



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL PETITION NO. 452 OF 2016**

**LUCY WANJIKU MUKARU** (suing as the legal representative of

**MUKARU NG'ANG'A –DECEASED.....PETITIONER**

**VERSUS**

**ATTORNEY GENERAL.....RESPONDENT**

**JUDGMENT**

1. **Mukaru Ng'ang'a** (Deceased) was a University lecturer. He was arrested on 4<sup>th</sup> of April 1986 by state agents after they searched his car and residence and held incommunicado at an unknown place without charge up to 4<sup>th</sup> July 1986 when he was served with a detention order. During that said period of incarceration, the deceased is said to have suffered gross violation of his fundamental rights. That he was tortured, assaulted, whipped, stripped naked, kept in a water logged cell, sprayed with cold water at high pressure from a horse pipe and subjected to cruel and inhuman treatment.

2. It was stated that the deceased was denied food, that he was badly beaten with pieces of wood and tyre on the buttocks, leg joints, ankles and other parts of his body; that he was denied sleep when he was held in a water logged cell, was threatened with death as state agents tried to extract a confession from him and that he was insulted, molested and his human dignity abused when he was forced to drink water mixed with his urine and faeces from the cell he was held.

3. Based on the above facts acts the deceased filed a plaint dated 2<sup>nd</sup> May 1987 and amended in 29<sup>th</sup> September 2015 seeking the following reliefs:

- a. A declaration that the deceased fundamental rights under sections 72 and 840 of the repealed constitution of Kenya had been violated.**
- b. General damages,**
- c. Punitive and exemplary damages,**
- d. Costs.**

**Response**

4. The Attorney General, the respondent, filed an amended defence dated 5<sup>th</sup> July 1996. It was admitted that the deceased was arrested without warrant on 4<sup>th</sup> April 1986, that his car and residence were also search without warrant but denied that the deceased was unlawfully imprisoned, held in a dark cell at an unknown place and without charge from 4<sup>th</sup> April 1986 to 4<sup>th</sup> July 1986.

5. The respondent stated that the arrest, search and imprisonment were done lawfully and in accordance with provisions of police Act, criminal procedure code and section 72(1) (e) and 3 of the repealed Constitution. It was averred that there were reasonable grounds to suspect and investigate the deceased on account of having committed cognizable offences being an active member of **Mwakenya Group**, possession of seditious literature and conspiracy to overthrow the government. The respondent denied that for the period (90 days) the deceased was unlawfully held in gross violation and contravention of his fundamental rights or in fragrant abuse of state power, or that the deceased was tortured, assaulted, beaten or subjected to cruel and inhuman treatment or gross indignity.

6. The respondent further denied particulars of cruelty and inhuman treatment, gross indignity, torture and assault. It was stated that during time the deceased was in police custody, he received no special treatment from that accorded to other prisoners. It was averred that the deceased received food, a mattress to sleep on and a blanket to cover himself with, and that at no time did the deceased draw the defendant's

attention to the fact that he was sick and needed medical attention.

7. It was stated that all persons arrested on suspicion of committing criminal offences, undergo normal interrogation which the deceased underwent and that the interrogation did not involve mistreatment, torture or abuse as alleged by the petitioner.

## **Evidence**

8. **PW1, LUCY WANJIRU NG'ANG'A**, the widow and legal representative of the deceased, filed a witness statement dated 10<sup>th</sup> September 2015 which she highlighted in Court. She testified that in 1980, the deceased went home in California estate, Nairobi in the company of police officers, who ransacked their house, took the deceased to an unknown place for a few days but later released him. That again in 1981 the deceased was arrested and although she tried to look for him in police stations, she did not find him. Although he was later traced at Kandara Police station, he was released without charge. She testified that the deceased started expressing fear for his life forcing them to relocate to their rural home in Kandara.

9. The witness testified that in 1982 the deceased once again went home in the company of police officers, was detained in one room, the house was searched and police officers took away books and also left with the deceased. She later traced him at a police station in Nairobi but was not allowed to talk to him. He was detained but later released on 17<sup>th</sup> April 1984. According to the witness, after the deceased was released, he tried to get a job without success, that the deceased had been offered a teaching job at the **University of Dar-es-salaam** but could not take it up because he did not have travel documents since his passport had been confiscated. She testified that he went to **Nyayo House** for his passport and clearance, but that evening, he again went home in the company of police officers who once again searched their house in front of their children causing them a lot of stress. They then left with the deceased without disclosing where they were taking him. For three months, she did not know where the deceased was. She was left raising children on her own. It was later announced that the deceased had been detained.

10. The witness further testified that when she was finally allowed to see the deceased, he narrated to her how he had been tortured; that he was kept naked in a dark cell flooded with water, that he was beaten, was sprayed with cold water from a horse pipe at great pressure, was forced to drink water mixed with his own urine and faeces, and that he was threatened with death. She told the Court that when the deceased was released in 1989 he had suffered severe physical injuries due to the inhuman treatment and degrading conditions he had been subjected to. The witness testified that again in on 10<sup>th</sup> March 1990, police officers visited their home but the deceased managed to escape, hid for a few days and later went into exile in Sweden. They later joined him there and they have since lived in Sweden. She told the Court that the deceased's health continued to deteriorate and he finally died on 9<sup>th</sup> July 1997 while being operated on.

11. **PW2, Oscar Ng'ang'a Mukaru**, son to the deceased, testified that his later father was a university lecturer who spent years in detention and later in exile for supporting political pluralism in the country. He testified that the deceased was first arrested in 1982, that he was again arrested in 1984 and later in 1986 and released in 1989. He testified that his father was forced to go underground and later fled from Kenya because of fighting for the poor.

12. **Oscar** told the Court that they were left shell shocked when officers ransacked their house and left items strewn all over, that after the deceased was released, and he came home a difference person from the one they had known. He testified that in 1986, once again police officers went to their home with the deceased but without a search warrant and again ransacked the house before leaving with the deceased. They later learnt that he had been taken to **Nyayo House** where he was tortured for three months and later detained.

13. The witness told the Court that the three years his father was in detention were tough to them for they struggled to cope with school and life generally in the absence of their father. He testified that in 1990 police officers went to their house but when villagers started gathering they withdrew. He testified that his father went underground and later went into exile in Sweden where they later joined him. He stated that the torture and inhuman treatment the deceased went through caused his health to deteriorate and eventually led to his death at the age of 52 years. He was passionate that the Court should order a public apology apart from compensation.

14. **PW3 WINNIE NJOKI MUKARU**, daughter to the deceased, also testified that in their early years, they led a normal life with her father driving them around to and from school and even taking them on outings. She testified that things however started changing in 1982 when strangers visited their home and went away with their father and for 2 years she never saw him and had no information about his whereabouts. She testified that when her father was eventually released he looked shaggy and dark. She told the court that at the time, they were struggling because their father had no job. She testified that later on their father expressed happiness on the news that he was about to get a teaching job and would also get his passport back.

15. According to the witness, that excitement vanished when again police officers visited their home, turned it upside down and arrested her father only to see him again three years later in 1989. She testified that their father did not live with them for long because when it became apparent that police officers were again trailing him, he went into exile in Sweden. They later joined him in Sweden since their lives were also in danger. She told the Court that one of their siblings went into depression because of what they had been subjected to and later died. She testified that they went through a lot of difficulties because of their father's tribulations.

## **Petitioner's Submissions**

16. The Petitioner's Counsel filed written submissions dated 16<sup>th</sup> October 2017 and filed in Court on the same day which they fully adopted and relied on, It was submitted that the deceased's rights were violated when he was arrested without warrant and unlawfully imprisoned from 4<sup>th</sup> April 1986 to 4<sup>th</sup> July 1986 and later detained up to 1989 when he was released.

17. The petitioner submitted that during the period of incarceration, the deceased was grossly abused and that his fundamental rights under sections 72 and 74(1) of the repealed constitution were violated. It was contended that during that period, the deceased was kept in a dark cell flooded with water, that he was beaten up, sprayed with cold water from a horse pipe at high pressure, stripped naked and subjected to

inhuman and degrading treatment under humiliating conditions and in violation by the deceased's fundamental rights.

18. It was contended that the deceased's fundamental freedoms and personal liberty guaranteed under section 72(1) of the repealed Constitution were violated and relied on the case of **Kenneth Matiba v Attorney General Misc Application No 666 of 1990** cited in **Kenya Bus Services Ltd & 2 Others v Attorney General & 2 Others [2005] eKLR** for the proposition that pleaded infringements of one's fundamental rights invoke the jurisdiction of the court under section 84 of the repealed constitution.

19. It was further contended that the deceased was held in unlawful detention from 4<sup>th</sup> April 1986 when he was arrested and kept incommunicado for 3 months without even the knowledge of his family that the deceased was later detained and was only released on 1<sup>st</sup> June 1989. It was submitted that the deceased had prior to his arrest been a lecturer at the University of Nairobi. It was also submitted that prior to his arrest and detention the deceased had been under constant police surveillance. It was argued that the deceased's detention was prolonged because of filing **Civil Case No 1794 of 1987** challenging the government's action.

20. Further submission was to the effect that even through the deceased was served with a detention order, the same was vague in that no reasons were given for detaining the deceased. It was argued that the detention order was served on the deceased 90 days after arrest, and did not meet the requirements of section 83(2)(a) of the repealed constitution for failure to specify in detail grounds or sufficient information for his detention. It was contended that the deceased was not a member of any illegal movement or organization and was not involved in any illegal activities. On that basis it was submitted that the deceased's arrest and subsequent detention violated sections 70(a) (b) and 72(1) (2) of the retired Constitution.

21. The petitioner further questioned the detention of the deceased arguing that under section 72(3) of the repealed Constitution one could not be held under police custody beyond 24 hours for minor offences or 14 days for serious offences. Reliance was placed on the case of **Albanus Mwasia Mutua v Republic Criminal Appeal No 120 of 2004** for the proposition that a person should be produced in court within 24 hours of his arrest, **Paul Mwangi v Republic Criminal Appeal No 35 of 2006** cited in **Julius Kamau Mbugua v Republic [2010] eKLR** where delay to produce one in court for 10 days was said to be unacceptable.

22. On torture, it was submitted that the deceased's protection from inhuman and degrading treatment under section 74(1) of the retired constitution was violated. It was contended that during the deceased's incarceration, he was subjected to torture, inhuman and degrading treatment through beatings being kept in a water logged cell, among other abuses such as being stripped naked and drinking water mixed with urine and faeces.

23. The petitioner cited Article 5 of **UCHR**, Article 7 of **ICCPR**, the Convention against Torture (CAT), and European Convention on Human Rights (ECHR) among other international instruments. Reliance was also placed on the case of Greek case **1969 YB EUR CON on Human Rights 186(EUR. Comm on H. R)** cited in **Kenneth Njindo Matiba v Attorney General [2017] eKLR** on the definition of torture. Also cited was the case of **Gerald Juma Gichohi & 9 Others v Attorney General [2015] eKLR** and **Republic v Minister for Home Affairs and Others Exparte Stamze – Nbi Hcc No 1652 of 2004** on the submissions that section 74(1) of the repealed constitution echoed Article 7 of ICCPR. The petitioner asked the court to be persuaded by the above decisions and hold that the deceased was tortured and as a result he suffered physical psychological and mental well-being thus award damages.

24. On the appropriate damages, it was submitted that the Court should be guided by the case of **Jenifer Muthoni Njoroge & 10 Others v Attorney General [2012] eKLR** on the factors to consider such as torture inflicted, length of time one was held in unlawful custody, decided cases on the subject and circumstances of the case. It was submitted that in **Kenneth Matiba's case**, Ksh.15 million was awarded for contravention of section 74 for breach of right to freedom from torture and inhuman treatment, **Wachira Waheire v Attorney General [2010] eKLR** where KShs2.5 million was awarded for confinement for 16 days.

25. It was submitted that in the present case the deceased was incarcerated for 90 days and even when the detention order was served, it had no reasonable grounds hence the deceased was held for a further 1063 days. Citing **Mak'Onyango v Attorney General [2012] eKLR** where 20 million was awarded, the petitioner urged for an award of 120 million for the multiple violations.

### **Respondent's submissions**

26. The respondent filed written submissions dated 16<sup>th</sup> October 2017 and filed in court on 17<sup>th</sup> October 2017 which counsel for the respondent adopted. It was submitted that the introduction of **section 2A** in the repealed **Constitution** abolished multi- party politics and made Kenya a one party state thus formation of political parties was unlawful and any such activities were subversive activities under section 72(3) of the penal code.

27. It was contended that the Preservation of Public Security Act was intended to suppress subversive activities as was defined by section 2(b) of that Act in prevention and suppression of rebellion, mutiny, violence intimidation, disorder and crime and unlawful attempts and conspiracies to overthrow the government or the constitution. The respondent argued that whereas Chapter V of the repealed Constitution made provision for protection of fundamental rights and freedoms this right was subject to the rights of others under section 72(1) (d) and (e).

28. The respondent submitted that the deceased was suspected of forming a political party parallel to the then ruling party which was contrary to the Constitution. According to the respondent, the deceased was suspected of forming a political party known as **Kenya National Democratic Alliance** (KENDA) an unlawful activity. It was argued that due to those facts, the deceased was arrested and detained under **section 29(a)** of the **Criminal Procedure Code** which gave police officers power to arrest without warrant if they had reasonable ground to suspect that a person had or was about to commit a cognizable offence; and section 62 of the same code which provides that a police officer may interpose for purposes of preventing and should to the best of his ability prevent commission of a cognizable offence.

29. The respondent further cited **section 64** of the Code which provides that a police officer who has knowledge of a design to commit a

cognizable offence may arrest without orders from a magistrates and without warrant, the person designing, if it appears to the officer that the commission of the offence could not be prevented. According to the respondent, these provisions together with those of the Preservation of Public Security Act formed the basis for police officers to arrest the deceased once they suspected him of committing a cognizable offence of forming a political party. Reliance was placed on the case of National Citizen Forum and 3 others v Governor of the County of Nairobi & 4 Others Petition No 397 of 2013 for the proposition that a police officer is entitled to effect an arrest without a warrant so long as he has reasonable grounds for entertaining the suspicion at the material time and that although subsequent events may show that the officer was in error at the time, the arrest will not be rendered unlawful.

30. The respondent further relied on the case of Dillion v O'brien and Davis (1887) 16 Cox CC 245 where **Lord Diplock** stated that in the case of arrest, reasonable grounds for belief of guilt at the time of arrest are sufficient justification though, subsequent information or events may show those grounds to be deceptive. It was contended therefore, that police officers were justified in arresting the deceased having suspected him of forming an illegal political party.

31. The respondent further submitted that the contention that police searched the deceased's car and house without warrant is misplaced. It was contended that section 57 of the Police Service Act provides the legal basis for searches without warrant. It was submitted that police officers conducted searches in the deceased premises including the car based on the suspicion that he intended to form a political party.

32. The respondent took issue with newspaper articles referred to by the petitioner submitting that they were of no probative evidential value and are inadmissible since the deceased was not the maker thereof. It was also contended that the photocopies of books were not authenticated. Reliance was placed on **section 67** of the **Evidence Act** which provides that documents must be proved by primary evidence.

33. The respondent also relied on the case of Tesco Corporation Ltd v Bank of Baroda (K) Limited (Civil Case No 182 of 2007) for the submission that newspaper reports are inadmissible and are not covered under section 35 of the Evidence Act, and Koigi wa Wamwere v Attorney General [2004] eKLR and Randunzau Ruwa & 2 Others v Internal Security, Minister & Another [2012] eKLR for the proposition that newspaper articles have no probative value.

34. On whether the petitioner is entitled to the reliefs sought, it was submitted that there was no proof of violation of human rights and fundamental freedoms. The respondent relied on **section 107** of the **Evidence Act** which provides that **whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist and that the burden of proof lies on that person.**

35. The respondent contended that there were no medical reports to prove injuries the deceased may have sustained including psychiatric evaluation or OB entries as proof that the deceased feared for his life. The respondent relied on the case of Joel Mutanya v Swan Carriers Ltd [2015] eKLR for the submission that the burden of proof is on the person who alleges existence of certain facts. It was submitted that exemplary and general damages should not be granted in the same petition in cases of violation of fundamental rights and freedoms and relied on the case of Benedict Munene Kariuki & 4 others v Attorney General [2013]eKLR.

36. The respondent submitted that should the court find in favour of the petitioner, general damages of Ksh1, 500,000 would be appropriate and relied on the case of Haruni Thungu Wakaba v Attorney General Misc Appl. No 1411 of 2004 where the court awarded between 1 million and 3 million and Rumba Kinuthia v Attorney General where 1.5 million was awarded for violations of human rights and fundamental freedoms.

### **Analysis and determination**

37. I have considered this petition, the response thereto; submissions by counsel for the parties and the authorities relied on. Two issues arise for determination; first, whether the deceased's constitutional rights were violated and, second; what reliefs should be granted.

### **Whether the deceased's constitutional rights were violated;**

38. From the pleadings and submissions, the deceased was arrested on 4<sup>th</sup> April 1986 and held until 4<sup>th</sup> July 1986 without being charged. The question is whether the deceased's arrest and confinement was lawful. The petition was filed by the deceased in 1987 while still in detention. It amended on 29<sup>th</sup> September 2015. The petition challenged the lawfulness of his arrest and incarceration for 3 months as being a contravention of his constitutional rights under sections 72 and 84 of the repealed Constitution. According to the petition, the deceased was arrested on 4<sup>th</sup> April 1986 and held incommunicado for 3 months without any charges being preferred against him or being produce in a Court of law. During that period, it was submitted, he was subjected to inhuman and degrading treatment; was stripped naked, kept in a cold cell flooded with water, sprayed with cold water from a horse pipe at great pressure, made to kneel down and denied food. It was also contended that he was insulted, molested and forced to drink water mixed with his urine and faeces for a period of 90 days while in solitude.

39. These facts are also contained the evidence of Lucy Wanjiku Mukaru (PW1), the legal representative of the deceased's estate who testified in Court. She narrated how she learnt of her later husband's tribulations and mistreatment when visited him while in confinement. She also told the Court that their house was searched several times without a search warrant before the deceased was arrested and detained.

40. According to the witness, the deceased's problems with the government had begun in 1982. She testified that on the day the deceased was arrested (**4<sup>th</sup> April 1986**), the police searched their house without a search warrant and also arrested him without warrant, that he was unlawfully held and was not released until **1<sup>st</sup> July 1989**. She narrated how the family suffered and that her late husband was unable to get a job because no one was willing to offer him a job. She narrated how the deceased was offered a teaching job at the **University of Dar –es-salaam** but could not take it up because his travel documents had been confiscated. She testified that although the deceased was later called to go for the passport, it was not released to him. Instead, police officers accompanied him to their house for more searches.

41. The witness told the court that when things became unbearable, the deceased escaped from the country through Uganda and went into exile in Sweden where he was given political asylum. The family soon joined him there but he died one day while being operated on. It was **Lucy Mukaru's** evidence that the deceased's health had begun to deteriorate while he was in detention because of the way he was treated including being forced to drink water mixed with his urine and faeces.

42. This evidence was supported by that of **PW2, Oscar Mukaru** son to the deceased and **PW3, Winnie Mukaru**, daughter. They both agreed with their mother that the deceased's health had begun to deteriorate while in confinement and that when he was released from detention, he fled to Sweden. They had to join him in Sweden and they still reside there because life had become unbearable. They testified that one of their siblings died out of depression because of what they had gone through.

43. The respondent never called evidence to rebut that of the petitioner. He relied on written submissions. It was submitted that the police had a right to search the deceased's premises without warrant if they had reason to suspect that he was about to commit a cognizable offence. According to the respondent, the cognizable offence was that the deceased was engaged in the formation of another political party contrary to the then Constitution which allowed only one political party. He was of the view that there was no violation of the law and or rights and fundamental freedoms of the deceased.

44. Article 70 (c) of the retired Constitution protected the privacy of the home and property. Despite this constitutional protection, the police could enter and search a house if they had reason to believe that a person had committed or was about to commit a cognizable offence. This is however a matter of evidence and it was up to the respondent to satisfy the Court through evidence that the deceased had committed or was about to commit a cognizable offence hence the police had a right to enter and search his house. The respondent did not call evidence and did not tell what cognizable offence the deceased had committed or was about to commit. The respondent only submitted from the bar that the deceased was suspected to be in the process of forming a political party contrary to the then **section 2A** of the retired Constitution, and that he was a member of **Mwakenya**. I note that there is no evidence that even after the searches, the police came across evidence linking the deceased with such a plan. Without evidence, the respondent cannot argue through submissions that there was a cognizable offence and therefore that the police had a right to conduct a search without a search warrant.

45. That notwithstanding, the deceased was arrested on 4<sup>th</sup> April 1986 but was not produced in Court or dealt with in accordance with the law until 4<sup>th</sup> July 1986 when he was served with a detention order. Section 70 (b) of the retired constitution guaranteed the right to life, liberty, security of the person and the protection of the law so long as that right did not jeopardise the right of others. Section 72(1) of the Constitution provided that **No person shall be deprived of his personal liberty save as may be authorized by law.** The section went on to give instances when a person's liberty could be compromised one of which was; (e) **upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law of Kenya.** It is clear from the evidence on record that the deceased's right to liberty was compromised when he was arrested on 4<sup>th</sup> April 1986 and held in solitude until 4<sup>th</sup> July 1986, There is no doubt therefore that the deceased was deprived of his liberty in those circumstances unless the respondent showed that he was suspected of committing or was about to commit a criminal offence and was being arrested pursuant to section 72 (1) (e) of the retired Constitution.

46. The respondent, in justifying that arrest, submitted that the deceased was suspected of forming a political party contrary to **section 2A** of the retired Constitution, was a member of "**Mwakenya**" an underground movement involved in subversive activities and therefore, the police had reason to arrest him. If that was true, the police would have been acting in accordance with section 72 (1)(e) of the repealed Constitution, and were required to produce the deceased before a Court of law within 24 hours given that the deceased would only be accused of committing a misdemeanour. That did not happen. Instead, the deceased was incarcerated for 90 days without being produced in court or set free as was required by section 72 (3) of that Constitution.

47. For avoidance of doubt, section 72 (3) provided;

**a. "A person who is arrested or detained,**

**b. For the purposes of bringing him before a court in execution of a court order; or**

**c. 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 and 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."**

48. The reason for limiting a person's liberty by arresting and detaining him on suspicion of committing or intending to commit a criminal offence, was for purposes of producing the person in court to be dealt with in accordance with the law. In this case, the deceased was arrested on 4<sup>th</sup> April 1986 on suspicion of committing a criminal offence and held incommunicado until 4<sup>th</sup> July 1986 without being produced in Court. The respondent has not shown that the deceased had committed or was suspected of committing a criminal offence punishable by death requiring him to be held for more than 24 hours. Even if they had, they would only have been entitled to hold the deceased for 14 days from the date of arrest and produce him in Court as was required by section 72 (3) (b) of the then Constitution.

49. The petitioner contended that the respondent violated the deceased's human rights and fundamental freedoms by holding him beyond the time allowed by the Constitution. The respondent has not on its part adduced any evidence that they had complied with the Constitution or at all. The respondent has not even attempted to explain why the deceased was held beyond the period of 24 hours stipulated in the Constitution then. It is obvious without more, that there was violation of the deceased's constitutional rights when he was held beyond the period allowed and there was no attempt to justify that violation.

50. Section 72(3) of the repealed constitution was important in protecting an individual's right to be produced in court so that he could be dealt with in accordance with the law whenever arrested for committing a criminal offence. This was to check and or curtail arbitrary arrests that had nothing to do with preservation of law and order or intended to protect public interest or even achieve the course of justice. The Court of Appeal dealt with the import of section 72 (3) (b) in the case of *Albanus Mwasia Mutua v Republic* [2006] eKLR, holding that there was gross violation of the appellant's constitutional right guaranteed to him by **section 72(3) (b)** because he was brought before the Court eight months after the date of his arrest and no explanation was offered at all for that delay. The Court 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"**.

51. Applying section 72(3)(b) and the above pronouncement to this case, it cannot be denied that the deceased's rights and fundamental freedoms were violated when he was held in custody for three months without being produced in court to be dealt with in accordance with the law. It is my finding that there was gross violation of the deceased's constitutional rights and fundamental freedoms for holding him beyond 24 hours and no justification was offered for it.

52. There was a related submission that the deceased was tortured and treated in an inhuman and degrading manner while in confinement. It was averred as well as submitted that the deceased was stripped naked, kept in a water logged cell, whipped, sprayed with cold water at high pressure, made to kneel down and forced to drink water mixed with his own urine and faeces as the police tried to extract a confession from him.

53. The respondent denied these allegations contending that the deceased was treated in a normal manner just like any other prisoner. The respondent argued that the deceased never brought to his attention the fact that he was unwell and needed medical attention. The respondent further submitted that there was no medical report to show that the deceased had been mistreated and or sustained any injuries while in police custody or that he suffered in any other way.

54. The respondent's submission and contention cannot hold. The deceased stated in the petition that during the period he was held incommunicado, he was badly tortured, assaulted, beaten and subjected to cruel and inhuman treatment. He gave particulars thereof including; that he was beaten with pieces of wood and tyres on the buttocks, ankles, leg joints and other parts of his body. It was stated that he was sprayed with water at great pressure, and threatened with death while the police were trying to extract a confession from him. These claims were repeated by **PWI**, the deceased's widow who testified that she was informed of these facts by the deceased when she visited him in detention.

55. Although the respondent filed a denial, he never tendered evidence to controvert that of the petitioner regarding the treatment the deceased is said to have been subjected to. It must be appreciated that from the date of his arrest, the deceased was held in police custody and was never produced in court. He was thereafter detained and was only released in 1989. He did not live in peace even after his release. He was routinely under police surveillance and when he found it unbearable he sought asylum in Sweden. The respondent's argument that there was no medical evidence to support the claim of mistreatment and torture is unsustainable in the circumstances of this case.

56. A person such as the deceased who was kept in solitary confinement followed by detention could not be expected to obtain medical evidence on the torture or mistreatment he went through while in solitary confinement when he did not even have time to think of such a course. He went into exile soon after his release and died while on treatment. His widow testified that he developed poor health while in confinement. Although there was no medical evidence to show the cause of death or what he was ailing from, that alone cannot be a ground for concluding that he was not tortured and or treated in a cruel and inhuman manner. Medical evidence could only show the degree of injuries suffered but not that he was not tortured at all. The respondent never called evidence from those who arrested and held the deceased to controvert the petitioner's evidence that the deceased was badly treated while in police custody. The respondent contended that the deceased was treated the way other prisoners were treated but called no evidence to enlighten the Court on what that treatment was like.

57. In my respectful view, it would be too optimistic to expect a person, like the deceased, who had been kept in solitary confinement followed by detention and thereafter exile, to produce medical evidence to support a claim of torture when the widow testified that she visited the deceased and heard from him regarding the ill-treatment he went through while in that confinement. On the evidence on record, the deceased could not have had a chance to see a doctor let alone gather medical evidence for purposes of producing it in Court in support of his claim about torture and inhuman treatment. It is not all ill-treatments that must result into visible injuries. Absence of physical injuries cannot mean one was not tortured or treated in an inhuman and degrading manner.

34. In that regard, I am persuaded by the observation by the Constitutional Court of South Africa in the case of *AZAPO V President of Republic of South Africa* (CCT 17/96) that;

**"Most of the acts of brutality and torture which have taken place have occurred during an era in which neither the laws which permitted the incarceration of persons or the investigation of crimes, nor the methods and the culture which informed such investigations were easily open to public investigation, verification and correction. Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof. Loved ones have disappeared, sometimes mysteriously and most of them no longer survive to tell their tales. Others have had their freedom invaded, their dignity assaulted or their reputations tarnished by grossly unfair imputations hurled in the fire and the cross-fire of a deep and wounding conflict. The wicked and the innocent have often both been victims. Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible; witnesses are often unknown, dead, unavailable or unwilling. All that often effectively remains is the truth of wounded memories of loved ones sharing instinctive suspicions, deep and traumatising to the survivors but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigours of the law."**

58. The above observation could not speak more about the case at hand. The deceased was a marked man who never knew peace. He was virtually being pursued wherever he went. He could not therefore look for or keep evidence medical or any other evidence for use in court.

When he was released, the case had already been filed and he was in the country for a short while before he went into exile. He may not have had time to prepare for the hearing of this case since he died while on treatment.

59. The petitioner referred to newspaper articles and copy of the manuscript of a book the deceased was writing which contained details of the treatment the deceased was subjected to. The law is now clear that newspaper articles are of no evidential value unless the writer of the article was called to authenticate the information in the particular article. I also note that the manuscript is a photocopy and there was no way of authenticating it. They were of little evidential value in the circumstances of this case.

60. The retired Constitution prohibited torture or inhuman treatment. Section 74(1) provided that “***no person shall be subjected to torture or to inhuman degrading punishment or other treatment***”. *Black’s Law Dictionary 9<sup>th</sup> Edition* defines “torture” as; “***The infliction of intense pain to the body or mind to punish, to extract a confession or information or to obtain a sarcastic pleasure.***” Article 1 of The United Nations Convention against Torture and other Cruel and Inhuman or Degrading Treatment defines the term ‘torture’ as;

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

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

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

61. Torture, as can be seen from the above definitions, is closely related to inhuman treatment in that both refer to infliction of pain with an ulterior motive and both were outlawed by **section 74(1)** of the retired Constitution. In the Ugandan case of *Salvatori Abuki and another v AG* (constitutional Case No 2 of 1997) (1997) UGCC 5 the Court stated that ***the common feature of this punishment is the causing of severe pains and suffering to the victim either physically or mentally.*** Further in the *Greek Case 1969 Y.B Eur. Conv. on H.R. 186 (Eur. Comm’n on H.R)* the European Commission on Human Rights stated;

**“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.”**

62. And in the case of *Selmouni v France* (2000) 29 EHRR 403, the *European Court of Human Rights* dealt with the case of *Selmouni* who alleged to have been treated in a manner that violated Article 3 of the European Convention. Article 3 provides that ***“No one shall be subjected to torture or to inhuman or degrading treatment or punishment”***, (a similar provision to our section 74(1) of repealed Constitution). *Selmouni* was subjected to treatment similar to what the deceased in this petition went through. The Court observed in that case;

**“[99] The acts complained of were such as to arouse in the applicant feelings of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical and moral resistance. The Court therefore finds elements which are sufficiently serious to render such treatment inhuman and degrading...In any event, the Court reiterates that, in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3”**

63. The Court went on to reiterate that **Article 3** (our section 74(1) ***enshrines one of the most fundamental values of democratic societies, and that even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment.*** I fully agree adopt the above observation in respect to this case. The deceased could not be treated the way he was with section 74(1) of the repealed Constitution in force. In that regard, torture in any form of inflicting physical or mental pain on someone with the intention of mocking or coercing him into submission or confession was prohibited in absolute terms by section 74(1) of the retired Constitution. Taken in that context therefore, I am satisfied that the deceased was subjected to acts which amounted to torture, inhuman or degrading treatment and or punishment in violation of his constitutional rights protected under section 74(1) of the repealed Constitution.

### **Appropriate Reliefs**

64. Having determined that the deceased’s constitutional rights were violated, the issue that I have to deal with is the appropriate reliefs to grant. In cases of violation of human rights and fundamental freedoms, the issue is usually one of compensation. The law is that where, like in this case, a party succeeds in demonstrating that there was violation of rights and fundamental freedoms, the Court should grant the petition. In the case of *Tinyefuze v Attorney General of Uganda* [1997] UGCC3 the Court stated that ***if a petitioner succeeds in establishing breach of a fundamental right, he is entitled to the relief in exercise of Constitutional jurisdiction as a matter of course.***

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

66. The reason for awarding compensation is also to live up to the fact that there should be no right without a remedy and to remind the state and its agents that rights have inherent value, must be respected, enhanced and protected; and that their violation will attract substantial compensation. In that regard therefore, in determining the appropriate award, the Court will consider factors such as the torture inflicted on the Petitioner, the length of time the Petitioner was held in unlawful custody, the decided cases on the subject matter and what would be fair and reasonable in the circumstances of the case. (See Jeniffer Muthoni Njoroge & 10 others v Attorney General (supra))

67. In the present petition, the deceased was arrested on 4<sup>th</sup> April 1986, and unlawfully held until 4<sup>th</sup> July 1986 when he was served with a detention order. That was a period of three months of unlawful confinement. The petitioner's counsel further submitted that the deceased was later detained for 1063 days and argued that the detention was illegal. He urged the Court to take the period of detention into account in determining the award for damages for violation of rights and fundamental freedoms.

68. I have really agonized over this submission. The petition was filed as a plaint in 1987 while the deceased was still in detention. I have examined the initial plaint filed in Court on 4<sup>th</sup> May 1987 but found no averment that the detention was unlawful. I have also perused the amended plaint dated 29<sup>th</sup> September 2015 and filed in Court on 30<sup>th</sup> September 2015. That too does not contain an averment challenging the legality of the detention. The fact of the detention being unlawful was only raised through the petitioner's written submissions.

69. This Court would have delved into the question of the legality of the detention had it been one of the matters pleaded hence an issue before it. In the absence of such an averment and bearing in mind that parties are bound by their pleadings, it will be inappropriate for the Court to address that issue at this late stage without falling into error. For that reason, the period challenged in the petition is the 90 days the deceased was in unlawful custody and the violations he was subjected for.

70. On the amount to award, the petitioner's counsel asked for Ksh120 million covering the periods of illegal confinement and detention; about three years. The respondent suggested Ksh1. 5 million should the Court find in favour of the petitioner. Both parties relied on a number of decisions to support their respective positions.

71. The purpose of compensation is not to repair the suffering or return the happiness or enjoyment of the already violated rights and fundamental freedoms. It is difficult to present proof of measurable economic or physical loss resulting from a violation of one's constitutional rights. In a case involving constitutional rights violation, all the court does is to attempt to place a value on the damage suffered by the petitioner because his constitutional rights were violated, to remind the state that constitutional rights are for enjoyment and not for violation and that any violations will not go without a remedy. ***It is also a reminder that the Constitution is neither a toothless bulldog nor a collection of pious platitudes but has teeth and in particular those found in sections 72 and 84 of the retired Constitution*** (see Felix Njagi Marete v The Attorney General (1987)KLR 690 ).

72. Having considered the period the deceased was held in unlawful confinement and the acts of inhuman and degrading treatment he was subjected to and also taking into account the awards in Koigi wa Wamwere v Attorney General [2015]eKLR where Ksh12 million was awarded and Kenneth Stanley Njindo Matiba v Attorney General [2017]eKLR, where an award of Kshs.15 million was made where both cases dealt with violation of constitutional rights and fundamental freedoms, I am of the considered view that an award of **Kenya shillings 15. million** is fair and reasonable in the circumstances of this case.

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

74. In conclusion, having considered the petition, the response, evidence and submissions on behalf of the parties, as well as precedent and the law, I am satisfied that the petitioner has proved her case that the deceased was unlawfully held for three months without producing him in Court in violation of his rights and fundamental freedoms protected under section 72(3)(b) of the repealed Constitution and that during his incarceration his rights guaranteed under section 74(1) of the repealed Constitution ***not to be subjected to torture or to inhuman or degrading treatment or punishment***, were violate. The petition must therefore succeed.

75. Consequently, the amended petition dated 29<sup>th</sup> September 2015 is hereby allowed in the following terms;

**i. A declaration is hereby issued that fundamental rights and freedoms of Mukaru Ng'ang'a (the deceased) protected under sections 72(3) (b) and 74(1) of the repealed constitution were violated by agents of the state.**

**ii. The petitioner is hereby awarded Kenya shillings 15, 000, 000 as damages for the violation in 1 above**

**iii. Costs and interest to the petitioner.**

**Dated, Signed and Delivered Nairobi this 9<sup>th</sup> Day of March 2018**

**E C MWITA**

**JUDGE**