



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO 226 OF 2016

DAVID IRUNGU MWANGI.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

1. **David Irungu Mwangi, the petitioner**, was a businessman in the 1990s dealing in import and export of Africa Jewellery and other assorted artefacts. He was the proprietor of **D.I imports and exports Limited**, based in Nairobi and **Lamu Africa Gallery** which had offices in New York City, United States of America.

2. The petitioner states that on 10th July 1990, soon after attending a public rally organized by a section of Kenyan opposition leaders clamouring for change (**Saba saba rally**), he was arrested by state agents from his offices at Manani Building Keekorok road opposite Old Nation Centre, Nairobi. He identified the officer who arrested him as **Chief Inspector Nyadega, Kivuti, Njuguna and Nganga**. He states that the officers did not give reasons for arresting him.

3. The petitioner avers that he was man handled and frog marched to Nairobi's central police station where he was locked up; that he was later driven for about one hour in the back of a Land Rover in blind folds and made to lie on his belly. The petitioner states that when the Land Rover came to a stop, he found himself in an underground hall where he was ordered to undress naked. He was led to a dark cold cell with a green light bulb with extreme low voltage that was intermittently switched on and off. He stated that while in his cell, he could hear men screaming in other rooms for hours followed with gun shots. According to the petitioner, he was made to sleep on a cold floor without blankets with the result that the exposure to cold affected his spine and knees, effects he feels to date.

4. The petition further states that he was kept in solitary confinement for 3 months without contact with the outside world and survived on a meal a day. He avers that he was interrogated for long hours while naked and hungry; was denied water and sleep on allegations that he was plotting to overthrow the government of the day through his participation in the Saba Saba Movement. He says that he was also accused that his business in New York was a conduit for funds from foreign governments for the purpose of destabilizing the legitimate government of Kenya. He contends that he was mercilessly assaulted using blows, kicks, slaps, tyre strips and horse pipes; and that he was kicked on his private parts; kept in cold water logged cells and threatened with death.

5. In a nut shell, the petitioner states that he suffered physical violations, cruelty, torture, inhuman and degrading treatment at Nyayo chambers until his released on 16th October 1990 without charges being preferred against him, and that his passport was confiscated and cancelled. He avers that during the incarceration period, his business that had thrived since 1986 generating about USD20, 000 a proximately Ksh2 million shillings monthly, suffered a big blow and collapsed and as a result, he lost his sole source of income.

6. The petitioner filed the petition dated 25th May 2016 and amended on 18th December 2017 seeking the following reliefs.

a) A declaration that the petitioner's fundamental rights and freedoms were contravened and grossly violated by offices who were Kenya governments servants, agents and or employees due to the harsh, inhuman and or degrading treatment occasioned to the petitioner.

b) A further declaration that the petitioner is entitled to general, exemplary and primitive damages against the respondents as may be assessed by the Honourable Court for the unjustified physical and Psychological suffering.

c) Compensation against the respondent as may be assessed by the Honourable court for gross violations of the petitioners

fundamental rights and freedoms and compensation against the respondents for loss of earning collapse of his business both local and international, and subsequent financial loss of gross profit of Ksh1, 558,369.40 monthly assessed and awarded at current exchange rate at the mean average of US D1=Ksh103. For five months as pleaded above.

d) An award of exemplary, aggravated and or punitive damages for blatant callous, oppressive and high handed violation of the petitioner's constitutional rights by employees, officers, servants and or agents of the respondent government of Kenya,

e) General damages of Ksh15,000.000/-

f) Costs and interests

g) Such further, other and consequential order the honourable court may deem fit to make.

Response

7. The respondent filed grounds of opposition dated 2nd August 2016 and filed in court on 3rd August 2017, contending that the petitioner had not demonstrated how the respondent had violated his constitutional rights under the constitution; that the petitioner was making baseless claims that he was unlawfully locked up at central police station for 3 months without adducing any evidence; that the petitioner is making wild allegations that he was operating business making a profit of over Kshs2,000,000/- and as a result of the alleged incarceration his business collapsed; that there is no any evidence to support such wild allegations; that the petitioner's interpretation of the Constitution is misleading, misconceived and self-serving; and that the amended petition is hapless, presumptive and an abuse of the court process and should be dismissed with costs. The respondent further contended that the grounds set out in support of the amended petition do not raise constitutional issues either for enforcement of fundamental rights or interpretation of the constitution; and that the petition is frivolous to the extent that it does not raise a cause of action against the 2nd respondent.

Evidence

8. The petitioner, who testified as **PW1**, told the court that he learnt how to prepare African Jewellery while an employee of African Heritage where he worked for 10 years rising to the position of manager in 1985. They started a company by the name **Trinity Jewellery** but in 1986, he started his own business known as D.1 Import and Export Ltd which was also dealing with African Jewellery including Kiondos, Kisii soft stones, and general Artefacts. The petitioner told the court that he later went to USA to market his products and got orders in excess of USD 20,000. He told the court that he started **Lamu Gallery shop** in New York and marketed the jewellery products in about 30 States in USA by which time he had about 15 employees. He testified that he joined politics and ran for Mathare Parliamentary seat in the 1988 and 1989 elections but lost on both occasions.

9. The petitioner testified that on 10th July 1990 he was picked from his office by special branch agents, blind folded, moved from one place to another, beaten, stripped naked, denied food and kept in a water logged cell. He told the court that he was tortured and subjected to inhuman treatment until he was released on 16th October 1990 without any charge being preferred against him, in violation of his constitutional rights and fundamental freedoms. It was his further evidence that due to this unlawful incarceration, his business went down as customers went away and stopped associating with him. He told the court that his family was not even allowed to see him in custody. The witness relied on a number of documents which he produced as exhibits 1-42. To show that his business was doing well making about Kshs 2 million a month but all this collapsed once he was taken into custody.

10. In cross examination, the petitioner told the court that he operated a company but did not have the certificate of incorporation in court. He maintained that his business was doing very well making over Ksh2 million a month; He stated that the details of his business earnings were prepared by a book keeper who doubled up as an accounts clerk but that he never engaged auditors. Asked about the business in USA. the petitioner stated that it was at Manar Building where he was a tenant but did not have a tenancy agreement in court.

11. Regarding his arrest the petitioner told the court that about 4 people entered his office; introduced themselves as police officer and left with him. He testified that he was taken to a dark room; that a person would occasionally and intermittently switch the light on and off and that he was held there for 4 months and in the process sustained injuries on his body but did not have a medical report.

12. **Jacqueline Nambe Mbote, PW2** an employee of the petitioner, testified relying on her statement recorded on 30th September 2016 that she worked as a secretary from 1987; that her duties included paying salaries, receiving orders for jewellery, picking raw materials, checking the quality of finished products, sending products for export, and filing roll calls among others. **Ms Mbote** testified that the business was doing well making profits and as a result, the petitioner opened another business in USA. She testified that on 10th July 1990 the petitioner was picked up from the office by police officers in plain clothes, who had stormed the office; asked for the petitioner but before she could answer them, they entered his office and left with him.

13. She told the court that they visited all police stations in the Nairobi area but did not trace the petitioner and she never saw him again until October 1990. She testified that after the petitioner's arrest they could not continue exporting products; that they cancelled many orders; lost more customers both local and international and as a result the business went down. According to this witness, many employees also left. She stated that even after the petitioner was released, so much had been lost that nobody wanted to be associated with him. She also stated that the petitioner's arrest destroyed their livelihood.

14. In cross examination; the witness told the court that she used to pay salaries, receive and pay for orders and was doing other duties including accounts. She told the court that they did not have an accountant in the office but that one Joseph used also prepare accounts. She said she remembers the petitioner was arrested on 10th July 1990 by police officers at about 12 noon; that the officers asked for the petitioner's office and entered even before she answered them. They left with the petitioner without talking to her. After the petitioner's

arrest, she stated, they cancelled many orders due to loss of business but she remained in the office until the petitioner's release in October 1990.

15. **Wilson NJoroge Munga, PW3**, also an employee of D.I import and export Ltd, testified that the business was doing very well; that on 10th July 1990, several people came to the office and asked for the petitioner; that entered the office and left with him and he did not come back. They went to various police stations looking for the petitioner but did not find him he told the court. He stated that after the petitioner's arrest, the business started going down because customers left. He testified that when the petitioner was released, he found the business low because it was difficult to manage it in the petitioner's absence.

16. In cross examination, the witness stated that he was the workshop manager and that on the fateful day, 10th July 1990, he had gone to see the Secretary- PW2, when officers came and arrested the petitioner, but he never knew why he had been arrested. He stated that he only came to know where the petitioner had been taken when the petitioner told them after his release.

Petitioner's submissions

17. **Mr. CN Kihara**, learned counsel for the petitioner submitted, highlighting their written submissions, that the petitioner was a jewellery specialist; that the petition is on violation of constitutional right and that the Constitution protects personal security and prohibited torture and inhuman treatment under section 74(1) of the retired constitution. Learned counsel further submitted that there was violation of privacy when the petitioner's office was searched in violation of section 76(1) of the repealed Constitution.

18. Learned counsel submitted that the petitioner discharged the burden of proof and gave credible evidence. He also contended that the exhibits the petitioner produced supported his case on the loss of business. Learned counsel further submitted that the petitioner suffered loss of earnings and relied on the documents produced as exhibits to buttress this fact. They included accounts for the years 1987, 1988 and 1989. Learned counsel relied on several decisions and urged the Court to allow the petition as prayed. These were including Wachira Weherire v Attorney General [2010] eKLR, Otieno M'kOnyang v Attorney General & another {2012} eKLR, and Kenneth Stanley Njindo Matiba v Attorney General [2017] eKLR

Respondent's submissions

19. **Mr. Sekwa**, learned counsel for the respondent submitted, also highlighting their written submissions, that although the petitioner claimed that he owned companies in Kenya and USA, he did not show proof that he owned those companies. Learned counsel contended that there were no certificates of incorporation or Business registration or number or even evidence of how the profits were earned.

20. Counsel submitted that no audited accounts were produced to aid the petitioner's case and maintained that authors some of the documents were not called as witnesses hence the Court cannot rely in such evidence. He also submitted that some of the documents are newspapers cuttings which are of no probative evidential value.

21. Regarding the petitioner's claim that he was tortured, learned counsel submitted that there was no medical evidence to support this claim; that no doctor was called to testify and relied on the submissions and authorities of Macharia wa Kamau & 2 others v Attorney General & 2 others [2015], Mumo Matemu v Trusted Society of Human Rights Alliance [2013] eKLR and Peter Ngari Kagume & 7 others v Attorney General [2009] eKLR

22. On damages, learned counsel contended that the petitioner brought the petition seeking damages for violation of constitutional rights but should not get exemplary damages. He relied on the decision in the case of Maharaj v Attorney general of Trinidad and Tobago (page 680) for the submission that in claims of violation of constitutional rights compensation is for deprivation of liberty a claim in public law as opposed to claims in private law. He prayed that the petition be dismissed.

Analysis and Determination

23. I have carefully considered this petition, the evidence on record and submissions by counsel for the parties. I have also considered the authorities relied on by both sides. Two issues arise for determination. First, whether the petitioner's constitutional rights and fundamental freedoms were violated; and second, depending on the answer to the above issue, whether damages are awardable.

24. The petitioner was a business man who was arrested on the afternoon of 10th July 1990 by persons said to be state agents and taken to an unknown place. He was not to be seen until after three months when he was released. After his arrest, he was taken to a police station in Nairobi where he was held briefly before he was transferred to **Nyayo House** where he was held in a dark room in a logged cell. He states that he was held under difficult conditions; was denied food and water and survived on one meal a day.

25. He was kept in solitary confinement and was not allowed access to a lawyer or to see his family. He told the court that he was beaten, stripped naked and kept incommunicado. He was interrogated for long periods during which he was intermittently slapped and kicked for associating with people intending to cause trouble and destabilise the then government, in violation of his constitutional rights and fundamental freedoms. He told the court that while in confinement, his business took a hit and went under because the people he left behind could not manage it, and it eventually collapsed

26. The petitioner further stated that he used to make Kshs2000, 000 a month and that his business was doing well and had even an outlet in New York in the USA, which also collapsed due to his detention. According to the petitioner he was accused that his business was associated with channelling foreign finding to the opposition, and told the court that he had not only suffered in terms of his human rights and fundamental freedoms, but also lost business and therefore asked the court to order compensation.

27. The petitioner called two witnesses **Jacqueline Wambui Mbote -PW2** and **Wilson Njoroge Munga -PW3**. They told the court how persons who identified themselves as police officers visited the petitioner's office where PW2 worked as a secretary and PW3 was the manager. They forced their way into the petitioner's office; walked out with the petitioner and left without a word. The witnesses told the court that they never saw the petitioner again until three months later in October 1990. They narrated how they visited police stations but were unable to trace the petitioner. They told the court that the business had been doing very well until the petitioner's arrest and incarceration which made the business take a hit. They also testified that they could not sustain the business because customers withdrew orders and that they were unable to meet customers' timeliness. They said that people also started viewing the petitioner as an unwanted person hence they did not want to be associated with him.

28. According to **Ms. Mbote**, the business which had been earning about Ksh2 million a month, went down and even after the petitioner's released in October 1990, there was little he could do to revive it. They told the court that the collapse of the business had also severely affected their livelihood.

Whether the petitioners arrest and detention violated his constitutional rights and fundamental freedoms

29. The petitioner was arrested from his office on 10th July 1990 without warrant. He was taken in blind folds to unknown place and by the time blind folds were removed, he found himself in a dark room which he later identified as the Nyayo House torture chambers. He is said to have been tortured and subjected to inhuman and degrading treatment. He was stripped naked, kept in a cold water logged cell, beaten and denied food and water.

30. The law as it stood then, section 70(a) of the repealed constitution guaranteed fundamental freedoms and the right to liberty. The law was clear that fundamental freedoms and the right to liberty and protection of the person were guaranteed to every person except in certain situations which had to be in accord with due process. Section 70(a) of the repealed Constitution provided that;

“Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely –

(a) life, liberty, security of the person and the protection of the law.”

31. The Constitution further made it clear that anyone arrested for suspicion of committing a criminal offence or being about to commit one, was to be produced in a court of law within twenty four (24) hours or 14 days in case he was suspected of committing a capital offence. In that regard, section 72(3)(b) of the repealed constitution stated that;

“A person who is arrested or detained;

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.”

32. The constitution required that suspects be produced in court either within twenty four hours of arrest or confinement on suspicion of commission of simple offences or twenty fourteen days if suspected of committing capital offences. The Court of Appeal expressed itself on the import of this section in the case of ***Albanus Mwasia Mutua v Republic*** [2006] eKLR where the Court held that there had been gross violation of the appellant's constitutional right guaranteed by ***section 73(b)*** because he was not produced before a court of law within the time that was required by the repealed Constitution upon his arrest or detention. ***Albanus Musau*** (the appellant in that appeal) had been produced in court after being held for eight months. The Court of Appeal 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”***.

33. In the present petition, the petitioner having been arrested on 10th July 1990 was not produced in a court of law as was required by the constitution or at all and there is no evidence that he was being held in accordance with any known provision of the constitution and the law. In this regard, there can be no doubt that the petitioner's right to liberty and to be treated in accordance with the constitution and the law was indeed violated. The state had 24 hours or 14 days whichever was applicable to produce the petitioner in a court of law to be dealt with in accordance with the law, but that did not happen in violation of clear provisions of the constitution. There could be no excuse for violating the supreme law of the land.

34. Alternatively, if the state and its agents did not want to comply with section 73(b) of the constitution, they could have subjected the petitioner to the provisions of section 83 of the repealed constitution which contained limitation of rights and fundamental freedoms and allowed people to be held and treated in a particular manner but still respecting their rights to due process. Section 83(2) provided that;

“(2) Where a person is detained by virtue of a law referred to in Subsection (1), the following provisions shall apply -

(a) he shall, as soon as reasonably practicable and in any case not more than five days after his detention, be furnished with a statement in writing in a language that he understands specifying in detail the grounds upon which he is detained;

(b) not more than fourteen days after the commencement of his detention, a notification shall be published in the Kenya Gazette stating that he has been detained and giving *Particulars of the provision of law under which his detention is authorized*;

(c) not more than one month after the commencement of his detention and thereafter during his detention at intervals of not more than six months, his case shall be reviewed by an independent and impartial tribunal established by law and presided over by a person appointed by the President from amongst persons qualified to be appointed a judge of the High Court;

(d) he shall be afforded reasonable facilities to consult a legal representative of his own choice who shall be permitted to make representations to the tribunal appointed for the review of the case of the detained person; and

(e) at the hearing of his case by the tribunal appointed for the review of his case he shall be permitted to appear in person or by a legal representative of his own choice.

(3) On a review by a tribunal in pursuance of this section of the case of a detained person, the tribunal may make recommendations concerning the necessity or expediency of continuing his detention to the authority by which it was ordered but, unless it is otherwise provided by law, that authority shall not be obliged to act in accordance with any such recommendations...

35. The section provided for safeguards to ensure that those being held as detained or restricted persons were assured of their human rights and fundamental freedoms and subjected to due process including being informed of the reasons for their detention or restriction, review of their detention, access to legal advice or representation among other rights. However, these provisions do not seem to have been complied with.

36. The respondent apart from denying the petitioner's claims in general terms through his grounds of opposition dated 2nd August 2016 and filed in court on 3rd August 2017, contending that the petitioner had not demonstrated how the respondent had violated his constitutional rights; that the petitioner was merely making baseless claims about his unlawfully detention for 3 months without adducing any evidence; he never called evidence to dissuade the court that the state was not responsible in arresting and holding the petitioner incommunicado.

37. The petitioner and his witnesses testified that he was arrested by state agents and held at Nyayo House where he was tortured and treated in inhuman and degrading conditions. He also disclosed the names of the state agents who arrested him. *PW2* told the court that the officers told her that they were police officers and acted that way. The respondent did not call evidence to rebut that of the petitioner and his witnesses that the petitioner was arrested by state agents. It is also in the public domain that during the period in question, the state and its agents conducted its affairs in secrecy, hardly kept any trail of records of arrested and detained persons and held people or released them at whims, with no record for reference. In such a situation respondent cannot deny through grounds of opposition without any other evidence that the petitioner was arrested and detained by state agents. I therefore find and hold that petitioner's arrest and detention for 5 months without being subjected to constitutional and legal principles, violated his constitutional rights and fundamental freedoms contrary to sections 70 (a), 72 (3) (b) and 83(2) of the **repealed Constitution**.

38. Allied to the claim that constitutional rights and fundamental freedoms were violation is the contention by the petitioner that he was tortured and treated in an inhuman and degrading manner in violation of his human rights. *Black's Law Dictionary*, 9th 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 sadistic pleasure". It defines "inhuman treatment" as "Physical or mental cruelty so severe that it endangers life or health."

39. Another definition is that in Article 1 of *The United Nations Convention against Torture and Other Cruel and Inhuman or Degrading Treatment*. The Convention 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."

40. Flowing from the above definitions ingredients of torture include there being infliction of intense pain, the pain should be physical or mental and it should be intended to extract a confession or to humiliate the victim; It must pose danger to the health of the victim. It means therefore, that there must be an element of force used to inflict pain in victim's body which is a threat to his life or health and to prove torture, there should be medical evidence to show that the person alleging torture, was subjected to the treatment that can be categorised as torture and the effect it had on him.

41. The petitioner told the court that he was tortured because he was beaten, stripped naked, was denied food, was kept in a cold water logged cell and was interrogated for long hours. He also stated that he was subjected to deem green light that was intermittently switched on and off causing discomfort to his eyes. He contended that exposure to cold floor and water logged cell affected his health and he experiences the effects to date. The petitioner admitted however, in cross examination that he did not have a medical report.

42. Section 74(1) of the repealed constitution prohibited torture. It provided that "no person shall be subjected to torture or to inhuman or degrading punishment or other treatment." As it is, the constitution prohibited torture, inhuman or degrading treatment or other treatment. Torture is not an easy claim to prove especially where the events complained of took place some distant period in the past and there is no

benefit of a medical record to assist the court comes to a conclusion. If the petitioner still feels the effects of the torturous acts he says he was subjected to, a medical report would have been helpful and more so if it was done immediately he was released from incarceration, to show that the treatment he complains of was the cause of this bodily suffering. In the absence of this vital evidence, it would be difficult for this court to find in favour of the petitioner in so far as torture is concerned.

43. However, there is the question of inhuman and degrading treatment that the petitioner claims he was subjected to. The petitioner states that he was stripped naked, denied food, kept in a cold water logged cell, whipped and interrogated for long hours. He also claims that a green light bulb was occasionally and intermittently switched on and off causing him great discomfort in the eyes which he says violated his rights and fundamental freedoms.

44. Section 74(1) of the **repealed Constitution** prohibited torture, inhuman or degrading punishment and any **“other treatment”** the section used the disjunctive word **“or”** which meant there could be torture, or inhuman or degrading treatment, or **“Other treatment.”** In that context, each of those treatments were prohibited by the repealed constitution. In the case of ***John Muruge Mbogo v The Chief of the Kenya Defence Forces & another*** [2018] eKLR, this court observed; that **“The words “or other treatment” used in section 74(1) being a constitutional provision conferring fundamental rights, should be given a broad, liberal and flexible interpretation to include any such treatment that is unusual to human beings and is intended to humiliate a person for sadistic pleasure”**

45. The petitioner states that he was stripped naked, denied food, kept in a cold water logged cell, whipped and interrogated for long hours. He also claims that a green light bulb was occasionally and intermittently switched on and off during the night. To my mind, this was not normal treatment that a human being should have been subjected to. It such **“other treatment”** that was prohibited by section 74(1) of the **repealed Constitution** and therefore violated the petitioner’s constitutional and human rights.

46. This being a constitutional provision, it must be taken to have intended to protect rights and fundamental freedoms of the individual and in interpreting it, **“respect must be paid to the language which has been used and to the traditions and usages which have given meaning to the language.”**(***Minister for Home Affairs & another vs. Fischer*** [1979] 3 ALL ER 21). It is the duty of the court to enforce constitutional provisions in the Bill of Rights respecting protecting rights and fundamental freedoms, whenever a claim for their violation fell for determination. In this regard, the Court of Appeal stated in the case of ***Attorney General v Kituo cha Sheria & 7 others*** [2017] eKLR, the Court of Appeal stated that **“there is a duty to recognize, enhance and protect the human rights and fundamental freedoms found in the Bill of Rights with a view to the preservation of the dignity of individuals and communities”**.

47. The petitioner suffered humiliation in the hands of state agents in violation of his constitutional rights and fundamental freedoms contrary to section 74(1) of the repealed Constitution. I am fortified in this finding with the statement in the ***Greek Case 1969 Y.B Eur. Conv. on H.R. 186 (Eur. Comm’n on H.R)***, where the European Commission on Human Rights stated that; **“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.”**

48. Similarly, section 3 of the European Convention which is the equivalent of section 74(1) of our repealed constitution, prohibits torture, inhuman and degrading treatment, and when it fell for consideration in the case of ***Selmouni v France*** (2000) 29 EHRR 403, The European Court of Human Rights stated;

“[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.”

49. That the petitioner was subjected to such treatment after depriving him liberty and without evidence that he provoked such treatment, was a clear violation of section 74(1) of the repealed constitution which prohibited human and degrading treatment or other treatment and, therefore, violated the petitioner’s human rights and fundamental freedoms.

50. The petitioner also contended that his arrest and confinement severely affected his business leading to its eventual collapse. He stated that as a result he suffered loss and damage and sought compensation. According to the petitioner, he used to run a company known as I.D Import and Export Limited which was based in Nairobi and had a branch in New York, USA. The company, he stated, specialised in Africa jewellery and artefacts which he manufactured and exported to various market destinations. As evidence of this, the petitioner produced various documents including pamphlets, payments and orders. He stated that the business was making about Ksh2 million a month and asked compensation in the region of Ksh 1, 558,369 per month based on the current USD rates. The respondent on their part argued that the petitioner did not prove existence of the company and never produced proper documents to support the amount the company made per month to justify any award for loss of business.

51. It is no longer debatable that a petitioner can claim loss of business where there are circumstances to show that he suffered loss due to the acts of the respondent, in this case the state. In ***Kenneth Stanley Njindo Matiba v Attorney General*** (supra, the court found that the actions of the state had led to collapse to his business empire and awarded him damages for loss of business. However in doing so the court must be guided by evidence of actual loss.

52. In the South African case of ***Rudman v Road Accident Fund*** [2002] 4 ALL SA 422 (SCA), the Supreme Court of Appeal stated with regard to a claim for loss of business;

“...I am prepared to accept the proposition (without pronouncing finally upon it) that in appropriate circumstances a farmer in Rudman’s position, who operates through a “family” company, may be able to prove and quantify his personal loss in a delictual claim with reference to the loss of income suffered by the company, provided that he does not fall into the trap of regarding the loss to the company as automatically and necessarily equivalent to his personal loss. In the present case, there is evidence to

show that the company has lost income because, by reason of Rudman's injuries, it did not achieve the increases in hunting income that were confidently and reasonably expected. There is also evidence to show that the company has incurred and will in future incur the additional expense of employing others to do what Rudman used to do. However, there is no proof that this produces loss to Rudman. There is no evidence, for example, that the value of his shares in the company is less, or even that he received less from the company by way of dividends or fees or drawings because of the company's reduced income, or that he will do so in the future. Rudman's financial statements, the company's financial statements, and the trust's financial statements for the years 1997, 1998, 1999 and 2000 do not show any loss to Rudman at all, and neither does Rudman's evidence nor the evidence of his accountant."

53. And in ***Raath v Nel*** (2012) 4 ALL SA 26 (SCA) the same court stated that *it is not axiomatic in these circumstances that the company's loss is the individual's personal loss, even if he is the sole shareholder and/or the driving force behind the company. Proof of the individual's personal loss is still required.*

54. In the present petition, the petitioner did not produce documentary evidence to show that the company existed as a limited liability company or business firm. In cross examination, he stated that it was a company but did not have a certificate of incorporation in court. He did not even say when it was registered if at all. Further still, the petitioner and his witnesses admitted that there was no qualified accountant and that the record was prepared by someone who was not a professional accountant. I also note that some of the documents produced were communication on intention to do business.

55. Secondly, the petitioner did not produce audited accounts for the business. What he produced were hard written document he said proved that the company was doing well businesswise. There was no profit and loss account or balance sheet to show how much the company or the business made in terms of profit and loss to justify the claim that the business was doing as well as the petitioner put it. That would enable the court determine whether the company or business really made profit or loss. Independently audited accounts would have been necessary as proof of the company's financial muscle for purposes of considering compensation if any. The petitioner did not even produce records of the state of the business when he was finally released.

56. In the absence of all these, it would be difficult, in my view, to hold that indeed the petitioner's company made profit and lost as much after he was arrested and confined. I am not saying that the petitioner's business did not suffer due to his arrest and confinement. What he did not do was produce evidence of earnings and losses to enable the court come to a sound conclusion based of facts. In this regard, there is no cogent evidence the court can rely on to make an award for loss of business.

57. It must be appreciated that a claim for loss of business is akin to special damages for it is intended to show that the claimant did suffer actual and not perceived loss. Compensation is to return the party to as nearly the same level he was before as possible. This requires proof of the actual loss suffered. From the evidence on record on this claim, I am not satisfied that the petition did enough to assist the court come to a reasonable and justifiable conclusion.

Whether the petitioner deserves damages for violation of his fundamental rights

58. Finally, having determined that the petitioner's constitutional and fundamental freedoms were violated, the remaining issue is that of compensation. The court reminds itself of the words by the Court of Appeal in ***Albanus Mwasia Mutua v Republic*** (supra) 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.***"

59. The same Court stated in ***Attorney General v Kituo cha Sheria & 7 others*** [2017] eKLR that there is a duty to recognize, enhance and protect the human rights and fundamental freedoms found in the Bill of Rights with a view to the preservation of the dignity of individuals and communities.

60. And In ***Tinyefuze v Attorney General (Constitutional)*** Petition No 1 of 1996[1997]3UCC3) 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.

61. What emerges from the above decisions is that constitutional rights and fundamental freedoms are sacrosanct intrinsic and non-violable. The state is enjoined by the constitution to respect, protect and defend human rights and fundamental freedoms but not to violate them. Where violated, the courts, as temples of justice, have only one duty; to order compensation once a party succeeds in proving that indeed his constitutional rights and fundamental freedoms have been violated. This is a sacred duty the court may not run away from.

62. In the present petition, I am satisfied that the petitioner's human rights and fundamental freedoms were violated by state agents when he was arrested and held incommunicado for five months while being subjected to inhuman and degrading treatment which calls for compensation. And while considering the issue of compensation the court should bear in mind that, "*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.*" (*Pilkington, Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms* [1984] 62 Canadian Bar Review 517)

63. On the level of damages awardable, the Court has to consider, the length of time the Petitioner was held in unlawful custody, torture or inhuman treatment the petitioner was subjected to; decided cases on the issue and what would be fair and reasonable award in the circumstances of the case under consideration and the comparable awards.

64. The petitioner was held for three months from 10th July 1990 to October 1990 when he was released. In ***Eliud Wefwafwa Luucho & 4 others*** (Petition No.121 of 2016 consolidated) the Court awarded Kenya shillings 5 million, ***Francis Mwangi Munyiri v Attorney General*** (petition No. 400 of 2014), Kshs. 5 million and in ***Jamlik Muchangi Miano v Attorney General*** [2017] eKLR Kshs. 5 million. These

petitioners had been subjected to more severe acts of brutality and inhuman treatment.

65. Considering that the petitioner was incarcerated for 3 months, I consider an award of general damages of Kenya shillings 3,000, 000 fair and reasonable compensation. Consequently, I allow the petition dated 25th May 2016 and make the following orders

- i. A declaration is hereby issued that the petitioner's human rights and fundamental freedoms guaranteed by sections 70(a), 72(3)(b), 74(1) and 83(2) of the repealed Constitution were violated by agents of the state.*
- ii. The petitioner is hereby awarded damages of Kenya shillings 3, 000, 000 for the violation his fundamental rights and freedoms in 1 above.*
- iii. Costs and interest to the petitioner.*

Dated, Signed and Delivered at Nairobi this 3rd Day of August 2018

E C MWITA

JUDGE