



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 206 OF 2012**

**BETWEEN**

**MWANDAWIRO MGHANGA.....PETITIONER**

**AND**

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

**JUDGMENT**

**Introduction**

1. The Petitioner has filed this Petition claiming that his fundamental rights and freedoms as were enshrined in **Sections 72(1) and (3), 74(1), 77(2) and 79** of the **Repealed Constitution** were violated by Special Branch Police Officers at Nyayo House and in various Kenyan police stations and prisons in 1982, 1985 and 1986 to 1991 in circumstances to be detailed out later.

2. In his Petition dated 26<sup>th</sup> April 2012, he therefore seeks the following orders;

*(a) A declaration that the Petitioner's fundamental rights and freedoms were contravened and grossly violated by the Respondent's Special Branch police officers, police and prisons departments, [and] magistrates who were Kenyan government servants, employees and in its institutions for the period between 1982 and 1991.*

*(b) A declaration that the Petitioner is entitled to the payment of damages and compensation for the violation and contravention of his fundamental rights and freedoms under the aforementioned provisions of the Constitution.*

*(c) General damages, exemplary damages and moral damages on an aggravated scale under Section 84(2) of the Repealed Constitution and Articles 23 and 29 of the Constitution 2010 for the unconstitutional conduct by the Kenyan government servants and agents be awarded.*

*(d) Any further orders, writs, directions, as this Honourable Court may consider appropriate.*

*(e) Costs of the suit and interest.*

**The Petitioner's case**

3. The Petitioner claims that he was first arrested on 18<sup>th</sup> August 1982 by officers from the Special Branch Police Department at his parents' home in Werugha in Taita District. The following day, he was taken to the General Service Unit Training College, Embakasi (GSU Embakasi) where he was interrogated for several days. Instead of being charged, in any Court, he was detained without trial at Sungura dormitory, at the said Training College, for one hundred and eleven days. He was thereafter released on 9<sup>th</sup> December 1982 without any charge. During this period, he claims he was held incommunicado and members of his family thought he was dead.

4. It is also his case that sometime in February 1985, he was expelled from the University where he was pursuing a Masters degree and thereafter, he was detained at Buru Buru Police Station where he alleged that he was tortured day and night by Special Branch officers led by one, Mr. Opiyo James. He claims further that during his time there, he was kept hungry, cold and was beaten until he collapsed and had to be taken to Kenyatta National Hospital for treatment.

5. He was allegedly later charged in Court with the offence of organizing and addressing illegal meetings and participating in an unlawful assembly before being remanded at Kamiti Maximum Security Prison. At the said Prison, he was allegedly kept naked in a water logged cell for two weeks and prison warders would splash cold water on him at midnight and before dawn every day. That also he was kept hungry most days and he only had five meals in two weeks. Later on, he was sentenced to serve one year's imprisonment together with a fine of Kshs.5,000.00 having been convicted of the above offences.

6. While at the prison, and serving his sentence, he claimed that he was kept in solitary confinement for many months with only one blanket and a bowl that also served as a toilet. He states further that he was only allowed to bathe two times a week and he was not allowed to brush his teeth until his release on 9<sup>th</sup> December 1985.

7. It was also his case that on 3<sup>rd</sup> April 1986, police officers invaded his home in Werugha in Taita, mounted a search for any *Mwakenya* related pamphlets before being arrested by the aforesaid police officers together with his brother and taken to Wundanyi Police Station where he was abused and mocked in the presence of his younger brothers. Thereafter, he stated that he was bundled into a motor vehicle and driven to Voi in cold weather while dressed in a shirt and trousers and yet the police would not allow him to dress warmly. At the police station, he was received by Special Branch police officers who hurled insults at him before he was taken to Mariakani Police Station where he was locked up with mad people as well as robbery and murder suspects. He was later transported to Nairobi and locked up at Kileleshwa Police Station where he slept in a cell without blankets or warm bedding.

8. It was the Petitioner's further case that at 5.00am the following day, he was blind folded then bundled into a waiting land rover vehicle and ordered to lie down like a dead person. He was then taken around the city of Nairobi for two hours before eventually being taken to a place he later came to discover was the Nyayo House basement. Here, he was allegedly locked up in a small cell which was extremely dark and was kept there for a period of one month and he would only leave that cell on the days he would be blindfolded and taken to the 25<sup>th</sup> floor of Nyayo House for further interrogation which was punctuated with beatings and other forms of inhuman treatment.

9. He also claimed that he was later taken to Court and despite pleading not guilty to the charges read to him, he was imprisoned for five years and upon his release he fled into exile in Dar-es-salaam, Tanzania in November 1989 and in November, 1991 he went into self exile in Sweden where, together with his family, he was given refugee status by the Swedish Government. He was subsequently adopted by Amnesty International as a prisoner of conscience.

10. In support of his case, the Petitioner called several witnesses and their testimony was that according to PW2, David Onyango Oloo, he met the Petitioner at the University of Nairobi in the 1980s where he had been enrolled as an undergraduate student. They lived in the same Hall of residence, Mboya Hall 9, and they also became close friends. He stated that he campaigned and voted for the Petitioner in the Students Organization of Nairobi University (SONU) Elections where the Petitioner was vying to represent the

faculty of Arts students. He won the said election and was thereafter catapulted to the leadership of SONU as the Vice-Chairman.

11. He stated that the Petitioner was first arrested on 3<sup>rd</sup> August 1982 aboard a Mombasa bound train and was later charged with three counts of sedition. He was eventually sentenced to five years' imprisonment and joined PW2 at Kamiti Maximum Security Prison where, together with others, he had been held for sedition related offences. He claimed that the Petitioner narrated his ordeal and showed PW2 marks, wounds and scars on his body that he had sustained as a result of alleged beating by State agents. He stated that at Kamiti Prison, they continued being close but they were reprimanded and punished by prison warders until the Petitioner was released in 1985.

12. PW2 stated further that the Petitioner was later on arrested again and ended back to Kamiti in April 1986 and continued his association with PW2 while in Prison. In June 1986, they were isolated in the punishment block and held with insane inmates and were locked up for twenty three (23) hours every day and were not allowed any visit by family or friends. Later on they both went separate ways due to prison transfers and after serving their prison terms, they went into exile with the Petitioner going to Sweden and PW2 to Canada.

13. PW3, Jacinta Wanjala Mwatela, testified that sometime in 1985, together with her husband, she attended the hearing of a case against her brother, Mwakunda Ringoma Mwachofi and his friend, Mwandawiro Mghanga, who were student leaders at the University of Nairobi. Her brother and the Petitioner had been charged with illegal demonstrations and in Court, she met the wife of Mwandawiro, Holiness Manga. After the mention of the case, she invited Manga to spend the night at her house in Magiwa Estate Nairobi and she noted that Manga looked very stressed and sick. On reaching home, Manga had a miscarriage and together with her husband, PW3 took her to see their private doctor, Dr. Philemon Kiwool (now deceased). The doctor carried out the procedure of cleaning Manga up and she stayed with the Mwatelas for two weeks as she recuperated before she left for her Taita, home.

14. PW 4, Prof. Kineene wa Mutiso stated that he had known the Petitioner since 1978 when the Petitioner was a student at Kabarnet High School while he was at Starehe Boys Centre. That they were both writers of poems that were published by various Swahili newspapers in the Country and they later joined the University of Nairobi as students in the Department of Linguistics and African Languages. He added that together with the Petitioner, they were involved in various projects at the University for developing the Kiswahili language and literature. Besides getting involved in the activities of developing Kiswahili and literature, the Petitioner was also a student leader and served as Vice-Chairman of SONU.

15. He claimed further that the Petitioner was arrested together with several students from the University of Nairobi in 1982 and he learnt later that the Petitioner had been detained at the GSU Training School, Embakasi, without being charged in any Court of law for any known offence and he later re-united with the Petitioner in August 1983 when the University was re-opened. He stated that he completed his studies in 1983 and was immediately admitted for a Masters of Arts degree at the Department of Linguistics and African Languages at the same university. He continued his friendship with the Petitioner who upon completion of his studies, was also admitted for a Masters of Arts degree at the Department of Linguistics.

16. In 1985, according to Prof. Kineene, the Petitioner was expelled from the University house which he had been allocated and so during the period of his suspension, the Petitioner together with his wife, Manga, lived in Prof. Kineene's house at the University Staff Quarters. He testified that the Petitioner was later arrested during a students' prayer meeting at the University of Nairobi Sports Ground and after three weeks detention was taken to Court. Prof Kineene stated that the Petitioner had informed the Court that while being held at Buru Buru police station, he was tortured. He was later imprisoned for one year at Kamiti Maximum Prison and during that period, Prof Kineene stated that he moved to Seoul, South Korea, where he was employed at Hankuk University of Foreign Studies and while there, he later learnt that the Petitioner had been arrested again in March 1986 and imprisoned for five years.

17. PW5, Wafula Buke, stated that he is a former SONU leader at the University of Nairobi having been

elected in 1987 but his leadership lasted for only 9 days because he was arrested, taken to several police stations including Central Police Station, Kasarani Police Station and lastly to Nyayo House. While in detention, he claimed that he was denied food, beaten with pieces of wood, rubber made from motor vehicle tyres, kicks, blows, slaps etc, and was kept in water clogged cells and was subjected to strong torrents of water from hose pipes. He also claimed that he was kept naked and was paraded naked in the presence of women police officers during his interrogation.

18. He added that he was kept in Nyayo House for 16 days, then taken to what he later learnt to be Kilimani C.I.D Headquarters before he was jailed at the Kamiti Maximum Prison. He alleged that he met the Petitioner in September 1989 at Kamiti after he had been transferred from Kibos Maximum Prison and that while at Kamiti, the Petitioner was subjected to intense beatings alongside himself and one, Waweru Kariuki. They were also kept in isolation cells for three months before the Petitioner was released.

19. PW 6, Oduor Ong'wen stated that he met the Petitioner in 1981 at the University of Nairobi and that both of them were elected as student leaders in SONU. That on 1<sup>st</sup> August 1981, there was an announcement on radio that the Government of Kenya had been overthrown, but the *coup-de tat* lasted only a few hours. Following the end of the attempted coup, the University was closed indefinitely, and all students ordered to report to their local chiefs.

20. He stated that he was arrested on 16<sup>th</sup> August 1982, by Special Branch Police Officers at his rural home in Alego and taken to Siaya Police Station, then to Kisumu Police Station. On 19<sup>th</sup> August 1982, he was transferred to Nairobi ending up at the General Service Unit (GSU) Training School in Embakasi where he found a group of students already detained those among them the Petitioner. At the said Training School they were held incommunicado, were denied food, beaten using belts, sticks and fists and were insulted. They all underwent this torture for one and half months and that they were later charged in Court. The charges against them were subsequently withdrawn and he re-united with the Petitioner in February 1983.

21. In October 1983, SONU elections were held and the Petitioner was elected the Chairman while PW6 was elected Secretary General. During their leadership, he stated that they were subjected to harassment by Special Branch officers and that he left the university in 1984 while the Petitioner remained behind to undertake post-graduate studies. The Petitioner was later expelled from the University in 1985, arrested again in 1986 and imprisoned.

22. PW 6 added that he was arrested by Special Branch police officers in Kericho in 1986 and taken to Nyayo House and while being held there, he was questioned about the *Mwakenya* movement which allegedly he was a member of, as was the Petitioner. During interrogation, he was beaten with sticks, broken table and chair legs, made to do press ups while naked, kept in water-clogged cells for days without drinking and later, he learnt from his captors that the Petitioner was also being held at the same place.

23. On 29<sup>th</sup> April 1986, he was taken to the Chief Magistrate's Court in Nairobi and charged with sedition. In Court he met the Petitioner who was facing similar charges. The Petitioner was subsequently sentenced to serve five years in prison while PW6 was jailed for four years. They were both inmates at Kamiti Maximum Security Prison but he claimed that after 9 months, the Petitioner was transferred to Kibos Maximum Security Prison when he was released on 29<sup>th</sup> December 1988 and when he went to visit the Petitioner at Kibos Maximum Security Prison, the Petitioner informed him that he was still being tortured by prison warders.

24. In his written submissions, the Petitioner claimed that his detention without trial was a violation of his right to personal liberty as was provided for under **Section 72** of the **Constitution** and on that submission, he relied on the case of *Albanus Mwasia Mutua v Republic Criminal Appeal No. 120 of 2004*.

25. He also claimed that the acts of bundling him into a land rover motor vehicle, locking him up with

mad people and being locked up in a small dark cell at Nyayo House amounted to torture. That the assault meted on him by prison warders at the various prisons he was held in also amounted to torture, cruel, inhuman and degrading treatment. That **Section 74(1)** of the **Repealed Constitution** prohibited torture and he relies on the cases of *Gerald Juma Gichohi & 9 Others v Attorney General (2015) e KLR* and *Wachira Weheire v Attorney General (2010) e KLR* to support that submission.

26. The Petitioner further submits that his rights under **Section 77** of the **Repealed Constitution** were also violated and that the act of remanding him alongside convicted criminals during his trial violated his right to presumption of innocence and he was also not allowed to meet his friends and obtain legal representation. That he was in any event not given enough time and facilities to prepare for his defence and he was not informed as soon as was practicable the nature of the offence he was not informed charged with. He thus submits that his rights to fair trial were infringed upon.

27. He now claims damages for the breach of his rights and submits that an award of Kshs.60,000,000.00 for the multiple violations for his rights would be adequate recompense.

### **The Respondent's case**

28. The Respondent, the Attorney General, did not file any affidavit in response to the Petition. However, he filed written submissions dated 28<sup>th</sup> April 2016.

29. He submits that the allegations contained in the Petition are baseless and obnoxious. That the Petitioner's case is weak and that he has failed to prove the allegations made and despite claiming that he sought medical help at Kenyatta National Hospital for alleged injuries inflicted by agents of the State, he failed to provide any medical notes or any documentary evidence that may prove that he was indeed injured.

30. On the newspaper evidence submitted, the Respondent submits that the Petitioner did not produce any other tangible evidence and relies on the case of *Macharia wa Kamau & 2 Others v Attorney General (2015) e KLR* where this court held that the magazine produced in evidence in that case did not have any probative value.

31. It is therefore the Respondent's case that the Petitioner is not entitled to the prayers sought and he urges the Court to dismiss the Petition.

### **Determination**

32. There are two issues for determination in this Petition; firstly, whether the facts as pleaded, disclose a violation of the Petitioner's rights as alleged and if so, the remedy if any, available to him.

33. Before I determine the above issues, I note that the Respondent submitted that the Petitioner had failed to avail documentary evidence to substantiate his allegations. He claimed in that regard that the newspaper cuttings relied upon by the Petitioner did not have any probative value and that in the case of *Tesco Corporation Ltd v The Bank of Baroda Civil Case 182 of 2007*, it was held that newspaper cuttings are not admissible within the meaning of **Section 35** of the **Evidence Act** which deals with secondary documentary evidence and its admissibility.

34. In that context, I have seen the newspaper cuttings the Petitioner has annexed to his affidavit and to my mind, they give a concise description of events as they happened in regard to the Petitioner's claims. It is also not in doubt that the Petitioner's ordeal at the hands of State agents was reported in various newspaper on diverse relevant dates.

35. Whereas this Court has therefore previously taken a dim view of newspaper cuttings whose contents have had no relationship whatsoever with a Petitioner – See **Monica Wangu Wamwere v the Attorney General Petition No.196 of 2013** and whereas **Section 35** of the **Evidence Act** and the decision in *Tesco (supra)* has been used to find that such newspaper cuttings have no probative value, the same cannot be

said of the present case. This is because the Petitioner has merely produced those cuttings to show that his ordeals were widely reported and to further corroborate the evidence of his witnesses. In previous decisions, especially those touching on alleged torture at Freedom Corner in 1992 – 1993 such as **Monica Wangu Wamwere (supra)**, the excerpts from “**Society Magazine**” had no connection whatsoever with those who produced them. To that extent only and without departing from the principles set out in **Tesco (supra)**, I will admit the newspaper cuttings produced by the Petitioner so far as they are relevant to his case.

### **Right to liberty**

36. The Petitioner claimed that he was detained by State agents and agencies on several occasions without trial. On the first occasion, he was allegedly arrested on 18<sup>th</sup> August 1982 at his parents’ home in Werugha, Taita District and he was thereafter locked up at both Wundanyi and Voi Police Stations. He was later taken to the GSU Training College in Embakasi, Nairobi where he was held for 111 days. On the second occasion, he was detained at Buru Buru Police Station for two days and the third incident of detention happened on 3<sup>rd</sup> April 1986 when the Petitioner was locked up at Mariakani Police Station, and later at Kileleshwa Police Station as well as at Nyayo House for an aggregate period of one month. The said allegations were never denied by the Respondent.

37. In that context, the applicable law at the time regarding the right to personal liberty was **Section 72** of the **Repealed Constitution**. This provision obligated any arresting authority to present any suspect to a Court of law within 24 hours for a misdemeanor and within 14 days for a capital offence. **Section 72** of the **Repealed Constitution** provided as follows;

*(1) No person shall be deprived of his personal liberty save as may be authorized by law.*

*(2) A person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.*

*(3) A person who is arrested or detained-*

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

*(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty- four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offense 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.*

38. In this case, the Petitioner was arrested and held for long periods of detention without trial and the evidence of the Petitioner in that regard was corroborated by Prof. Kineene wa Mutiso among others. No explanation for such unlawful detention was given in pleadings and at the oral hearing. The law did not allow the Respondent to hold the Petitioner for such long periods without presenting him to Court within the times envisaged by **Section 72** aforesaid (See also **Albanus Mwasia Mutua v Republic (supra)** where it was held that an accused person is to be produced in Court within 24 hours of arrest for misdemeanors.) Consequently, the holding of the Petitioner in detention for a longer period than 24 hours in the aforesaid three incidents without trial was unlawful and in clear violation of **Section 72** of the **Repealed Constitution**, and I so find.

### **Protection from torture**

39. The Petitioner also claimed that while being held at Nyayo House, he was subjected to acts of torture,

cruel and inhuman degrading treatment. In that regard, **Section 74(1)** of the **Repealed Constitution** protected the right not to be subjected to torture and other cruel and degrading treatment thus; “**No person shall be subject to torture or to inhuman or degrading punishment or other treatment**”. Torture is also prohibited in all its forms and the general principle in law is that there can never be a justification for torture and indeed it is perhaps the reason why it is one those fundamental rights and freedoms that can never be derogated from. In that regard, **Section 86(2)** of the **Repealed Constitution** recognized that fact and provided that the protection against torture is one of those rights that could not be derogated from by the State and all its agents.

40. This and other Court have previously held in cases such as *James H Gitau Mwaru v Attorney General Misc No. 56 of 2005*, *Harun Thungu Wakaba & 20 Others v Attorney General HCCC No. 1411 of 2004*, *Wachira Waheire v Attorney General Misc Civil Applic No. 1184 of 2003* and *Rumba Kinuthia v Attorney General HCC No. 1408 of 2004*, that the acts of beating a suspect with whips, kicks, slaps, broken chair pieces, kicks and blows constituted torture. Further, that the confinement of such a suspect in solitude in a dark cell flooded with cold water equally amounts to torture.

41. In addition to the above, in **Monica Wangu Wamwere (supra)**, this Court determined that for torture to be proved, the following elements as distilled from **Article 1** on the **Convention Against Torture** must be existent in a claim:

(i) There must be evidence of severity of pain and suffering – see **Article 1** of the **Convention against Torture**.

(ii) There must be an intent in reckless indifference to the possibility of causing pain and suffering-see **J. Burgers and H. Danelius, The United Nations Convention Against Torture, (Martinus Nijhoff, 1988) page 118**.

(iii) Acts that do not cause extreme pain and suffering to an ordinary person are normally outside the definition of torture – see **Sarah Joseph and Melissa Castain, The International Covenant on Civil and Political Rights, Third Edition, page 218**.

(iv) The act of torture must involve a public official – see **Article 1** of the **Convention against Torture**.

42. There is no doubt in mind that although he Petitioner produced scant physical and material evidence of torture during his unlawful incarceration for a period of exceeding 100 days, it is now a matter of public record that all those held at Nyayo House during the one-Party rule were subjected to intense torture. The President of the Republic indeed publicly aoplogised to victims of such torture one of whom was the Petitioner. The Nyayo House Torture Chambers have also been kept open as a testimony to the fact that such torture will never occur again. A fund to compensate victims has also been set up and it is instructive that the Respondent failed to respond to any of those allegations. I therefore have no hesitation in finding that the Petitioner was indeed tortured for the periods and dates that he claims that he was.

43. Before I conclude on this issue, the Petitioner also claimed that while at Kamiti Maximum Security Prison, he was kept in solitary confinement with a bowl that served as both a bathroom and toilet. He was not allowed brush his teeth at all and was allowed out in the sunshine for only one hour per day. The evidence of the Petitioner in regard to the deplorable conditions at the prison were corroborated by PW4, Wafula Buke among others.

44. In that regard, the High Court in the case of *Koigi Wamwere v Attorney General (2012) e KLR*, recognised the fact of poor prison conditions and took judicial notice of past notorious conditions in Kenyan prisons and stated as follows with regard to the claim of violation of the Petitioner’s rights while being held in prison;

**“I have set out in detail some of the averments of the petitioner with regard to what he considers**

*to be acts of torture committed against him by state and state agents during his detention and incarceration in his two trials. Weighed against the definition of torture set out above, I must, regretfully, find that there were no acts of torture as recognised in law committed against the petitioner during his detention in prison. What the petitioner was subjected to was the same deplorable conditions to which other prisoners in Kenya are subjected to. The poor diet, lack of adequate medical and sanitation facilities, lack of an adequate diet, have been hallmarks of prison conditions in Kenya. The discriminatory dietary regulations that the petitioner refers to, if they were indeed in force as the petitioner avers, are doubtless a carry-over from the discriminatory colonial regulations which independent Kenya inherited and has not seen fit to question and change.*

The judge concluded thus;

*To find that the poor prison conditions amount to torture which entitles the petitioner to compensation would open the door for similar claims by all who have passed through Kenya's prison system.*

45. Recently, this Court in the case of **Robert Njeru v Attorney General Petition No. 261 of 2014**, further stated as follows;

*I agree with the reasoning of the learned judge (in Koigi Wamwere v Attorney General (2012) e KLR) as regards to torture generally in prison. I also take judicial notice of the fact that prisons conditions were not pleasant at all in the past and may still be especially as they relate to diet, beddings and sanitation. I did not hear the Petitioner to claim that the harsh prison conditions were peculiar to him as compared to other inmates. I therefore do not find a violation of his protection to cruel, inhuman and degrading treatment while being held in prison.*

I reiterate the above findings and in the circumstances, I am unable to find a violation of the right not to be subjected to torture in regard to the conditions in which the Petitioner was held in the prison. However and having so said, I cannot find any justification for the beatings *inter alia* of the Petitioner by prison warders. I say so because both the Petitioner and PW6 testified that while at the prison, the Petitioner was beaten by prison warders, kept in water clogged cells for days and was denied food and sleep. These acts cannot be justifiable if looked at in the context of the definition of torture above and they indeed amount to torture.

46. In conclusion, I shall find that the Petitioner was subjected to torture contrary to **Section 74(1)** of the **Repealed Constitution** in circumstances set out above.

### **Right to fair trial**

47. The Petitioner claimed that his rights as were protected under **Section 77** of the **Repealed Constitution** were violated. **Section 77** provided that:

*(1) If a person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.*

*(2) Every person who is charged with a criminal offence –*

*(a) Shall be presumed innocent until he is proved or has pleaded guilty.*

*(b) Shall be informed as soon as reasonably practicable in a language that he understands and in detail of the nature of the offence with which he is charged.*

*(c) Shall be given adequate time and facilities for the preparation of his defence.*

*(d) Shall be permitted to defend himself before the court in person or by a legal representative of his own choice.*

*(e) Shall be afforded facilities to examine in person or by his legal representative, the witness called by the prosecution before the Court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and*

*(f) Shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge.*

48. In the above regard, I have already held that the Petitioner was unlawfully held for periods not envisaged by **Section 72** of the **Repealed Constitution**. I have also noted that the Petitioner's complaints that he was held incommunicado and was not allowed to seek legal representation on certain occasions was never contested by the Respondent. I note however that on the occasions that he was taken to Court, his family was present and he had legal representation. His allegations that he was forced to admit to trumped up charges are neither here nor there but as he seemed to have thereafter served his sentences to the full and whatever my views about prevailing circumstances at the time, without appeals against those sentences, it is difficult for me to find in his favour on those allegations. **Section 77**, it must be understood, applied to situations where an accused person has been charged in Court and not before.

49. To the extent stated above therefore, I find no violation of **Section 77** of the **Constitution** as alleged.

### **Remedy**

50. Having found that the Petitioner's rights under **Sections 72** and **74** of the **Repealed Constitution** were violated by the Respondent, this Court must award him an appropriate remedy and I note in that regard that the Petitioner was unlawfully incarcerated at various police stations, the GSU Training School and Nyayo House for days. During his first arrest he was held in custody while being tortured for 111 days. In the second incident, he was held for two days and lastly, he stayed at Nyayo House for one month. During this time, he was subjected to acts of torture, cruel, inhuman and degrading treatment and he now seeks damages of Kshs.60,000,000.00.

51. In ***Benedict Munene Kariuki and 14 others v the Attorney General High Court Petition No. 722 of 2009*** the Court stated that a global figure is most appropriate in cases for enforcement of constitutional rights and freedoms because the acts complained of related largely to the same transaction or subject matter and in similar cases such as ***Wachira Waheire v Attorney General (supra)*** where the Applicant was held in Nyayo House for 28 days, he was awarded Kshs.2.5 million. In ***Dominic Arony Amolo v Attorney General Misc Applic No. 494 of 2003***, the Applicant was awarded Kshs.2.5 million. In ***Harun Thungu Wakaba and others v Attorney General HCC No. 1411 of 2004***, the Petitioners were awarded Kshs.3 million and in ***Miguna Miguna v Attorney General Petition No. 16 of 2010***, the Petitioner was awarded Kshs.1.5 million.

52. I am aware in that context that damages are awarded as a matter of discretion and in doing so in the present case, I have taken into account the above comparable decisions and others such as ***Gitobu Imanyara v Attorney General Petition No.78 of 2010***, the specific but unique circumstances of the present Petition, passage of time since the other decisions were made and changed political circumstances in Kenya and in doing so, a global award of Kshs.10,000,000.00 is adequate compensation to the Petitioner.

53. As for costs, they follow the event and so they shall be awarded to the Petitioner.

### **Disposition**

54. The final orders to be made are that Judgment is entered in favour of the Petitioner against the Respondent as follows;

***(a) A declaration is hereby made that the Petitioner's fundamental rights and freedoms under Sections 72 and 74 of the Repealed Constitution were contravened and grossly violated by the Respondent's Special Branch Police Officers, and Officers in the Prison department, who were Kenyan Government servants, employees and in its institutions for diverse periods between 1982 and 1991.***

***(b) A declaration is hereby issued that the Petitioner is entitled to the payment of damages and compensation for the violations and contravention of his fundamental rights and freedoms under the aforementioned provisions of the Repealed Constitution.***

***(c) An award of Kshs.10,000,000.00 is hereby mde in favour of the Petitioner.***

***(d) Costs of the Petition.***

***(e) Interests in (c) and (d) above until payment in full at court rates.***

55. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 27<sup>TH</sup> DAY OF JANUARY, 2017**

**ISAAC LENAOLA**

**JUDGE**

**DELIVERED AND SIGNED AT NAIROBI THIS 30<sup>TH</sup> DAY OF JANUARY, 2017**

**E. CHACHA MWITA**

**JUDGE**