



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

PETITION NO.427 OF 2008

BETWEEN

PETER TONNY WAMBUA

DAVID K. MUTUA

JAMES M. WAMBUA

STANLEY N. NGARUIYA

GEORGE M. GATANA

PIUS K. NDETEI

EDWARD GICHERU

MOHAMED MWAURA

RAYMOND M. MWANGI

BENSON O. KUBE

PETER M. NGUMBAU

STEPHEN O. ORIANG

JUSTUS A. ASWANI

GEORGE O. ONDIEKI

STEPHEN MBURU KARIUKI

JAMES K. MUKUTHI

PETER M.O. MIYIENDA

FRANCIS K. BETT (All members of VOCA welfare Association)...PETITIONERS

AND

THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

Introduction

1. The attempted coup in August 1982 in Kenya and the events surrounding it will forever go down in history in several respects and the subsequent period was characterized by alleged human rights violations in suppressing the coup, by the establishment. This historical period has been documented with different narrations by participants, victims and observers all of which points in some instances to the said violations and more than 30 years later, the issue still lingers in the public domain and along Court corridors, including in the filing of the present Petition.

2. The 18 Petitioners herein have thus jointly filed this Petition dated 15th July 2008 as officers and servicemen employed on diverse dates by the Kenya Air Force and were later discharged out of circumstances associated with the attempted coup. The Petitioners further allege to be members of an entity known as Victims of Attempted Coup Welfare Association and allege violations of their constitutional rights for which they are aggrieved and seek the following declaration and orders from this Court:

a) A declaration that the circumstances under which the Petitioners were arrested, detained, tortured, tried and/or convicted following the attempted coup d'etat of 1st August 1982 constituted a breach of their rights as provided for in Section 70 (a) of the Constitution of Kenya (now repealed);

b) A declaration that the period between 1st August 1982 and 30th March 1983 when the Petitioners were arrested and purportedly discharged from the said Force constituted a continued period of continuous breach of the Petitioner's rights to liberty guaranteed under section 72 of the Constitution of Kenya (now repealed);

c) A declaration that the detention of the Petitioners in various detention centers in grossly inhuman conditions between the periods of 1st August 1982 and March 1983 amounted to cruel and inhuman treatment and was in breach of Section 74 of the Constitution of Kenya (now repealed);

d) A declaration that the failure by the Kenya Armed Force to pay the Petitioners any form of benefits upon their purported discharge from the said force constituted cruel and inhuman treatment and was in breach of Section 74 of the Constitution of Kenya (now repealed);

e) A declaration for payment of damages consequential upon the above declarations and/or such orders, writs or directions for purposes of enforcing and securing enforcement of the provisions hereinabove disclosed as having been breached in relation to the Petitioners.

The Petitioners' case

3. The Petitioners' case is consistent in each of them alleging that subsequent to the attempted coup of 1st August 1982, they were arrested, kept in confinement, interrogated, tortured and unilaterally purportedly discharged from the Kenya Air Force by an illegal entity christened the '82 Airforce' which entity convened courts martial that tried and convicted and/or in some cases acquitted the Petitioners. The Petitioners' contracts of employment with the force were also purportedly terminated without regard to the law and practice relating thereto. The Petitioners in addition allege that they have since suffered indignity, stigma, trauma and poverty due to deprivation of their right to gainful employment, as a direct consequence of the violation of their constitutional rights aforesaid.

4. The Petition is supported by affidavits dated 15th July 2008 deposed to by each of the Petitioners. In the said affidavits, the Petitioners restate the contents of the Petition and attach copies of documents relating to their service at the Kenya Air Force as well as individual medical reports. With the exception of the 9th, 14th and 18th Petitioners, each of the Petitioners thus filed a supporting affidavit dated 29th July 2013 that was in material respect similar to each other the difference being the position held by each of the Petitioners at the material time, the circumstances under which they were arrested, place and details of their alleged incarceration and particulars of the alleged torture meted out to them. The 18th Petitioner died in the course of the hearing and no further steps having been taken in regard to his Petition.

5. The 9th and 14th Petitioners on their part filed supporting affidavits dated 17th July 2013 and 23rd April 2013, respectively, which are substantively similar to the affidavits filed on 29th July 2013 while the 2nd Petitioner further swore a supplementary affidavit on 30th June 2013.

6. The Petitioners in a nutshell allege that they were each arrested on diverse dates, incarcerated in a dark cell for various days including being transferred from one prison facility to another while being subjected to various forms of inhuman treatment. They further accuse the Government of Kenya, through its agents and Department of Defence Staff, of violating their constitutional rights in the following general respects:-

- a) Illegal search and stripping of the Petitioners in public and in prison against generally accepted norms of decency.
- b) Physical and mental torture by being threatened with execution, physical beatings, being held in a water logged cell for days without food, water and medicine
- c) Being held *incommunicado*, without food and in dark cells for several days without communicating with relatives or their legal advisers.
- d) Being subjected to a court martial and denied a legal adviser of their choice and forced to take an advocate provided by the court martial.
- e) Being discharged from the service dishonorably without pension or terminal dues by an illegal entity.

The Petitioners proceed to state the consequences of the incarceration ranging from illness to disintegration of their respective family units through divorce.

7. The Petitioners further contend that the above violations were grave and in violation of both the Repealed Constitution and the Constitution 2010 and several conventions including the Universal Declaration of Human Rights to which Kenya is a signatory. The Petitioners as a consequence pray *inter alia* for compensation for the said breach of their constitutional rights.

8. In addition, the Petitioners claim that having been unlawfully discharged from service, they should be paid withheld earnings to cover the period they would have been in service i.e until the age of 55 years and a further five years up to the new retirement age of 60 years. They have annexed respective tabulations of their computations to guide this court in awarding the said claim.

9. At the hearing of the Petition, a total of 18 witnesses testified out of which 17 were the Petitioners and the 18th witness being Dr. James Mburu, a Psychiatrist. The witnesses narrated their ordeals largely along the contents of their affidavits already on record. I will nevertheless for the record proceed to briefly state the testimony by each of the witnesses.

10. PW1, was the 1st Petitioner, Peter Tonny Wambua. He testified that subsequent to the attempted coup, he was arrested but was never charged with any offence and could not know who arrested him. He was later locked up in Naivasha Maximum Prisons from 12th November 1982 to 31st December 1983 and

claims that while there, he was physically and mentally tortured but could not identify the perpetrators of those actions. He also claim that during his incarceration, members of his family were not allowed to visit him but he made no complaints about all those issues and has no documents to support his allegations because it was impossible to get such documents. In his testimony he added save that he was examined by a doctor in 2007 many years after his alleged ordeal and the medical report prepared by his doctor was produced in Court. He also stated that he filed the Petition after 20 years only after the Government in Kenya had changed for fear of being victimized.

11. On cross examination by the Court, the witness clarified that he had been locked up between 1st August 1982 up to 28th February 1983 and he added that during his interrogation, his feet were burnt with cigarette butts and he was beaten at joints and ankles and put in cold water for 3 days.

12. PW2, David Kisilu Mutua is the 2nd Petitioner and he testified that after his arrest, he was held up in Naivasha Maximum Prison in a cell full of water to the knee level for three days among other acts of torture leading to serious injuries to his body. Upon his release, he was allegedly examined by a Dr. Gakuo in 1989 and who required Shs.180,000/- for an operation but the 2nd Petitioner did not avail medical documents to support his testimony. He also testified that he was arrested on 1st August 1982 and was taken to Kamiti Maximum Prison up to 11th August 1982 before being taken to Naivasha Maximum Prison up to 25th September and back to Kamiti until 28th September 1982 after which he was charged in the Court martial at Lang'ata Barracks. He identified a Major Maingi of the Military Intelligence Corps among those behind the physical torture he was subjected to. His family including his father, a retired army officer was unable to access him during the incarceration. At the time of his testimony before this Court, he was using a walking stick as a result of injuries allegedly suffered and disputed that the injury to his foot occurred during a sporting engagement. He has also claimed Kshs.2,250,650/= on lost earnings based on the applicable force regulations.

13. PW3, James Mbithi Wambua is the 3rd Petitioner who testified that he was arrested on 1st August 1982 by Kenya Army officers whose identities he could not recall and was locked up at Naivasha Maximum Prison for 25 days during which he was tortured by one, Brigadier Musamba, alongside other unknown people. His cell was also allegedly filled with water to the knee level and had no windows. He further alleges that he was stripped naked and had scars to show the beatings he received. He showed the scars to this Court.

14. PW4, Stanley Njogu Ngaruiya is the 4th Petitioner. He stated that he was arrested and seriously beaten on 1st August 1982 by persons he termed as 'army personnel' who he could not otherwise identify. That he was initially detained at Lang'ata Prison before being transferred to Naivasha Prison for 2 months. He was later charged in the Court Martial at Lang'ata and imprisoned from 4th October 1982 to 26th June 1987 after his appeal to the High Court, led to a reduction of his sentence.

15. PW5, Peter Mose Ondieki Miyienda is the 17th Petitioner. He stated that while he was not charged at the Court Martial, he was continuously detained from 1st August 1982 at Kamiti and Naivasha Maximum Prisons and released on 2nd June 1983. While at Kamiti for 36 days, he was allegedly tortured physically and psychologically by unknown personnel who wore army uniforms. He further testified that he cannot walk properly and is still ailing in the knees.

16. PW6, Stephen Odie Orieng is the 12th Petitioner. He stated that after his arrest, he was tried before the Court Martial and convicted but the sentence was later reduced from 12 to 9 years on appeal. He was initially detained at Naivasha and Kamiti Maximum Prisons and served for 6 years and 3 months and was while detained he was diagnosed with hypertension and is currently on medication. His ordeal during interrogation included being locked up in a toilet without water in Naivasha prison whereas the cell at Kamiti Prison was dark with contaminated water.

17. PW7, Raymond Muthee Mwangi is the 9th Petitioner. He joined the Kenya Armed Forces on 24th

August 1981. He was charged before the Court Martial on 13th January 1983 and sentenced to 2 years which sentence was reduced to 9 months on review. He was thus detained for a total of 14 months at various facilities including, Kamiti, Naivasha, Industrial Area and Kodiaga Prisons.

18. PW8, Edward Gicheru is the 7th Petitioner. He stated that he had served the Kenya Airforce for over 14 years before his arrest and he was later charged at the Court Martial for mutiny and sentenced to 18 years in prison. He never appealed against the sentence and stated that he was arrested by army officers in military uniform and held in Kamiti and Naivasha Prisons for between one to two months where he was tortured by unknown assailants prior to his conviction.

19. PW9, George Orina Ondieki is the 14th Petitioner. He clarified that he was not taken to the Court Martial as stated in paragraph 2 of his affidavit of 23rd April 2013 but that he had been detained at the Department of Defence for 5 days being taken to Kahawa Barracks, Kamiti Prison and later Naivasha Prison. He was released in March 1983 and because of the alleged torture inflicted on him, he allegedly visited doctors severally in 1984, 1985 and 1986 having developed high blood pressure. He also alleged that he had multiple healed scars, missing teeth as per the medical report prepared by Dr. Geoffrey Mucee but despite his evidence that he had necessary supporting documents for his medical situation, the documents were not produced in Court.

20. PW10, Stephen Mburu Kariuki is the 15th Petitioner. He testified that he was not taken to the Court Martial but only interrogated and later detained in Naivasha for 7 months without trial. Before then, he had allegedly been arrested on 1st August 1982 and detained for 20 days at Kamiti Prison. He maintained that he was tortured physically and psychologically during that period.

21. PW11, Pius Katee Ndeti is the 6th Petitioner. He joined the Kenya Air Force in 1978 and by 1st August 1982, he was a commissioned officer with the rank of Captain earning Shs.3,140/- as at July 1982 according to a copy of his payslip. He was allegedly detained both at Naivasha and Kamiti Prisons and was only released in March 1983. He stated that he was only subjected to psychological and not physical torture and he never saw a doctor until 2007 for counseling. He has no medical complaints at present.

22. PW12, Peter Mwenda Ngumbao is the 11th Petitioner. He was enlisted in the Armed Forces in 1977 in the regimental accounts and pay office. He denied having been taken to the Court Martial adding that he was detained for 228 days at various places without trial. He did not have any physical injuries after his ordeal but only required psychotherapy as recommended by Dr. James Mburu (PW18).

23. PW13, George Mwangi Gatana is the 5th Petitioner. He states that he was detained for 10 days in Kamiti and Naivasha Maximum Prisons up to March 1983 and that he was not taken to the Court Martial but was tortured physically and mentally for 122 days.

24. PW14, Mohamed Mwaura is the 8th Petitioner. He was employed by Kenya Armed Forces in 1975 and was charged before the Court Martial on allegations of participating in a mutiny where he was convicted and sentenced to 4 years imprisonment. He appealed to the High Court and the sentence was reduced to a lesser period which he served at King'ong'o Prison. Prior to the proceedings at the Court Martial, he was held at Kamiti Prison for 30 days and then Naivasha for a month. He stated further that he was beaten and had gun butt injuries, suffered in a cold cell with bad food and subjected to psychological torture leading to post traumatic stress disorder.

25. PW15, Justus Anjichi Aswani is the 13th Petitioner. He was charged at the Court Martial with the offence of failing to suppress a mutiny and sentenced to 18 months' imprisonment as indicated in a certificate of imprisonment dated 25th October 1985 which Prison authorities took to be imprisonment 8 years which was reduced to 3 years on appeal to the High Court. He stated that prior to his conviction he was tortured by army personnel and he was treated at various hospitals and dispensaries since in 1985 and was still undergoing treatment at the time of testimony. He did not however have any documents apart from the report issued by the Independent Medical Legal Unit through its resident doctor, Dr. Mwaura.

26. PW16, Benson Omale Kube, is the 10th Petitioner. He testified that he was arrested at Eastleigh Airbase and taken to Kamiti Prison where he was tortured and not allowed any medical attention at the time. He claims to be ailing and had developed a mild stroke as a result of the torture and now attends treatment at Kenyatta National Hospital. He referred the Court to a discharge letter dated 7th February 1983 in which he is indicated to have been discharged from the armed forces without prejudice. The discharge letter further indicates that the witness may be due for service benefits or gratuity.

27. PW17, James King'oo Mukuthi is the 16th Petitioner. He stated that he was tried at the Court Martial but the proceedings were unfairly conducted and he was later sentenced to 12 years' imprisonment which was reduced on appeal to 9 years and later to 4 years. He was prior to conviction detained at Kamiti Prison for 3 weeks before resuming duty and later re-arrested and detained at Naivasha Prison before the charges at the Court Martial. He served his sentence in Kodiaga, Naivasha, Kamiti and then Naivasha Prisons again. He also stated that he had been physically and mentally tortured by unnamed army and prison personnel and that he was still ailing as a result of his ordeal.

28. PW18, Dr. James Mbugua Mburu was the last witness to testify. He is a Medical Doctor and Psychiatrist by specialization. He examined some of the Petitioners on 26th October 2007 and prepared reports in respect of the 1st, 4th, 6th, 10th, 11th, 12th, 13th and 16th Petitioners. He produced the reports with a general recommendation that they needed further psychological support and follow up, the psychological issues having developed and experienced during incarceration.

29. The medical reports by Dr. W.M. Wokabi and Dr. Silvanus Wabwire were produced by consent. These doctors had prepared medical reports for the other Petitioners.

30. With the exception of the 2nd Petitioner, who opted to represent himself during the proceedings, the other Petitioners filed joint submissions on 27/10/2015. The 2nd Petitioner also filed written submission on the same date as directed by the court.

The Submissions of the 1st to 17th Petitioners (except 2nd Petitioner)

31. The Petitioners submit that contrary to the assertions by the Respondent, there is no limitation in law as to when an action on infringement of constitutional right can become time barred. The Petitioners also indicate that they have filed the Petition as members of VOCA in the public interest and on their individual behalf. They rely on **Article 258** of the **Constitution 2010** as read with **Article 22** of the **Constitution** as well as **Trusted Society of Human Rights Alliance v Attorney General [2012] eKLR** paragraphs 1-5 and **Abdi Sitar Yusuf vs Attorney General & 2 others [2013] eKLR** paragraph 1-13 for that submission.

32. The Petitioners have in their submissions summarized the nature of alleged breaches of the Constitution as per their evidence adduced in court and on the particulars of violations and the law, the Petitioners argue that the acts they were subjected to including incarceration, beatings, being stripped in public and denial of basic needs without due regard to their well being amounted to breach of **Sections 70(a)** and **74(1)** of the **Repealed Constitution**.

33. Relying further on Mutungi J.'s holding in **Ann Njogu & 5 others v R [2007]eKLR**, the Petitioners further argue that their detention for long periods without trial amounted to a violation of their rights under **Sections 72(3), 74(1)** and **77** of the **Repealed Constitution** as with **Articles 19(2), 25(a), 28, 29, 50** and **51** of the **Constitution of Kenya 2010**. The Petitioners further referred to the case of **Albanus Mwasi Mutua v Republic [2006]eKLR** to make the point that the detention of any suspect of a crime beyond the prescribed period of time was unlawful.

34. On what amounts to torture and inhuman treatment, the Petitioners made reference to the **European Court of Human Rights** definition of torture in **The Greek case 1969 Y.B Eur. Conv. on H.R. 186** as *“the notion of inhuman treatment [that] covers at least such treatment as deliberating causes suffering, mental or physical, which in the particular situation is unjustifiable . . . has the purpose,*

such as the obtaining of information or confession, or the infliction of punishment and it is generally as aggravated form of inhuman treatment". They also referred torture and cruel degrading treatment as defined by Visram J. (as he then was) in **Samuel Rukenya Mburu v Castle Breweries, Nairobi HCCC 1119 of 2003** in the same terms. In essence, the Petitioners argue that what they were subjected to is in direct violation of their rights not to be subjected to torture, inhuman and degrading treatment as contemplated in both national and international laws.

35. The Petitioners furthermore point to **Article 49** of the **Constitution of Kenya 2010** which adumbrates the rights of an arrested person and according to them, the key constitutional rights which were not adhered to when the Petitioners were arrested include **Articles 19(2), 25(a)** of the **Constitution of Kenya 2010**. They, in addition, make reference to **Article 2** of the **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** which prohibits torture and requires parties to take effective measures to prevent it in any territory under their jurisdiction. This prohibition is absolute and non-derogable and according to them is unjustified even in instances of war, internal political instability, public emergency and terrorist acts. It is also their case that it is not a defence for subordinates who commit acts of torture to extricate themselves from legal responsibility on grounds that they were merely following orders from their superiors.

36. Regarding the issue of prosecution before the court martial, the Petitioners rely on **Article 25(c)** of the **Constitution** which does not limit the right to fair trial and also point out to **Article 50(1)** and **(2)** of the **Constitution** on the need for a fair and public hearing before an independent and impartial tribunal or body and the emphasis on the need for a fair trial including the components thereof. These provisions are, according to the Petitioners, a re-enactment of the provisions of **Sections 72** and **77(1)** of the **Repealed Constitution**.

37. The Petitioners are also categorical in their submissions that they are not appealing the decisions of the Court Martial but rather argue that its process was an illegality having been conducted by an illegal entity known as the '82 Airforce. The Petitioners further argue that even if they were offenders, which they deny, their misconduct never warranted the brutal, degrading, inhuman and illegal actions meted against them thereby necessitating the claim for damages for violation of their rights.

38. In conclusion, the Petitioners seek compensation as a result of the alleged violations committed against them and reliance thereby is placed on Hayanga J.'s decision in **Dominic Arony Amolo Misc. Appl. No.494 of 2003** where the learned judge considered two options in awarding damages: one is for a lump sum for all the breaches cited and the second option is for damages for each of the heads of breach of fundamental rights. The Petitioners thus cited several other cases in which damages were awarded for the breach of fundamental rights including the cases of **Harun Thungu Wakaba v The Attorney General Misc. Appl. No.1411 of 2004**, **Rumba Kinuthia v Attorney General (supra)** and **Peter Ngari Kagume & others v Attorney General** and **Dick Joel Omondi v Attorney General High Court Petition No.192 of 2012**, in **Wachira Waiheru v Attorney General Misc. Case No.1184 of 2003**.

39. The Petitioners also cited the Court of Appeal case of **Peter M. Kariuki v Attorney General Appeal No.79 of 2012 (unreported)**, in which the appellant was awarded a sum of Shs.15,000,000/= as damages for violation of his constitutional rights and also Shs.22,965,460/= as his salary arrears and damages.

40. In the end, the Petitioners pray for a lump sum award for general damages of Shs.15,000,000/= for each Petitioner as fair and reasonable compensation for the alleged violations and further pray that they be awarded and paid severally their salary arrears/ withheld earnings as indicated in their respective affidavits since the discharge from employment denied them their right to social security and most of them are living in abject poverty without means. These withheld earnings are allegedly claimed pursuant to **Article 31(1)(e)** of the **Constitution** and cover the duration each of the Petitioners would have attained the retirement age of 55 years. The Petitioners for the above reasons pray that their Petition be allowed as prayed.

The 2nd Petitioner's submissions

41. It was the 2nd Petitioner's submissions that his arrest, detention, torture, conviction and discharge from service following the attempted *coup de tat* of 1st August, 1982 constituted a breach of the right to personal liberty as was then provided for under **Section 70(a) of the Repealed Constitution**.
42. Further, that his arrest and the purported discharge from service by an entity known as the '82 Air Force was tainted with illegality, irregularity and unfairness and was in contravention of established rules of natural justice and constituted a breach of the rights to liberty as was guaranteed under **Section 72 of the Repealed Constitution**.
43. In addition, that detention in various detention centers in grossly inhuman conditions between the periods of 1st August, 1982 and 28th May, 1989 amounted to cruel and inhuman treatment and was a breach of his rights as was guaranteed under **Section 74(1) of the Repealed Constitution**.
44. He also faulted the Court Martial that tried him and argued that it did not uphold the due process of law and acted in breach of **Section 77(1)(2)(a)-(e) (now Article 50(1)(2)) of the Constitution** and also acted in contravention of the rules of natural justice.
45. The 2nd Petitioner also submitted that his detention for 59 days from 1st August to 28th September 1982, his eventual arraignment before the Court Martial at Lang'ata without being accorded a fair public hearing in a competent, impartial and independent court established by law and the subsequent dismissal from service without any dues was a violation of his fundamental rights to human dignity, protection of the law, personal liberty, and freedom from torture, cruel, inhuman and degrading treatment and the right to a fair and expeditious trial. He relied on the cases of **Ann Njogu & 5 Others v Republic (2007) eKLR** and **Albanus Mwasia Mutua v Republic (2006) eKLR** for this submission.
46. On his right to be promptly informed of reasons for arrest and detention and any charges against oneself, he relied on **Article 9(2) of the International Covenant on Civil and Political Rights, Article 7(4) of the American Convention on Human Rights and Article 5(2) of the European Convention on Human Rights**. He also relied on the case of **ACHPR, Media Rights Agenda (on behalf of Niran Malaolu) v Nigeria, Communication No.224/98**, a decision adopted during the 28th session, 23 October - 6 November 2000; para 43 of the text published at <http://hrlibrary.umn.edu/africa/comcases/224-98.html>. He further cited **ACHPR, Huri-Laws (on behalf of the Civil Liberties Organization) v. Nigeria, Communication No. 225/98**, and the decision adopted during the 28th Ordinary Session, 23 October - 6th November 2000, paras. 43-44 of the text of the decision as published at <http://hrlibrary.umn.edu/Africa/comcase/225-98.html> where the African Commission on Human and Peoples' Rights held that failure or negligence on the part of security agents of a state party "scrupulously" to comply with the requirement to submit reasons for arrest and inform the person arrested promptly of any charges against them is a violation of the right to fair trial as guaranteed by the African Charter on Human and Peoples' Rights.
47. He further relied on the ACHPR decision in **Amnesty International and Others, Communciation Nos. 48/90, 50/91 and 89/93**, (decision not dated), para. 59 of the text published at <http://hrlibrary.umn.edu/africa/comcases/48-90 50-91 52-91 89 93.html> a case against the Sudan, where the Commission explained that **Article 6 of the African Charter** "*must be interpreted in such a way as to permit arrests only in the exercise of powers normally granted to the security forces in a democratic society*"; and since the wording of the relevant Decree allowed "*individuals to be arrested for vague reasons, and upon suspicion, not proven acts*", it was "*not in conformity with the spirit of the African Charter*" and violated Article 6 thereof.
48. Relying also *inter alia* on the cases of **Portorreal v Dominican Republic, HRC, UN-DOC.CCPR/C/31/D/188/1984 (1987)**, **HRC, Media Rights Agenda (On behalf of Niran Malaolu) v Nigeria, Communication No 224/98** adopted during the 28th session, 23, October - 6 November 2000, para 43, it was his further submission that the right of one not to be deprived of his liberty applies at all times even during a state of emergency. Further, that in the case of **Adolfo Drescher Caldad v Uruguay, (43/1979), HRC, UN DOC./A/38/40 supp 40 at 192-183 ss 13.2 HRC Conducling**

observation Sudan, UN Doc. CCPR/C/79/ add 85 (1997 213, Nechiporuk and Yonkalo v Ukraine, the European Court, the Human Rights Committee concluded that it was not sufficient simply to inform detainees that they were being arrested for security reasons without any indication of the substance of the alleged offence.

49. He also submitted that contrary to the provisions of **Rule 3 of the Armed Forces Rules of Procedure enacted under Sections 80 and 82 of the Armed Forces Act Cap 199** (now repealed), he was not taken before the Commanding officer of the Kenya Air Force, Eastleigh Air Base where he administratively belonged or before the Commanding Officer of the Kenya Air Force, Air Defence Control Unit, where he was physically attached, but instead, he was taken before Brigadier A.K Cheruiyot and some Senior Army Officers among them Major Maingi of Military Intelligence on 9th August 1982. The said officers only sought to know his personal particulars and whether he had armed himself with a rifle, during the attempted coup, where he had kept the rifle and how many times he had met Dr. Willy Mutunga (later to become Chief Justice of Kenya).

50. In further support of his Submissions above, he relied on **Communication No.248/1987, G. Campbell v. Jamica** (views adopted on 30th March 1992), p.246, para 6.3 where the Human Rights Committee explained that *“one of the most important reasons for the requirement of ‘prompt’ information on a criminal charge is to enable a detained individual to request a prompt decision on the lawfulness of his or her detention by a competent judicial authority”*. He also relied on the principle expressed in **Communication No.597/1994, P. Grant v Jamaica** (views adopted on 22 March 1996), in UN doc. GAOR, A/51/40 (Vol.II), p.212, para. 8.1. that the law had been violated in a case where the complainant had not been informed, upon arrest, of the charges against him and was only so informed seven days after he had been detained.

51. That for the above reasons, he asserted that failure on the part of Brigadier Cheruiyot and the Senior Army Officers to inform him of his reason of arrest and detention at Kamiti Maximum Prison constituted a breach of his liberty as was guaranteed under **Section 72 (2) of the Repealed Constitution** and now enshrined in **Article 49(1)(a)(i) of the Constitution 2010** and protected under international laws. That the investigation by Brigadier Cheruiyot and his fellow army officers also contravened the **Armed Forces Act, Rules of Procedure and Regulations** and subverted the rule of law.

52. Regarding his detention for 59 days without a charge or without being brought before a Court Martial or any other Court contrary to **Section 72(3) (b) of the Repealed Constitution**, he submitted that the same constituted breach of his right to personal liberty.

53. He added that, he was a citizen and a serviceman in the Kenya Air force, and was entitled to protection of the law like any other citizen. He relied on the decision of Linnet Ndolo, J in **Petition No. 49 of 2012 Estate of Capt Kariuki Kingaru Murebu (Dcd) & 8 Others v Attorney General [2014] eKLR** where the learned Judge held that men in uniform were not only citizens to whom the Constitution applied but were also covered by the **Armed Forces Act** by virtue of their employment. He added that Ojwang J (as he then was) in the case of **Lt. Col. Benjamin Muema v Attorney General & 2 Others [2006] eKLR** also stated that the centerpiece of military law in Kenya was the **Armed Forces Act (Cap.199)** and on that point he also made reference to **Petition No. 587 of 2012 in Gerald Juma Gichohi & 9 Others v Attorney General [2015] eKLR** (paragraph 102) and **Peter M. Kariuki v Attorney General, Civil Appeal No.79 of 2012** (paragraph 103).

54. He further relied on **Selmouni v France, Para 98, Ribitsch v Austria, 1889 6/91[1995]ECHR 55(4th December 1995)** Para 38 and **Tekin v Turkey Judgment of June 1998**, Reports 1998-IV, PP.1517-18 Para.53 where the Court held that the use of force against persons deprived of their liberty, where the use of force has not been made strictly necessary by their own conduct, diminishes human dignity and is in principle an infringement of their set for in **Article 3** [the prohibition on torture, inhuman or degrading treatment or punishment].

55. It was his further submission that, his detention in deplorable conditions at Kamiti Maximum Security Prison i.e being kept in a crowded cell; sleeping on a cold floor with no beddings; in a cell with an over

flowing toilet; using the toilet in the presence of another inmate and to be present when the toilet was being used by another cell-mate; with no food for three days and with a powerful electric light on for 24 hours making it impossible to sleep; denial of medical care for bodily injuries sustained during the brutal arrest at the Kenya Air Force, Eastleigh Air Base and at Kamiti Maximum Prison, all violate **Article 10 (1) of the ICCPR**, which states that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person, a right similarly protected by **Article 3 of the Geneva Convention**. On this point, he further relied on General Comment 21 UN Compilations of General Comments. Para.3 at p142 and the cases of **Dougoz v Greece (no citation given) and ACHPR, John D. Ouko v Kenya, Communication No.232/99** the latter being a decision adopted during the 28th Ordinary Session, 23 October - 6 November 2000, paras.22-33 where the African Commission on Human and Peoples' Rights concluded that **Article 5 of the African Charter** was violated in Ouko's case, where the complainant alleged that the detention facility he was held in had a 250-watt electric bulb that had been left on throughout his ten-month-long detention and during that period, he had also been denied bathroom facilities and had been subjected to physical and mental torture. In the view of the Commission, these conditions contravened the complainant's right to respect for his dignity and freedom from inhuman and degrading treatment as guaranteed by **Article 5 of the Charter**.

56. He further submitted that the physical assault during arrest, arbitrary detention in deplorable conditions at Kamiti Maximum Prison and Naivasha Prison was barbaric, deliberate, in bad faith and caused him physical pain which was unlawful and in violation of his fundamental rights as to the integrity and dignity of the person, freedom against torture, cruel, inhuman and degrading treatment or punishment guaranteed by **Sections 70 and 74(1) of the Repealed Constitution**.

57. The 2nd Petitioner also challenged his purported dismissal from service pursuant to **Section 176(g) of the Armed Forces Act (Cap 199)** as having being done by an illegal entity known as the '82 Air Force' and on that he relied on the case of **Capt. Geoffrey Kujoga v Attorney General, Misc. Application No 293 of 1993** where the Court ruled that the outfit called "82 Air Force" was not anchored in the Armed Forces law hence was unknown in law and that the said entity was incapable of hiring and firing the Petitioner. Further, that since he was a member of Kenya Air Force and has never been a member of '82 Air Force', the Commander or the Commanding Officer of the illegal '82 Air Force' had no authority to retire, dismiss or terminate his services.

58. *ders to be mandatory, and departure there from (is) fatal*" and **Lt. Col. Prithi Pal Singh Bedi Etc Union of India & others on 25 August, 1982**ed was urged that compliance with this procedure which affords full opportunity of participants cannot be treated as merely directory but must be held to be mandatory to ensure a just and fair trial and its violation must be held to vitiate the order convening the court-martial and the order would be without jurisdiction.

59. Regarding the Court Martial proceedings, he submitted that due process guaranteed to an accused person the right to the presumption of innocence under **Article 77(2) (a) of the Constitution** and he further stated that **Article 7(1)(b) of the African Charter on Human and Peoples Rights, Article 14(2) of the ICCPR, and Article 6(2) of the European Convention on Human Rights** all provide that, *"everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law"*, a right also guaranteed in **Article 11(1) of the UDHR**. Further, that in the cases of **Barbera, Messager and Jarbado v Spain (10590/83) 188 s 77, Telfferer v Austria (33501/96) (2001) s15 Ricardo Canese v Paraguay** it was held that the presumption of innocence *"imposes on the prosecution the burden of proving the charge, guarantee that no guilt can be presumed until the charge has been proved beyond a reasonable doubt and ensures that [an] accused has benefit of the doubt."*

60. Further, that an *"accused must be presumed to be innocent until the accused guilt is established by legal and competent evidence beyond reasonable doubt"* and yet in his case, there was no competent evidence to convict on a charge of mutiny and that the evidence against him was obtained in violation of **Armed Forces Act**.

61. He added that his right to the presumption of innocence was also undermined by excessive publicity after the coup attempt on 1st August 1982, and during political demonstrations in support of the then

President Daniel Moi, which provoked an atmosphere of public hysteria akin to lynch mob, characterizing the entire Kenya Air Force as comprised of coup plotters and rebels, which amounted to interference with the administration of justice and made it impossible for him to have a fair trial.

62. For all the above reasons, the 2nd Petitioner prays that his part of the Petition be allowed with costs and I should note that I only summarized his submissions on relevant matters to the matter before me. They were otherwise verbose and repetitive, with respect.

The Respondent's submissions

63. The Respondent filed grounds of opposition on 21st August 2009, Replying Affidavit on 30th October 2014 and a list of documents on 14th October 2014 in opposition to the Petition. He denies that the Petitioners were arrested, confined, subjected to gross inhuman conditions, interrogated, tortured, or forced to record statements which formed the basis of subjecting them to proceedings at the Court Martial. It is also his contention that the Petitioners voluntarily recorded their statements having been party to the attempted coup while armed and that were lawfully tried, convicted and sentenced with some of them such as Mutua David Kisilu (PW 2), James Mbithi Wambua (PW3), Mohamed Mwaure Ngauru (PW14) and James Kingoo Mukuthi (PW 17) pleading guilty to the charges that were read out to them.

64. The Respondent has also summarized the oral evidence adduced by the Petitioners and in general terms, he disputes the assertion that the Petitioners had proved the claims of either torture or arrest and argues that the medical reports adduced do not corroborate their testimonies. It is his other contention that the medical reports adduced were prepared more than 25 years from the date of the alleged violations including torture and none of the witnesses adduced evidence that they were undergoing follow-up or reviews despite claiming to be ailing to date. Moreover, that no witnesses were available to support the allegations by the Petitioners and no complaints were ever made by the Petitioners on the alleged violations, to any lawful authority, a situation which the Respondent argues amounts to a fabrication of evidence by the Petitioners.

65. As for the 17th Petitioner, the Respondent argues that since there was no application for substitution filed following his death, no award should be made in his favour as no one came to prove any of his complaints.

66. The Respondent also framed the following issues for determination;

- a) Whether the honourable Court has jurisdiction to determine the employment claims raised in this matter.
- b) Whether the Petitioners are entitled to the earnings arising from the employment claim.
- c) Whether the Petitioners constitutional rights have been violated.
- d) Whether the Petitioners are entitled to the prayers sought.

67. On the first issue of jurisdiction, the Respondent submits that jurisdiction is everything and without it, the court has no power or authority to determine the issue in dispute. In that context he cited **Halsbury's Laws of England volume 24(2010) 5th Edition at paragraph 623** as referred to in the case of **Ferdinand Ndung'u Waititu v IEBC & Others Civil Appeal 324 of 2013**. He further referred to the case of **Owners of Motor Vessel "Lillian S" [1989] KLR 1** to support his submission on this point.

68. The Respondent in that regard has submitted that the Petition is founded on an employment claim where the Petitioners allege that they were unlawfully dismissed from employment and claim compensation and withheld earnings for the alleged unlawful dismissal. Such a claim, the Respondent argues, can only be determined by the Employment and Labour Relations Court in terms of **Article 162(2)** of the Constitution of Kenya 2010 and **Section 12** of the **Employment and Labour Relations**

Act Cap.234B. In support of this argument, he invited the Court to consider the case of **United States International University v Attorney General, Constitutional Petition No.170 of 2012** and **Samson O. Ngonga v Public Service Commission & 5 others Petition No.459 of 2011** where the High Court declined jurisdiction to entertain employment disputes including those which relate to alleged violation of the Bill of Rights in view of the existence of the Industrial Court as it then was known.

69. The second challenge on jurisdiction relates to **Section 3** of the **Public Authorities Limitation Act Cap.39** which states:

“No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued.”

According to the Respondent, it is more than 30 years since the alleged cause of action arose and considering that the relationship between the Petitioners and the Respondent was a contract of employment, such claims can only lawfully survive for a maximum of 3 years. He has relied on the case of **Samson O. Ngonga v Public Service Commission & 5 others Petition No.4 of 2013** where the Court dismissed the matter as being time barred. In support of his position he further cited **Iga v Makerere University (1972) EA** where it was held that the **Limitation of Actions Act** does not extinguish a suit or action itself, but operated to bar a claim or remedy sought for and when a suit is time barred, the Court cannot grant any remedy or relief. The same Court then stated as follows:

“The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the pleadings, and no grounds of exemption are shown in the pleadings, the suit must be rejected.”

The Respondent in that context submitted that this Court lacks jurisdiction and that the claims before it are also time barred.

70. On the second issue as to whether the Petitioners are entitled to the earnings arising from the employment claim, the Respondent has argued that the Petitioners are not entitled to any compensation for the reasons discussed above. In addition, he argued that entitling the Petitioners to withheld earnings until their retirement age will be contrary to **Section 49** of the **Employment Act** which limits an award of damages to a cumulated amount of 12 months salary or wages. (referring to **PJO vs FACL [2015]eKLR** where the prayer for damages until retirement was held to be unconscionable as it would amount to reinstatement of the claimant to employment for work that was never done.). The Respondent therefore maintains that the Petitioners are not entitled to any compensation or compensation until their retirement age.

71. As to whether the Petitioners’ constitutional rights have been violated, the Respondent has argued that the burden of proof for such infringement rests with the Petitioners as set out in **Anarita Karimi Njeru v the Republic (1976-1980) KLR 1272** as further applied in **Meme v Republic & Anor [2004]eKLR** and **Republic v Truth Justice and Reconciliation Commission and Another ex parte Augustine Kathangu and 9 others [2011]eKLR** the latter case dealing with the provisions of **Article 22** and **258** of the **Constitution of Kenya 2010**.

72. It is also the Respondent’s position that the Petitioners have not met the principles and the threshold enunciated in the **Anarita Karimi Njeru case (supra)** and refers to the provisions of **Section 107** and **109** of the **Evidence Act** in asserting that the burden of proof lies on the person who wishes any Court to believe of the existence of a fact whose existence the Court should rely on to give a Judgment. The Respondent thus denied the alleged violations and has argued that it is incumbent upon the Petitioners to substantiate their claims as was stated by Nyamu J. in **Constitutional Application No.128 of 2006 Lt. Col Peter Ngari Kagume & Others v Attorney General**. The learned Judge had opined as follows:

“ . . . when the court is faced by a scenario where one side alleges and the rival side disputes, the one alleging assumes the burden to prove the allegation . . . ”

73. The Respondent in addition has argued that the Petitioners have not produced any evidence to back their allegations, the medical reports having been prepared over 25 years after the alleged occurrences and similarly, that the medical receipts adduced are not genuine as they are undated or recently dated, an indication that they were only prepared for purposes of the present Petition.

74. In the absence of any independent witnesses, it is also the Respondent's case that it is not enough to allege that a person was arrested and tortured by officers of the Government and as was stated in **Lt Col Peter Ngari Kagume case (supra)** the Court should be deaf to speculations and imaginations and must be guided by evidence of probative value only. That it is also not enough for the Petitioners to make averments as to what transpired to them in the absence of further tangible evidence capable of being subjected to cross examination to test its veracity.

75. The Respondent has also taken issue with the delay with which the Petitioners have taken to prosecute their rights and in so arguing, it is his case that prosecuting their case after more than 25 years, the records having information as to their allegations have been destroyed, lost, misplaced and the people conversant with the matter could be dead then the Petitioners are being unfair to the Respondent. Relying further on **Lt Col Peter Ngari Kagume case (supra)** he submitted that time is of essence and a person whose constitutional rights have been infringed should have some zeal and motivation to enforce his or her rights and that is possibly the wisdom of time limitation in filing of cases.

76. On the final issue he set out for determination, the Respondent was categorical that the Petitioners are not entitled to the prayers sought as they have not proved their case on merit and whereas the Court has a constitutional mandate to protect and safeguard the rights and freedoms of the individuals, the Petitioners must demonstrate to the satisfaction of the Court that their rights have been violated. The Respondent thus argues that the Petition lacks merit and should be dismissed with costs.

Determination

77. While the Respondent raised the question whether the association known as VOCA was entitled to file the present Petition, the issue is of no consequence because the Petitioners presented their cases as individuals who were also members of VOCA.

78. Nowhere in pleadings or in their evidence was any claim by VOCA as a registered association. The entire Petition and submissions related to claims of violation of their rights by the Petitioners and that is the end of that issue.

79. The other issue raised by the Respondent which requires quick resolution is the question whether the Petitioners could properly raise alleged illegality in their discharge from the Kenya Airforce the same being an employment matter. In that regard the Petition herein was filed after the Promulgation of the **Constitution 2010** and by dint of **Article 165(5)** as read with **Article 162(2)** of the said **Constitution**, the High Court has no jurisdiction over employment and labour relations. Previously, employment being a civil dispute, the High Court had jurisdiction over such matters under **Section 60** of the **Repealed Constitution**.

80. My view is that a purely employment related question cannot now be raised in the High Court for the above reasons but where a party raises issues of employment as a Bill of Rights question, then this Court may have jurisdiction to determine that limited question.

81. I therefore subscribe to the position taken by the Court in **USIU v AG, Constitutional Petition No.170 of 2012 and Samson O. Ngonga v PSC & 5 Others, Constitutional Petition No.459 of 2011** that where a party tries to avoid both the jurisdictional barrier and the limitation of time barrier, then its claim cannot be entertained even if it is clothed as a purely constitutional matter.

82. It is obvious to me in the above context that the lengthy complaint and submissions by the Petitioner on the question of their discharge from employment is relevant to their substantive claim only to the extent that they specifically pleaded and prayed for orders that their constitutional rights under **Section 74**

of the **Repealed Constitution** were violated by the Respondent's agents when they were unlawfully discharged from service. To that extent, such a claim must be the business of this Court in the context of the larger claim in the Petition that their rights were violated whether in fact such a claim is merited is a matter to be scrutinized shortly.

83. The Respondent raised another issue, a common one in their type of cases; that the Petition was filed close to twenty years after the events complained of and should be struck out for that reason.

84. On my part, reading past decisions of the High Court, a common thread runs through them; that there is no time limit to bring Petitions alleging violation of constitutional rights but as a matter of fairness, it would be expected that at the very least, a Petitioner ought to explain any inordinate delay in filing constitutional proceedings. That is why in **Harun Thungu Wakaba (supra)**, the Court stated thus;

“I take note of the fact that there are a series of similar cases of alleged breaches of fundamental rights and freedoms, committed prior to the year 2002, before the change in Government. The explanation that the environment of the fundamental rights and freedoms has been accepted. In that regard, I would borrow the following passage from Wachira Waheire vs the Attorney General (supra): “The elections held in the year 2002 and the consequent wave of change in this County are a historical fact. The explanation given by the Plaintiff is therefore not unreasonable. In coming to this conclusion, we bear in mind many cases which came up after that change, such as Dominic Arony Amolo vs the Attorney General I which the Plaintiff's claim filed in the year 2003 which was more than 20 years after the cause of action arose was allowed. We are therefore not persuaded that the Plaintiff's claim should be defeated because of the delay in filing his claim”.”

85. I agree with the statements above, and while it cannot be denied that the events of 1st August 1982 led to other events including the arrest, detention and conviction of some of the Petitioners, it is also true that the Petitioners and others suspected of involvement in the coup attempt were ostracized, denied access to many social amenities and employment. Their explanation that they were also stopped from seeking counsel until change of the political regime must be accepted as a sufficient explanation for the delay in filing their Petition and I shall now proceed to interrogate their claims on their merits.

86. The above findings would leave me with only two issues for determination:

- i) Whether the Petitioners' constitutional rights under **Sections 70, 72 and 74** of the **Repealed Constitution** were violated by agents of the State now represented by the Respondent.
- ii) If so, what remedies are available to the Petitioners?

Violations of Sections 70, 72 and 74 of the Constitution

87. The above Sections of the Repealed Constitution provided for the following rights:

- a) **Section 70** – fundamental rights and freedoms of the individual including freedom from discrimination, right to life, liberty, security of the person, conscience and assembly as well as protection for the privacy of the home and property.
- b) **Section 72** – protection from personal liberty save as may be authorized by the law.
- c) **Section 74** – protection from torture, inhuman and degrading treatment.

88. While **Section 77(1)** of the **Repealed Constitution** (on the right to a fair hearing) was cited in submissions, the plea was never made in the Petition and that may explain why the Respondent did not address it all. I will also not address it for the same reason save what I shall say in passing about the proceedings at the Court Martial.

Sections 70 and 72 of the Repealed Constitution – Right to Personal Liberty

89. From my summary of the cases for the Petitioners and the response by the Respondent, **Section 72** is relevant to the said issues as it provides as follows:

1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases –

a) in execution of the sentence or order of a court, whether established for Kenya or some other country, in respect of a criminal offence of which he has been convicted;

b) in execution of the order of the High Court or the Court of Appeal punishing him for contempt of that court or of another court or tribunal;

c) in execution of the order of a court made to secure the fulfillment of an obligation imposed on him by law;

d) for the purpose of bringing him before a court in execution of the order of a court;

e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law of Kenya;

f) in the case of a person who has not attained the age of eighteen years, for the purpose of his education or welfare;

g) for the purpose of preventing the spread of an infectious or contagious disease;

h) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community;

i) for the purpose of preventing the unlawful entry of that person into Kenya, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Kenya or for the purpose of restricting that person while he is being conveyed through Kenya in the course of his extradition or removal as a convicted prisoner from one country to another; or

j) to such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within Kenya or prohibiting him from being within such an area, or to such extent as may be reasonably justifiable for the taking of proceedings against that person relating to the making of any such order, or to such extent as may be reasonably justifiable for restraining that person during a visit that he is permitted to make to a part of Kenya in which, in consequence of the order, his presence would otherwise be unlawful.

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 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.

4) *Where a person is brought before a court in execution of the order of a court in any proceedings or upon suspicion of his having committed or being about to commit an offence, he shall not be thereafter further held in custody in connexion with those proceedings or that offence save upon the order of a court.*

5) *If a person arrested or detained as mentioned in subsection (3) (b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall, unless he is charged with an offence punishable by death, be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.*

6) *A person who is unlawfully arrested or detained by another person shall be entitled to compensation therefor from that other person.”*

90. The above Section requires little more than a literal interpretation and of interest is **Section 72(30(b))** which shifts the burden of proof to a respondent who claims that a person arrested on suspicion of having committed an offence to law was brought to Court within the constitutionally sanctioned period (See – also for example **Maina Wa Kinyatti v AG Petition No.595 of 2012** and **Denish Gumbe Osire v Cabinet Secretary, Ministry of Defence, Petition No.572 of 2013**).

91. In the present case, the Respondent made no effort to explain why the Petitioners were incarcerated for long periods without being taken to any Court including the Court Martial. In their evidence, the Petitioners were held between 25 days and over 200 days and were thereafter either released without any charge or charged and convicted at the Court Martial.

92. While it is difficult to find any fault with the sentences and orders of incarceration meted out by the Court Martial to some of the Petitioners, who indeed admitted the charges and later appealed to the High Court for reduction of sentences, without an explanation as to why they were kept in custody from 1st August 1982 until proceedings at the Court Martial or until eventual release without charge, the Petitioners have proved that they were unlawfully detained and I so find.

93. In that regard, from the evidence before me, I find that the Petitioners were unlawfully held contrary to **Section 72(3) (b)** of the **Repealed Constitution** for the following specific periods:

- | | | |
|------------------------|---|----------|
| 1. PETER TONNY WAMBUA | - | 212 days |
| 2. DAVID K. MUTUA | - | 28 days |
| 3. JAMES M. WAMBUA | - | 25 days |
| 4. STANLEY N. NGARUIYA | - | 60 days |
| 5. GEORGE M. GATANA | - | 58 days |
| 6. PIUS K. NDETEI | - | 212 days |
| 7. EDWARD GICHERU | - | 62 days |
| 8. MOHAMED MWAURA | - | 69 days |
| 9. RAYMOND M. MWANGI | - | 167 days |

10. BENSON O. KUBE	-	183 days
11. PETER M. NGUMBAU	-	228 days
12. STEPHEN O. ORIANG	-	95 days
13. JUSTUS A. ASWANI	-	87 days
14. GEORGE O. ONDIEKI	-	244 days
15. STEPHEN MBURU KARIUKI	-	230 days
16. JAMES K. MUKUTHI	-	27 days
17. PETER M.O. MIYIENDA	-	53 days
18. FRANCIS K. BETT	-	Deceased

Section 74 of the Repealed Constitution – Freedom from torture, inhuman and degrading treatment

94. From the Petition, oral evidence and submissions, the Petitioners claimed that the above rights were violated because of the following alleged actions of the agents of the State:

- a) Illegal search and stripping of the Petitioners in public and in prison against generally accepted norms of decency.
- b) Physical and mental torture by being threatened with execution, physical beatings, being held in water logged cells for days without food, water and medicine.
- c) Being held *incommunicado*, without food and in dark cells for several days without communicating with relatives or their legal advisers.
- d) Being subjected to a Court Martial and denied a legal adviser of their choice and forced to take an advocate provided by the court martial.
- e) Being discharged from service dishonorably without pension or terminal dues by an illegal entity.

95. In response to the above claims, the Respondents denied that the Petitioners were ever arrested or tortured and contended that without medical reports, and witnesses, their claims must fail.

96. Before returning to whether the claims above have been proved to the required standards, in the **Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Rights against Terrorism, 11th July 2002** in line with the principle that there can never be any justification for torture, inhuman and degrading treatment, it was asserted that “*the use of torture, or of inhuman or degrading treatment or punishment; is absolutely prohibited, in all circumstances, and in particular during the arrest, questioning or detention of a person ... irrespective of the acts that person is suspected of ...*” This principle is in accord with the expectations and language of **Section 74 (1)** of the **Repealed Constitution** which provided that:

“No person shall be subject to torture or to inhuman or degrading punishment or other treatment”

97. Regarding the methods to be used by interrogators such as those who interrogated the Petitioners particularly at Naivasha Maximum Security Prison, even in the most serious of cases, such as terrorism and treason, the Supreme Court of Israel, in **Public Committee against Torture v The State of Israel**

and the General Security Service, HCJ 5100/94 categorically stated that the prohibition against torture, degrading and inhuman treatment is ‘absolute’ and that sleep deprivation for example is disproportionate to that right so is any other attempt at violence directed at a suspect’s body or spirit. The same finding must be made in this case in view of the circumstances narrated elsewhere above

98. In our own realm, the Court of Appeal in **Koigi Wamwere v AG [2015] eKLR** had this to say on torture:

“On our own consideration of the matters complained of, we come to the unhesitating conclusion that the ascription of the term torture to them was a subjective and loose stretching of the term, which though conversationally and informally understandable, does not bear fealty to the technical legal definition of torture. Torture is defined by the Convention against Torture at Article 1 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 action 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

We have highlighted the last phrase or sentence of that definition not only because it seems, on the face of it, to be exclusionary of some of the complaints by the appellant but, more so because, whether by default or by design, they are missing from the appellant’s counsel’s quotation of the article in their submissions. It seems to us arguable that had counsel fully quoted the article, and given full weight and credit to the last phrase, the submissions made would necessarily have been either altered or otherwise qualified.”

99. Applying the above definitions and principles, I have no doubt that having seen almost all the Petitioners in Court, and having read the medical Reports by Dr. James Mburu, Dr. Geoffrey Mucee, Dr. W. M. Wokabi and Dr. Silvanus Wabwire which detail out the Petitioner’s historical issues and present mental and physical conditions, it is very difficult not to accept their accounts of their arrest, incarceration and torture as not being factual.

100. While the Respondent has taken issue with lack of treatment notes dating back to 1982, it must be noted that the Petitioners were in the custody of agents of the State at a most disturbing time and I accept their explanation that they were not able to keep neat files with all records of the torture that they were subjected to, or even medical records of any resultant injuries.

101. While therefore I am satisfied that the Petitioners were, separately or jointly stripped naked in public, beaten and threatened with execution, held in water logged cells without food, water or medicine, denied visits by relatives and legal representatives, two issues must be addressed separately: Whether being subjected to Court Martial proceedings, being held in untidy prison conditions as well as being discharged from service dishonourable, amount to torture, degrading treatment and punishment.

102. Regarding the unsavoury prison conditions, the Court of Appeal stated as follows in **Koigi Wamwere (supra)**:

“We take the view, as did the learned judge, that whereas prison conditions s picture-squarely described by the appellant left a lot to be desired and cried out for reform, the treatment suffered by the appellant in common with the other inmates, whether in detention or in prison, did not amount to torture as legally defined. We do not understand the learned judge to have been speaking as an apologist for, or gate keeper for the State in stating, obiter, that to hold that the appellant had been tortured would be opening floodgates of litigation on the same basis by all

person who passed through the Kenya prisons system at the time. Such an avalanche of litigation would, of course, have grave and deleterious effects which the judge, as a responsible judicial officer, could not afford to be oblivious to.”

I agree and would only add that unless there was obvious specific mistreatment, discriminatory conduct towards an inmate, the above holding would remain true. The exception to the above rule cannot therefore hold in the present case.

103. In addition, the language of **Section 72(1)** that the taking away of personal liberty is not unlawful if conducted within the law (in this case, proceedings of a lawfully constituted Court Martial) cannot also amount to torture, degrading or inhuman treatment. The same goes for general prison conditions, however appalling, save for direct, discriminate and torturous punishment of an individual as I have stated above.

104. Regarding dishonourable discharge from service and the large claims made by the Petitioners as lost earnings, first of all, that issue was indeed pleaded but only as an aspect of torture, inhuman and degrading treatment which should ordinarily only attract the remedy of general damages. A claim for lost earnings is specific to employment law, a matter this Court is reluctant to address for the reasons given earlier.

105. There being no clear nexus between the latter claim and the non-derogable rights under **Section 74** of the **Repealed Constitution**, the above two claims are dismissed.

Other issues raised regarding violation of Rights

106. Elsewhere above, I reproduced submissions by the 2nd Petitioner touching on **Section 77(1)** of the **Repealed Constitution** in which he faulted the conduct of the Court Martial that eventually convicted him. He specifically, as did some Petitioners, faulted lack of representation *inter alia* therein. With respect, the issues of fact relating to those matters were only produced in submissions which cannot make those issues matters of evidence requiring my interrogation. Similarly, lengthy references to non-compliance with the now repealed **Armed Forces Act** and the alleged illegality of the 82 Airforce in submissions with facts neither pleaded nor tendered in evidence would preclude this Court from interrogating those facts. I must also reiterate that whereas each Petitioner calculated what they considered as dues arising from their alleged unlawful discharged(s) from the Airforce, those calculations have no basis as evidence, even if I had to consider them at all. That is to say on those matters.

What remedies are available to the Petitioners?

107. In their joint Petition, the Petitioners have sought declarations of breach of their rights under **Sections 70, 72 and 74** of the **Constitution** and I have stated above that the circumstances of their arrest, detention, torture, degrading and inhuman treatment indeed violated those Sections of the Repealed Constitution. I have however dismissed their claims to torture, inhuman and degrading treatment as regards their discharge from service and proceedings at and after conviction at the Court Martial.

108. Payment of general damages is a necessary consequence of my findings above but in submissions, the Respondent has argued that the Petitioners are not entitled, at all, to any award of damages. That position is untenable because **Section 72(6)** of the **Repealed Constitution** was specific and direct that compensation is a necessary consequence of breach of the right to personal liberty and **Section 84** of the same **Constitution** granted this Court the jurisdiction to grant such a remedy as it deems fit for breach of fundamental rights. One such remedy, it is now trite, is general damages.

109. The quantum of damages is however a matter of discretion taking into account the violation, manner of violation, intensity and length of violation as well as *inter alia* past decided cases on the same subject. It is not scientific nor is it mechanical hence the statement in **Koigi Wamwere (supra)** that:

“Accepting that the award of damages is not an exact science, and knowing that no monetary

sum can really erase the scarring of the soul and the deprivation of dignity that some of these violations of rights entailed, we find and hold that the appellant is entitled instead to damages in the global sum of Kshs.12 Million with interest at Court rates from the date of the Judgment of the High court appealed against.”

110. Applying all the above principles to the present case, noting the length of the unlawful detention, nature of torture, degrading and inhuman treatment that the Petitioners suffered, past comparable decisions such as **Gerald Juma Gichohi and 9 Others vs AG, Petition No.587 of 2012**, inflation and depreciation of currency, having granted the declarations sought, the quantum of damages for each Petitioner shall be as follows:

1. PETER TONNY WAMBUA	-	Kshs.5.2 Million
2. DAVID K. MUTUA	-	Kshs.700,000.00
3. JAMES M. WAMBUA	-	Kshs.650,000.00
4. STANLEY N. NGARUIYA	-	Kshs.1.5 Million
5. GEORGE M. GATANA	-	Kshs.1.45 Million
6. PIUS K. NDETEI	-	Kshs.5.3 Million
7. EDWARD GICHERU	-	Kshs.1.65 Million
8. MOHAMED MWAURA	-	Kshs.1.25 Million
9. RAYMOND M. MWANGI	-	Kshs.4.15 Million
10. BENSON O. KUBE	-	Kshs.4.5 Million
11. PETER M. NGUMBAU	-	Kshs.5.75 Million
12. STEPHEN O. ORIANG	-	Kshs.2.30 Million
13. JUSTUS A. ASWANI	-	Kshs.2.15 Million
14. GEORGE O. ONDIEKI	-	Kshs.6.1 Million
15. STEPHEN MBURU KARIUKI	-	Kshs.5.25 Million
16. JAMES K. MUKUTHI	-	Kshs.650,000.00
17. PETER M.O. MIYIENDA	-	Kshs.1.35 Million
18. FRANCIS K. BETT	-	Deceased

111. I have made no award in favour of Francis Bett because upon his death, no substitution was made and no evidence in his favour was tendered.

Final Orders

112. For the above reasons, Judgment is entered in favour of the 17 Petitioners against the Respondent in the following terms:

a) It is hereby declared that the circumstances under which the Petitioners were arrested,

detained and tortured, following the attempted coup d'etat of 1st August 1982 constituted a breach of their rights as provided for in Sections 70(a), 72 and 74 of the Repealed Constitution of Kenya.

b) The Petitioners are awarded general damages for the violations aforesaid as follows:

- 1. PETER TONNY WAMBUA - Kshs.5.2 Million**
- 2. DAVID K. MUTUA - Kshs.700,000.00**
- 3. JAMES M. WAMBUA - Kshs.650.000.00**
- 4. STANLEY N. NGARUIYA - Kshs.1.5 Million**
- 5. GEORGE M. GATANA - Kshs.1.45 Million**
- 6. PIUS K. NDETEI - Kshs.5.3 Million**
- 7. EDWARD GICHERU - Kshs.1.65 Million**
- 8. MOHAMED MWAURA - Kshs.1.25 Million**
- 9. RAYMOND M. MWANGI - Kshs.4.15 Million**
- 10. BENSON O. KUBE - Kshs.4.5 Million**
- 11. PETER M. NGUMBAU - Kshs.5.75 Million**
- 12. STEPHEN O. ORIANG - Kshs.2.30 Million**
- 13. JUSTUS A. ASWANI - Kshs.2.15 Million**
- 14. GEORGE O. ONDIEKI - Kshs.6.1 Million**
- 15. STEPHEN MBURU KARIUKI- Kshs.5.25 Million**
- 16. JAMES K. MUKUTHI - Kshs.650,000.00**
- 17. PETER M.O. MIYIENDA - Kshs.1.35 Million**
- 18. FRANCIS K. BETT - Deceased**

c) The Petitioners shall have interest on (b) above plus their respective costs of the Petition from the date of this Judgment until payment in full.

113. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF JULY, 2017

ISAAC LENAOLA

JUDGE

DELIVERED AND SIGNED AT NAIROBI THIS 26TH DAY OF JULY, 2017

JOHN MATIVO

JUDGE