit that the petitioner's evidence is not admissible simply because the petitioner relies on newspaper cuttings whose genuineness is presumed by court but unless produced by the maker of the statement and deposing to have reported the fact remain hearsay and in admissible. The petitioner has not solely relied on the newspapers cutting but gave direct evidence of what befell her. The Respondent did not file any response nor called any evidence to controvert the petitioner's evidence. I find the petitioner's unchallenged evidence cannot be challenged by Respondent's counsel through submissions. In view of the Respondent's failure to have filed response or replying affidavit or grounds of opposition I find it cannot purport to use submissions to controvert the petitioner's affidavit evidence. I find no merit in the Respondents submissions on the allegation that the adduced evidence in court by the petitioner is inadmissible as apart from relying on newspaper cutting the petitioner relied on her own evidence as regards the violation motion; she underwent and which evidence was not challenged or controverted. There is no good reason why the evidence of the petitioner cannot be admissible.

C) What relief is the petitioner entitled to?

38. I now turn to consider what reliefs the petitioner is entitled to. I note both Counsel in this petition did not submit orally on the petition but opted to rely on their written submissions. The Respondent in its submissions has not addressed the court on the reliefs that court may grant, whereas the petitioner has done so. I am alive to the fact that monetary compensation for violation of fundamental rights is now an acknowledged remedy in public law for enforcement and protection of fundamental rights. I bear in mind that violation of fundamental rights and freedoms, enshrined in our constitution cannot be adequately compensated by any amount of money for the suffering endured by the petitioner herein.

39. In considering the quantum of damages to award I am guided by Court of Appeal in case of **Nairobi Civil Appeal No. 86 of 2013 Koigi Wa Wamwere vs AG**, where the court stated:-

“Given, however, the age of some of the older Authorities some of which we have referred to, which all range between Kshs. 1.5 Million and 2.5 Million in damages, and considering that the violation of rights suffered by the Appellant fell under two distinct instances namely the to torture at the macabre Nyayo House Cells and while held at Kamiti's Block G, which the learned Judge found and accepted, we think the sum of Kshs 2.5 Million awarded to him as the global General Damages was patently inadequate.”

40. I have considered that the petitioner herein suffered physical and psychological torture in the hands of police and immigration officers. She was humiliated and ridiculed and deprived her freedom arbitrarily without just cause, detained without trial, subjected to torture physically and psychologically in a cruel, inhuman and degrading manner for substantial period of time at different occasions. Upon considering all the above and considering that Fundamental rights and freedom of the individual are inherent and not granted by state and that they are to be respected, upheld and promoted so as to promote constitutionalism and the Bill of Rights, I find it would be against the constitution not to enforce such rights and not to make adequate compensation for individuals breached fundamental rights and freedoms. I find an award of Kshs.5, 000,000/- would be reasonable and just in the circumstances.

41. The upshot is that I find the petitioner has proved her case on balance of probability as required by law and I proceed to make the following orders:-

a) A Declaration be and is Hereby issued that the Petitioner's Fundamental Rights and Freedom were contravened and grossly violated by the Respondent's Special Branch Police Officers and Immigration Officers who were Kenyan Government servants, agents, employees in January 1987 when they stopped her for 2 weeks from leaving Kenya by impounding her Kenyan Passport and threatening to torch her house at Engashura when she attempted and persisted to lawfully fly out of the Country to join her husband KOIGI WA WAMWERE in Norway where he was exiled.

b) A Declaration be and is Hereby issued that the Petitioner's Fundamental Rights and Freedoms were contravened and grossly violated by the Respondent Immigration Officers on 29th July 1992 when the Petitioner was arrested at Jomo Kenyatta International Airport and detained for 8 hours when she arrived in Kenya from Norway to visit her husband KOIGI WA WAMWERE who was held at Kamiti Maximum Security prison.

c) A Declaration be and is Hereby issued that the Petitioner is entitled to the payment of damages and compensation for the violations and contraventions of her fundamental rights and freedoms under the provisions of The Constitution of Kenya 2010 at Kshs. 5,000,000/-.

d) The petitioner is awarded Kshs.1, 000,000/- as General damages, exemplary damages and moral damages on an aggravated scale under Article 23(3) of The Constitution of Kenya for the unconstitutional conduct by the Kenyan government servants and agents.

e) The Petitioner is awarded costs of the suit and interest on (c) and (d) above at court rate from the date of this judgment.

Dated, signed and delivered at Nairobi this 26th day of November, 2019.

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J .A. MAKAU

JUDGE