



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI, MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO 121 OF 2016

In the matter of Articles 22, 23, 25 (a) and Article 29 of the Constitution of Kenya 2010

and

In the matter of Alleged contravention of Fundamental Rights and Freedoms under Articles 25 (1) and 29 (a), 29 (c), 29 (d) and 29 (f) & 49 (f) of the constitution of Kenya 2010

ELIUD WEFWAFWA LUUCHO.....PETITIONER

versus

THE ATTORNEY GENERAL.....RESPONDENT

CONSOLIDATED WITH

PETITION NO. 122 OF 2016

PATRICK MUSUNGU WATI.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

and

PETITION NO. 123 OF 2016

SAMUEL WANGILA MABONGA.....PETITIONER

versus

THE ATTORNEY GENERAL.....RESPONDENT

and

PETITION NO. 124 OF 2016

PATSON KIPCHIRIS KAMOKOYWO.....PETITIONER

versus

THE ATTORNEY GENERAL.....RESPONDENT

and

PETITION NO. 125 OF 2016

JOSHUA MARK OKELLO.....PETITIONER

versus

THE ATTORNEY GENERAL.....RESPONDENT

JUDGEMENT

1. This judgement disposes five consolidated petitions, namely numbers **121** of 2016, **122** of 2016, **123** of 2016, **124** of 2016 and **125** of 2016. The common thread in the said petitions is alleged violation of each of the petitioners fundamental rights by the police and/or state agents particularly torture and inhuman/degrading treatment.

2. It is important at the outset to point out that the Courts simply do not and cannot countenance a denial or violation of the fundamental right to due process or violation of constitutionally guaranteed fundamental rights which are a cornerstone of our legal system. After all, it is the Court's primary duty to protect the basic rights of the people vis-à-vis government actions.

3. Discussing the primary duty of the court alluded to above, perhaps, it would be fitting to recall the words of Albert Camus, noble prize winner who said "*either cooperate with injustice or fight with it*" and the words attributed to Elie Wiesel, a holocaust survivor who remarked that "*.....we must always side with the Rule of Law.*" [\[1\]](#)

It cannot be denied that most government actions are inspired with noble intentions, all geared towards the betterment of the nation and its people. But then again, it is important to remember this ethical principle: "The end does not justify the means." No matter how noble and worthy of admiration the purpose of an act, but if the means to be employed in accomplishing it is simply irreconcilable with constitutional parameters, then it cannot still be allowed. The Court cannot just turn a blind eye and simply let it pass. It will continue to uphold the Constitution and its enshrined principles.

5. **Eliud Wefwafwa Luucho** is the petitioner in petition number **121** of 2016. He states that sometimes in February 1995, while working in his coffee farm, six heavily armed police officers from Chepkube Police Station arrested him. At Cheskaki Police Station he was interrogated about his involvement with "February Eighteen Revolutionary Army" organization.

6. The next day he was transferred to Kimilili Police Station. Interrogation continued at the Kapskwony Police Station every morning. His hands were tied at the back, he was beaten on his head, knees, hands and legs using pieces of timber. He was told to say what he knew about a movement known as the February Eighteen Revolutionary Army (FERA). He was locked in a solitary cell incommunicado and tortured for two months.

7. He avers that electric wires were used to squeeze his testicles. A police officer walked on his chest. Every morning he was forced to carry a bucket full of human waste with his bare hands. He slept on bare floor.

8. For food, he was fed with two slices of bread and a cup of strong tea once a day for two months, his arrest was not recorded in the occurrence book at the police station, and his family did not know about his whereabouts throughout the entire period and enquiries by family members/lawyers were met with

denials. He was ultimately released from Kimilili Police Station and told to get lost and never to tell anyone what happened to him lest he be arrested again.

9. Upon being released, he was admitted at the Sirisia Health Centre with swollen legs for one week, and continued to attend treatment. Complains include inability to walk steadily, regular headaches, dizziness, slurred speech, poor memory and inability to recognize close relatives and sleep disturbances. Two medical reports dated 23rd December 2014 and 16th December 2014 confirm *inter alia* a scar in the occipital region of the head, a scar 1/2 by 3 inches scar on the left ankle, poor hearing, poor memory, impotence, depression and Amnestic syndrome. As a consequence of the foregoing, the petitioner suffered loss and damage.

10. **Patrick Musungu Wati** is the petitioner in Petition No. **122** of 2016. He was arrested at his home on 29th January 1995. He was held at Cheskaki Police Station for three days. He was taken to Webuye Police Station overnight for interrogation and torture. He was kept in underground police cells for three days without food and denied contact with his family.

11. At Webuye Police Station he was asked to say what he knew about a movement called February Eighteen Revolutionary Army and was held in the said station incommunicado for three days. He was blindfolded, bundled in a vehicle and taken to Kamiti Prison where he was held in seclusion for two weeks. He was fed with one slice of bread and water daily, he was beaten with a club and wooden pieces. His penis and testicles were flicked with pins, hanged with a wire and slapped on his eyes and ears. He was threatened with death. He was taken back to Cheskai Market where he was pushed out of the vehicle and left on the road.

12. As a consequence of the aforesaid torture, he experiences multiple joints and chest pains, inability to walk properly, headaches, dizziness, fear, anger, sweating, forgetfulness and inability to sleep. Medical Report dated 23rd December 2014 shows that the said injuries are consistent with torture.

13. **Samuel Wangila Mabonga** is the petitioner in Petition No. **123** of 2016. He was arrested on 16th May 1995 and driven to Bungoma Police Station where he was kept in an underground cell. Later, he was transferred to Kakamega Police Station where he was remanded in a dark room for one week. He was beaten all over the body, especially joints and his penis was pierced repeatedly with needles. He was badly beaten on his ribs and shoulders using a gun. His collar bone was broken. His testicles were tied using a robe in an attempt to extract a confession from him that he was a member of the February Eighteen Revolutionary Army. During the entire ordeal, he was denied access to his family or an advocate.

14. Medical reports dated 23rd December 2014 and 16th December 2014 confirm *inter alia* that he is generally weak, depressed, had a clavicle fracture, inability to sleep, tenderness on the left abdomen, low libido and that the said injuries are consistent with torture.

15. **Patson Kipchris Kamokoywo** is the petitioner in Petition number **124** of 2016. He was arrested at his home at Chongeywo by Military Police Officers, blindfolded, bundled in a vehicle and was driven to Chelebei Administration Police Camp where he was beaten and later taken to Kapsiro Military Camp where he was stripped naked and beaten until he lost consciousness.

16. The following day he was transferred to Kapkota Military Camp and later to Webuye Police Station where he was detained, tortured daily until his legs, buttocks and genitalia started swelling. The officers persisted asking him how he had been training as an officer of an unlawful movement known as Sabaot Land Defence Force.

17. He was taken to Sirisia Court where a Magistrate directed that he be taken to hospital for treatment but instead he was taken back to Webuye Police Station where he was detained for one week in a dark cell and interrogated amid regular torture. He was denied access to family members and an advocate.

18. He was later taken back to Sirisia Court where his case was mentioned and he was later remanded in Kakamega G.K. Prison for 7 days. His health deteriorated and he was taken to Kakamega Provincial General Hospital where he was admitted for 7 days, underwent a surgery and on 29th May 2008, he was released and ordered to continue attending mention at Bungoma Law Courts.

19. Medical reports dated 19th June 2015 and a discharge summary dated 29th May 2008 reveal *inter alia* that he had cut wounds on right knee, buttocks and genitals, right knee arthritis due to complicated injuries, low libido, inability to sit for long.

20. **Joshua Mark Okello**, the petitioner in petition number **125** of 2016 avers that he was arrested in August 1982 at his home in Eastleigh Air Base in Nairobi by Kenya Air Force Police Officers, blindfolded, beaten with gun butt on his lower back and elbows and later taken to Kamiti Prison where he was forced to walk on his knees with hands raised above his head from the prison gate to the cells. He was put in a water logged cell for one week after which he was fed with a small quantity of rotten food.

21. After one week torture, he was taken to Naivashia Maximum Prison and back to Kamiti Prison and later Langata Barracks where he was charged in court martial and after pleading not guilty he was taken back to Kamiti Prison cell where he was consistently beaten all over his body while naked for more than three months and was finally released on 14th Marc 1983. He was denied access to his family or an advocate.

22. He lost his lower teeth, pain in legs and poor libido. Medical reports dated 8th April 2015 and 15th January 2015 confirm arthritis of knee joints, low backache, depression all of which are consistent with torture.

23. All the petitioners seek orders that their fundamental rights were violated and an award for damages/compensation for the said violation.

24. On 19th June 2017 it was agreed by consent that the petitions be determined by way of written submissions to be filed within 28 days from the said date. The Respondents were directed to file a Response to the petition and a mention date was fixed for 26th July 2017, but on the said date the Respondent had not filed a Response to the petition. Thus, the only material before me is the documents filed and relied upon by the petitioners which remain un rebutted.

Petitioners advocates submissions

25. Counsel urged the court to find for the petitioners and award each one of them Ksh. 6,000,000/= for damages.

Respondents Advocates submissions

26. Counsel for the Respondent submitted that the petition was not specific on the alleged violations,[\[2\]](#) that the evidence adduced was hearsay, that the burden of proof had not been discharged, that the petition is time barred[\[3\]](#) and that the petitioners are not entitled to the reliefs sought.

Analysis of the facts, law, issues and determination

27. A fundamental question that cannot go un noticed is the question of limitation. The alleged cause of action took place in 1995, 1982, 2008, whereas actions against the government ought to be filed within one year as provided under the Government Proceedings Act.[\[4\]](#)

28. The question of limitation of time in regard to allegations of breach of fundamental rights has in many cases been raised by the State and our courts have consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights[\[5\]](#) with a section of our judiciary holding that a court must always consider whether the delay in filing a petition alleging

violation of constitutional rights is unreasonable and prejudicial to a respondent's defense^[6] and further the state cannot shut its eyes on its past failings^[7] nor can the court ignore the dictates of transitional justice discussed below.

29. My understanding of the jurisprudence on the issue of limitation is that courts will be reluctant to shut out a litigant on account of limitation of time unless there are obvious reasons to do so. In considering such delays, the court cannot avoid taking judicial notice of the immense difficulties which prevailed at the period of the alleged violations making it impossible for aggrieved persons to file cases of this nature against the government. In fact it is the promulgation of the constitution of Kenya 2010 that opened the doors of justice thereby making it possible for aggrieved persons to institute cases of this nature.

30. These petitions were filed on 7th April 2016, almost 7 years after the promulgation of the 2010 constitution. I appreciate that 7 years is a long period of time and the delay has not been explained, but considering the prevailing political situation prior to the promulgation of the 2010 constitution which made it impossible for victims to file cases of this nature in court and bearing in mind the dictates of transitional justice, and in particular the need to uphold and strengthen the rule of law, and to hold the perpetrators of violations of human rights accountable, and the need to provide victims with compensation, and the need to effectuate institutional reform, I find that it would be unfair to uphold the defense of limitation in the circumstances of the present case.

31 The Constitution of Kenya 2010 gives prominence to national values and principles of governance. Article 10 (2) of the Constitution provides the national values and principles of governance which include the rule of law, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised. These principles are binding on all State organs, State officers, public officers and all persons whenever any of them applies, or interprets, the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.

32. There is no doubt that the 2010 constitution brought a fundamental change to this country with a strong emphasis on the rule of law and national values. It was a major transition from the dark past to a future where constitutionalism would reign supreme. But the key question that boldly requires to be addressed is what would happen to all those Kenyans whose rights were grossly violated by state agents. Was Kenya simply going to transit to the new constitutional dispensation and simply forget such atrocities. Andrea Bonime-Blanc^[8] defines "transition" as referring to "a period of reformist change between regimes - not to a change of government within the same constitutional framework nor to a revolutionary transformation."

33. This brings into sharp focus the concept of transitional justice and because of its importance and relevance to the issue under consideration, I will spare some ink to discuss it below.

34. The end goals of transitional justice in general should be to prevent similar recurrence of human rights violations in future; to repair the damage caused through systematic patterns of human rights violations; to uphold the rule of law; to recognize the human dignity and worth of those who have been victimized and to create a stable and governable political environment."

35. The primary objective of a transitional justice is to end the culture of impunity and establish the rule of law in a context of democratic governance. In general, therefore, one can identify the broad objectives that transitional justice aims to serve:- These are; establishing the truth, providing victims a public platform, holding perpetrators accountable, strengthening the rule of law, providing victims with compensation, effectuating institutional reform, promoting reconciliation. Transitional justice is not a special form of justice. It is, rather, justice adapted to the often unique conditions of societies undergoing transformation away from a time when human rights abuse may have been a normal state of affairs.^[9]

36. It is important to repeat that owing to the political climate of the day, it was not possible for victims of human rights abuses to seek court redress and this door was opened by the promulgation of the 2010 constitution.

37. In the abstract at least, the transition of transitional justice connotes unspecified change. Yet, for **Ruti Teitel**, who arguably coined the term ‘transitional justice’ in 1991,^[10] the transition at issue is essentially a political one involving ‘the move from less to more democratic regimes.’^[11] This conceptualization of transition is hardly unique to Teitel, and indeed it can be said that liberal democratic transitions constitute the paradigmatic transition of transitional justice.^[12] Implicit in this understanding of transition is a sort of teleological or ‘stage theory’ view of history.^[13] If barbarism, communism and authoritarianism lie at one end of the narrative, then western liberal democracy sits at the other ‘end of history.’^[14] With law as the master discipline and lawyers as the high priests, the mechanisms of transitional justice become a sort of secular rite of passage symbolizing political evolution.^[15]

38. **Dustin N. Sharp** observes that the label ‘transitional justice’ has for some time been applied to contexts that do not involve a liberal political transition (Rwanda, Chad, Uganda, Ethiopia), if they involve a political transition at all (Kenya, Colombia), or contexts that involve transition from one nominally liberal ethno-regime to another (Côte d’Ivoire). Beyond illiberal transitions, the term has also been invoked to describe the use of truth commissions and other commissions of inquiry in consolidated liberal western democracies (Australia, Canada).^[16]

39. I note that counsel for the Respondent opted not to file a Response to the petition. Thus, the only evidence on record is the evidence tendered by the petitioners. Failure to adduce any evidence means that the evidence adduced by the Plaintiff against the defense is uncontroverted and therefore unchallenged.^[17] In short, the petitioners evidence remained unchallenged.

40. Regarding the constitutional issues raised in these petitions, it must be borne in mind that the Constitution must be interpreted in a broad way and not in a narrow and pedantic sense. Certain rights have been enshrined in our Constitution as fundamental and, therefore, while considering the nature and content of those rights the Court must not be too astute to interpret the language of the Constitution in so literal a sense as to whittle them down. On the other hand the Court must interpret the Constitution in a manner which would enable the citizens to enjoy the rights guaranteed by it in the fullest measure subject, of course, to permissible restrictions.^[18]

41. The Petitioners narrated the torture and inhuman treatment subjected to them by the police. This court cannot deviate from its own duty of determining acts which amount to infringement of constitutional rights of the citizens. In my view, every act of the state and its organs must pass through the test of constitutionality which is stated to be nothing but a formal test of rationality. The former constitution just like the 2010 constitution prohibited torture and acts of inhuman and degrading treatment. How can the callous acts of police officers such as squeezing the testicles of a person in their custody or piercing men's genitals with needles or pins be justified not to mention the brutal beatings. I have no doubt in my mind that the repealed constitution out rightly outlawed such inhumane and degrading treatment and it is regrettable that security agents had degenerated to such a level. Such acts should only be consigned in the dustbin of our history never to resurface again.

42. In cases of violation of fundamental rights, the Court examines as to what factors the court should weigh while determining the constitutionality of the actions complained of. The court examines the case in light of the provisions of the Constitution. When the constitutionality of an act of state agents is challenged on grounds that it infringes a fundamental right, what the court has to consider is the “*direct and inevitable effect*” of such actions. In my view, actions that amount to inhuman and degrading treatment are out rightly unconstitutional.

43. Chapter 5 of the Repealed constitution contained the Bill of Rights, that is Protection of fundamental rights and freedoms of the individual. The notion of inhuman treatment covers at least such treatment as deliberately causes suffering, mental or physical, which, in the particular situation is unjustifiable. The word torture is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be de-grading if it grossly humiliates him before others, or drives him to an act against his will or conscience.^[19]

44. The term "harassment" in its connotative expanse includes torment and vexation. The term "torture" also engulfs the concept of torment. The word "torture" in its denotative concept includes mental and psychological harassment.[20] In this case, we are not essentially dealing with personal injuries but with inhuman treatment, torture, harassment and the mental and physiological effects of such actions to the victims. The actions visited upon the petitioners in my view amount to torture and a gross violation of the petitioners constitutional rights.

45. When a citizen is arrested on allegations of committing an offence as was alleged in the present case, his/her Fundamental Rights are not abrogated in *toto*. His dignity cannot be allowed to be comatose. The right not to be subjected to inhuman treatment enshrined in the Constitution, includes the right to be treated with human dignity and all that goes along with it.

46. Inhuman treatment has many a facet. It fundamentally can cover such acts which have been inflicted with an intention to cause physical suffering or severe mental pain. It would also include a treatment that is inflicted that causes humiliation and compels a person to act against his will or conscience. There is no shadow of doubt that any treatment meted out to a citizen which causes pain, humiliation and mental trauma corrodes the concept of human dignity.

47. The majesty of law protects the dignity of a citizen in a society governed by law. It cannot be forgotten that the State is governed by rule of law which must be paramount. The Constitution as the organic law of the land has unfolded itself in manifold manner like a living organism in the various decisions of the court about the rights of a person under the Bill of rights. When citizenry rights are sometimes dashed against and pushed back by the members of the police force, there has to be a rebound and the Constitution springs up to action as a protector.

48. The normative idea underlying this broad consensus is that fundamental rights are owed to persons as a matter of human dignity and should be honored no matter what form of government a particular community chooses to adopt.

49. As David Feldman has written, "there are certain kinds of treatment which are simply incompatible with the idea that one is dealing with a human being who, as such, is entitled to respect for his or her humanity and dignity."[21]

50. The rights of political freedom, right to life, freedom from inhuman and degrading treatment, due process, and equal protection are among the minimal rights that the world has come to demand of any society. In the words of the U.S. Supreme Court, these rights are "implicit in the concept of ordered liberty." [22]

51. It is the sacrosanct duty of the police to remember that citizens while in their hands are not denuded of their fundamental rights under the Constitution. The restrictions imposed on fundamental rights have the sanction of law by which the enjoyment of fundamental right is curtailed but the citizens basic human rights are not crippled so that the police officers can treat citizens in an inhuman manner. On the contrary, they are under obligation to protect fundamental rights of the citizens and prevent all forms of atrocities.

52. The law enjoins the police to be scrupulously fair to an alleged offender and to ensure fair investigation and fair trial and also to ensure that the citizens constitutional and fundamental rights are not violated. I find that the police subjected all the petitioners to inhuman and degrading treatment which was not justifiable at all under the repealed constitution.

53. The petitioners claim damages as a result of breach of their fundamental rights. The purpose of public law is not only to civilize public power but also to assure the citizens that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting 'compensation' in proceedings under Article 23 of the constitution or seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalizing the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as

it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty, by not protecting the fundamental rights of the citizen or by subjecting the citizen to acts which amount to infringement of the constitution.

54. It is thus now well settled that award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under the constitution. The quantum of compensation will, however, depend upon the facts and circumstances of each case. I accept in principle that constitutional damages as a relief separate and distinct from remedies available under private law is competent because a violation of a constitutional right must of necessity find a remedy in one form or another, including a remedy in the form of compensation in monetary terms.

55. On the quantum of damages, award of damages entails exercise of judicial discretion which should be exercised judicially and that means that it must be exercised upon reason and principle and not upon caprice or personal opinion.^[23] The jurisprudence that has emerged in cases of violation of fundamental rights has cleared the doubts about the nature and scope of the this public law remedy evolved by the Court. The following principles clearly emerged from decided cases;^[24]

- i. Monetary compensation for violation of fundamental rights is now an acknowledged remedy in public law for enforcement and protection of fundamental rights;*
- ii. Such claim is distinct from, and in addition to remedy in private law for damages for tort;*
- iii. This remedy would be available when it is the only practicable mode of redress available;*
- iv. Against claim for compensation for violation of a fundamental right under the constitution, the defence of Sovereign immunity would be inapplicable.*

56. I note that arriving at the award of damages is not an exact science, and also I am aware 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.^[25] When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation is discretionary and, moreover, the violation of the constitutional right will not always be coterminous with the cause of action in law.^[26]

57. An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in helping the court arrive at a reasonable award. The court must consider and have regard to all the circumstances of the case.

58. An injury suffered as a result of discrimination, harassment or inhuman and degrading treatment is no less real because it does not possess tangible physical or financial consequences. And the difficulty in assessing the amount of compensation for that type of injury should not deter a court from recognizing its potential.^[27]

59. It is self evident that the assessment of compensation for an injury or loss, which is neither physical nor financial, presents special problems for the judicial process, which aims to produce results objectively justified by evidence, reason and precedent. Subjective feelings of upset, frustration worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on and the degree of their intensity are incapable of objective proof or of measurement in monetary terms.

60. Translating hurt feelings into hard currency is bound to be an artificial exercise. There is no medium of exchange or market for non-pecuniary losses and their monetary evaluation, it is a philosophical and policy exercise more than a legal or logical one.[28] The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution.

61. Although they are incapable of objective proof or measurement in monetary terms, hurt feelings are none the less real in human terms. The courts and tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available in the calculation of financial loss or compensation for bodily injury.

62 I am persuaded that the petitioners proved to the required standard that they were tortured, treated to inhuman and degrading treatment and that their rights were violated by the police. Considering the nature of the violations of the constitutional rights, the injuries sustained by each one of them as per their medical reports referred to earlier, and considering the above legal principles and bearing in mind the fact that it may not be easy to quantify denial of fundamental rights and freedoms, I find that the petitioners are entitled to an award of damages.

63. Doing the best I can, I find that the following awards would be reasonable in the circumstances.

- a. Elliud Wefwafwa Luucho.....Ksh.5,000,000/=
- b. Patrick Musungu Wati.....Ksh.5,000,000/=
- c. Samuel Wangila Mabonga.....Ksh. 5,000,000/=
- d. Patson Kipchris Kamokoywo.....Ksh. 5,000,000/=
- e. Joshua Mark Okello.....Ksh. 5,000,000/=

64. Accordingly, I enter judgement in favour of the petitioners against the Respondent as follows:-

i. **A declaration** be and is hereby issued that each of the petitioners Fundamental Right and Freedom from torture, degrading and inhuman treatment was violated by the police and pr state agents.

ii. **A declaration** be and is hereby issued that the petitioners are entitled to damages for violation of their Fundamental Rights enshrined in the Repealed constitution.

iii. **That** judgement be and is hereby entered in favour of the petitioners against the Respondent by way of general damages as follows:-

- a. Elliud Wefwafwa Luucho.....Ksh.5,000,000/=
- b. Patrick Musungu Wati.....Ksh.5,000,000/=
- c. Samuel Wangila Mabonga.....Ksh. 5,000,000/=
- d. Patson Kipchris Kamokoywo.....Ksh. 5,000,000/=
- e. Joshua Mark Okello.....Ksh. 5,000,000/=

iv. **That** the above sums shall attract interests at court rates from date of filing suit until payment in full.

v. The Respondent do pay the costs of these proceedings to the petitioners plus interests thereon at court rates.

Orders accordingly.

Signed, Dated, Delivered at Nairobi this 21st day of **September**, 2017.

John M. Mativo

Judge

[1] Mr. Dainius Zalimas, President of the constitutional Court of the Republic of Lithuania, The Rule of Law and Constitutional Justice in the Modern World, 11-14 September 2017, Vilnius, Lithuania, delivering a speech at the Farewell Dinner for the 4th Congress of the World Conference on Constitutional Justice, 13th September 2017.

[2] Anarita Karimi Njeru vs R {1976-1980}KLR 1272 Cited

[3] Counsel cited Ochieng Kenneth K'ongutu vs Kenyatta University & 2 Others HC Pet No. 306 of 2012 and Joseph Migere Onoo vs A.G, H C Pet No. 424 of 2013

[4] Cap 40, Laws of Kenya

[5] See Joan Akinyi Kabasellah and 2 Others vs Attorney General, Petition No 41 of 2014, Dominic Arony Amolo vs Attorney General, Nairobi High Court Misc. Civil Case No 1184 of 2003 (OS) [2010] eKLR, Otieno Mak'Onyango vs Attorney General and Another, Nairobi HCCC NO 845 of 2003

[6] Joseph Migere Onoo vs Attorney General, Petition No. 424 of 2013

[7] Gerald Gichohi and 9 Others vs Attorney General Petition No. 487 of 2012

[8] Andrea Bonime-Blanc *Spain's Transition to Democracy* (1987) 8-9.

[9] http://www.un.org/en/peacebuilding/pdf/doc_wgll/justice_times_transition/26_02_2008_background_note.pdf

[10] Ruti G. Teitel, 'Transitional Justice Globalized,' *International Journal of Transitional Justice* 2(1) (2008): 1-4.

[11] Ruti G. Teitel, *Transitional Justice* (New York: Oxford University Press, 2000), 5.

[12] Padraig McAuliffe, 'Transitional Justice's Expanding Empire: Reasserting the Value of the Paradigmatic Transition,' *Journal of Conflictology* 2(2) (2011): 32-44.

[13] See, Alexander Hinton, 'Introduction,' in *Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence*, ed. Alexander Hinton (New Brunswick, NJ: Rutgers University Press, 2010).

[14] See generally, Francis Fukuyama, *The End of History and the Last Man* (New York: Avon Books, 1992).

[15] See, Michael Rothberg, 'Progress, Progression, Procession: William Kentridge and the Narratology of Transitional Justice,' *Narrative* 20(1) (2012): 1-24.

[16]Dustin N. Sharp, Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition; <https://academic.oup.com/ijtj/article/9/1/150/678021/Emancipating-Transitional-Justice-from-the-Bonds>

[17] Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001

[18] See Mudholkar J in Sakal Papers v Union of India AIR 1962 SC 305 at p 311

[19] Greek Case 1969 Y.B. Eur. Con. on H.R. 186 (Eur. Comm'n on H.R). Also see Lenaola J. (As he then was) in the case of Milka Wanjiku Kinuthia & Others vs The Attorney General

[20]See Joginder Kumar v. State of U.P. (1994) 4 SCC 260, paragraph 23

[21] David Feldman, Human Dignity as a Legal Value -Part I, 1999 Pub. L. 682, 690-91.

[22] Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[23]Mbogo & Another vs Shah{1968} EA 93

[24] V.K. Sircar, Compensation for Violation of Fundamental Rights, a new remedy in Public Law Distinct

from relief of damages in tort, <http://ijtr.nic.in/articles/art7.pdf>

[25] Koigi Wamwere v Attorney General{2015} eKLR

[26]Attorney General v Ramanoop [2005] UKPC 15, [2006] 1 AC 338

[27]This concept was well expressed by Mummery LJ in Vento v Chief Constable of West Yorkshire Police [2003] ICR 318, at 331: -

[28] As Dickson J said in Andrews v Grand & Toy Alberta Ltd(1978) 83 DLR (3d) 452, 475-476, (cited by this court in Heil v Rankin [2001] QB 272, 292, para 16)