



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI, MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO 360 OF 2014

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 (a) and 29 (a), 29 (c), 29 (d) and 29 (f), 39 (3) and 40 (1) (1) and (b) of the constitution of Kenya 2010

Chege Kuria Mwere Alias Chege Kuria Wamere.....Petitioner

versus

The Attorney General.....Respondent

CONSOLIDATED WITH

Petition No. 361 OF 2014

Isaac Kinya Kang'ethe.....Petitioner

versus

The Attorney General.....Respondent

and

Petition No. 362 OF 2014

Stanley Ngigi Mkimunge.....Petitioner

versus

The Attorney General.....Respondent

and

Petition No. 363 OF 2014

Mulumia Onyango Cornelius.....Petitioner

versus

The Attorney General.....Respondent

and

Petition No. 364 of 2014

Joab Hebson Otieno Ndonji.....Petitioner

versus

The Attorney General.....Respondent

and

Petition No. 365 of 2014

Pascal Omilo Wandera.....Petitioner

versus

The Attorney General.....Respondent

and

Petition No. 366 of 2014

Boniface Wambiri Wanjohi.....Petitioner

and

The Attorney General.....Respondent

JUDGMENT

Introduction

1. This judgement disposes seven consolidated petitions, namely numbers **360** of 2014, **361** of 2014, **362** of 2014, **363** of 2014, **364** of 2014, **365** of 2014 and **366** of 2014. 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. They all seek inter alia a declaration that their fundamental Rights and freedoms were violated and an award of damages for the infringement.

2. In a previous decision of this court I observed that:- *"While natural law theories hold less influence today, the human rights movement of the last fifty years reflects a remarkably parallel secular understanding, namely that there are certain basic human rights to which all persons are entitled, simply by virtue of their humanity. Human rights treaties, including those that Kenya is a party to or has ratified, uniformly provide that the rights of due process, fundamental rights and freedoms, and equal protection are owed to all persons, regardless of nationality."*^[1]

3. The Universal Declaration of Human Rights, for example, aptly described by Professor Richard Lillich as the *"Magna Carta of contemporary international human rights law,"* is expressly premised on *"the inherent dignity and ... the equal and inalienable rights of all members of the human family."*^[2] The Universal Declaration explicitly guarantees the rights of due process, political expression and association, and equal protection.^[3]

4. Article 2(5) of the Constitution expressly imports the general rules of international law and makes them part of the laws of Kenya.

5. 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.^[4] 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."*^[5] 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.^[6]

6. In the words of the U.S. Supreme Court, these rights are *"implicit in the concept of ordered liberty."*^[7] The starting point is that Human rights enjoy a *prima facie*, presumptive inviolability, and can only be limited as provided under the constitution. Period. **Louis Henkin** wrote in *The Age of Rights*:-^[8]

"Government may not do some things, and must do others, even though the authorities are persuaded that it is in the society's interest (and perhaps even in the individual's own interest) to do otherwise; individual human rights cannot be sacrificed even for the good of the greater number, even for the general good of all. But if human rights do not bow lightly to public concerns, they may be sacrificed if countervailing societal interests are important enough, in particular circumstances, for limited times and purposes, to the extent strictly necessary."

7. Discussing the question of violation of constitutionally guaranteed Fundamental Rights in *Eliud Wefwafwa Luucho & 3 others v Attorney General*^[9] I observed that *"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."*

8. Discussing the primary duty of the court in the said case, I remarked:-^[10]

"... 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." ^[11]

The parties

9. For ease of reference, the Petitioners in these consolidated Petitions shall henceforth be referred to as follows:- (a) **"the first Petitioner"** -Chege Kuria Mwere alias Chege Kuria Wamere, (b) **"the second Petitioner"** -Isaac Kinyanjui Kang'ethe, (c) **"the third Petitioner"**- Stanley Ngigi Mkimunge, (d) **"the fourth Petitioner"**- Mulumia Onyango Corneleius, (e) **"the fifth Petitioner"**- Joab Hebson Otiende Ndonji, (f) **"the sixth Petitioner"**, (g) **"the seventh Petitioner"**-Boniface Wambiri Wanjohi.

10. The Respondent is the Hon. Attorney General sued in his capacity as the legal Representative of the Government of Kenya.

Petitioners' case

11. The Petitioners case is that they were tortured by special branch officers and subjected to inhuman/degrading treatment.

12. The **"first Petitioner"** avers that he was arrested on 16th December 1990 at his home at Engashura Village in Nakuru County by special Branch Police officers. They searched his home and took him to Nakuru Central Police Station. He was questioned about his family relationship with Hon. Koigi Wa Wamere, his last visit to Uganda, Mwakenya and their store for ammunition and guns all of which he knew nothing.

13. He avers that on 17th December 1990, he was bundled into a Police Land Rover, blindfolded, and driven to Muthaiga Police Station, Nairobi. On 18 December 1990, he was taken to the dark basement cells at Nyayo House Torture Chambers, then to the 24th floor of the building, was paraded before about 10 people led by a one James Opiyo. He was asked to tell them all he knew about Kenya Patriotic Front formed by his nephew Hon. Koigi Wa Wamere.

14. He also avers that he was ordered to strip naked. He was beaten mercilessly for 10 days. He was locked up in a dark cell flooded with cold water. He sprayed horse pipe water for several hours while naked. He was denied food for days. He was sleeping mat and a blanket. He was denied drinking water. He was threatened with death and was forced to do press-ups with his fingers pointed down. From 16th December 1990 and 28th December 1990 his family was not informed about his whereabouts. On 28th December 1990, he was dropped at Westland's, Nairobi barefoot with wounds on his feet, joints and pains over his body.

15. The "**second Petitioner**" avers that he was arrested on 15th May 1989 on allegations of sabotage, namely interfering with a railway line. He was taken to Nakuru Police Station. He was detained for one month at Nyayo house torture chambers basement cells. He was interrogated by about 10 people led by a one James Opiyo. They sought to extract confessions from him. He was mercilessly slapped, beaten using whips, broken chairs, kicks, blows repeatedly for one month. He was arraigned at the Nakuru Law Courts where he was forced to plead guilty and sentenced to 14 years and 18 months imprisonment in criminal case number 1061 of 89. He was held at Naivasha Annex Prisons in a secluded cell. He was subjected to immense torture and beatings. The conviction was quashed on appeal in Nakuru High Court Criminal Appeal No. 223 of 1990.

16. The "**third Petitioner**" avers that he was arrested on 16th December 1990 at his home in Engarashura, Nakuru by special branch officers. He was taken to Nakuru Central Police Station where he was questioned about his family relationship with Hon. Koigi Wa Wamwere, his last visit to Uganda, Mwakenya, and their store of ammunition and guns all of which he knew nothing about.

17. On 17th December 1990 he was bundled into a Police Land Rover, blindfolded, and driven to Muthaiga Police Station, Nairobi. On 18 December 1990, he was taken to the dark basement cells at Nyayo House Torture Chambers, and later to the 24th floor of the building before a panel of about 10 people led by a one James Opiyo. He was asked to tell them all he knew about Kenya Patriotic Front formed by his nephew Hon. Koigi Wa Wamere.

18. He was ordered to strip naked, was beaten mercilessly repeatedly for 10 days. He was locked up in a dark cell flooded with cold water. He would be sprayed with horse pipe water for several hours while naked. He was denied food for days, denied a sleeping mat and a blanket and drinking water. He was threatened with death. He was forced to do press-ups with his fingers pointed down. From 16th December 1990 and 28th December 1990 His family were not informed about his whereabouts. On 28th December 1990, he was dropped at Westland's, Nairobi barefoot with wounds on his feet, joints and pains over his body.

19. The "**fourth petitioner**" avers that he was arrested on 29th November 1990 at his house in Makerere Estate, Bungoma Township, special branch officers. They took his books, newspapers, magazines and personal correspondence and other publications without offering reasons. The said materials have never been returned to him.

20. The alleged offence was not disclosed to him. He was held in a solitary cell at Bungoma Police Station overnight. The next day he was driven blindfolded to a different police station where he was locked in isolation. He was driven to his parents home which was searched, and later taken to Eldoret forest where he was tortured. His nails were pierced using needles till he lost consciousness. He was later taken to Webuye Police Station, and Nyayo House where he was blindfolded and taken to 24th Floor before a panel of about 10 people led by a one James Opiyo. He was asked to state what he knew about

Mwakenya Organization, of which, he knew nothing.

21. He was ordered to strip naked, was beaten mercilessly using slaps, rubber whips, chair pieces, kicks, blows which was repeated for 2 months. He was held in a dark cell flooded with cold water. Horse pipe water would be sprayed on him for several hours while naked. At times he lost consciousness in the cell.

22. The officers would try to give him water and milk but owing to painful throat he was unable to swallow. He was held in the said cell for two months and two weeks. He was denied food, a sleeping mat, blanket and drinking water. From 29th November 1990 to July 1991 neither his family nor his friends knew his whereabouts nor could they communicate with him.

23. He was threatened with death and coerced to plead guilty to the offence of sedition and was jailed at Bungoma Prison where he was held in solitary confinement under inhuman conditions/ torture/treatment. He was fed with bad food. He claims he was tortured due to his political opinions.

24. The "**fifth petitioner**" avers that on 4th June 1986 he was arrested by three special branch police officers. At Thika Police Station he was asked to lead the officers to his house for a search, then he was driven back to the Station and was taken to Juja Police Station. The next day he was taken to his work station, asked to handover keys, then taken to Kilileshwa Police Station, Nairobi and locked up.

25. At around 8.00pm he was blindfolded and driven to a dark underground cell at Nyayo House torture chambers. Early in the morning, he was taken to 24th floor, paraded before a panel of about 10 people led by a one James Opiyo. He was asked to state what he knew about Mwakenya organization which he knew nothing about. He was ordered to strip naked, was beaten mercilessly using slaps, rubber whips, broken chairs pieces, kicks and blows for seven days. He was held in a dark cell flooded with cold water and horse pipe water would be sprayed on him for several hours while naked. At times he lost consciousness. For many days he went without food or water and was denied a sleeping mat and blanket.

26. From 4th June 1986 to 11th June 1986 he was denied conduct or access to family members. He was threatened with death, held in solitary confinement under dehumanizing conditions, forced to walk semi-nude and denied food. He avers that he was tortured due to his political beliefs.

27. The "**the sixth petitioner**" avers that he was arrested by special branch officers on 10th June 1986 at the Block Hotel's Central Reservations offices, Nairobi. He was taken to Nyayo house. He was accused of being a member of Mwakenya. He was ordered to remove his clothes and was beaten using broken chairs and metal rods. He was locked at spring valley police station over night in a solitary cell. The following day he was blindfolded and driven around Nairobi ending up at to a dark cell at Nyayo House Torture chambers where before day break he was taken to the 24th floor before a panel of about 10 men who asked him if he knew Mwakenya Organization.

28. He was ordered to strip naked and was beaten mercilessly with slaps, rubber whips, broken chair pieces, kicks and blows. This continued for seven days. After each torture session, he would be returned to a dark cell, flooded with cold water, and horse pipe water would be sprayed on him while naked. At times he lost consciousness. He was denied food, water, sleeping mat and blanket. At times he would be given water and milk but could not drink owing to painful throat. From 10th June 1986 to 17th June 1986 his family did not know his whereabouts nor was he allowed to communicate with them.

29. The "**seventh Petitioner**" avers that he was arrested on 4th July 1990 near Nyayo House, Nairobi by special branch officers, he was told that he was under arrest for his association with Mr. Matiba whom he was working for as a body guard. He was taken to Central Police Station, Nairobi. Before day break was taken to Nyayo House Torture chambers, then to the 24 floor, where he was presented before a panel of about 10 people, led by a one James Opiyo. He was asked to tell them what he knew about Mwakenya organization and what he did not know.

30. He was ordered to strip naked. He was beaten with slaps, rubber whips, broken chairs pieces, kicks

and blows repeatedly for 8 days. He was held in a dark cell flooded with cold water. He would be sprayed with horse pipe water for several hours while naked. At times he lost consciousness. He was denied food for days, denied a sleeping mat, blankets and drinking water and would be at times offered water and milk which he could not swallow owing to painful throat. From 4th July 1990 to 17th July 1990 his family did not know about his whereabouts. He was threatened with death and held in solitary confinement.

Respondents Grounds of objection

31. The Respondent filed grounds of objection citing inordinate delay in filing this Petition, lack of evidence that the alleged acts were committed by government officers and terms this petition as an abuse of court process.

Petitioners advocates submissions

32. The Petitioner's counsel cited violation of the Petitioners Rights and urged the court to award each Petitioner Ksh. 8,000,000/= for exemplary and general damages for torture, degrading treatment.

Respondents Advocates submissions

33. Counsel for the Respondent submitted that the petitioners did not discharge the burden of prove, and insisted that the petition lacks merit.

On the question of limitation of time

34. A fundamental question that cannot go un noticed is the question of limitation. The alleged cause of action as enumerated in the Petitions took place in 1986 in some and 1989 and 1990 in others. Actions against the government ought to be filed within one year as provided under the Government Proceedings Act.[\[12\]](#)

35. In numerous decisions of this court I have addressed in detail the question of limitation of time in cases of this nature. In *Eliud Wefwafwa Luucho & 3 others vs Attorney General*[\[13\]](#)I addressed the subject as follows:-

"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[\[14\]](#) 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[\[15\]](#) and further the state cannot shut its eyes on its past failings[\[16\]](#) nor can the court ignore the dictates of transitional justice discussed below.

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.

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.

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.

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^[17] 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."

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.

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."

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.^[18]

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.

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,^[19] the transition at issue is essentially a political one involving 'the move from less to more democratic regimes.'^[20] 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.^[21] Implicit in this understanding of transition is a sort of teleological or 'stage theory' view of history.^[22] If barbarism, communism and authoritarianism lie at one end of the narrative, then western liberal democracy sits at the other 'end of history.'^[23] 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.^[24]

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)."[\[25\]](#)

36. I adopt the above passage in total and I find no difficulty in concluding that it would be against the dictates of transitional justice to uphold the defense of limitation in this case considering the difficulties Kenyans experienced at the material time and recognizing that it was not possible for aggrieved parties to seek court redress in cases of this nature at the material time.

On the question of burden of proof.

37. I note that the Respondent opted not to file a Response to the petition. Instead the Respondent only filed grounds of opposition. Thus, the only evidence on record is the affidavit evidence filed by the petitioners. Failure to file a response by way of a Replying affidavit means that the petitioners affidavit evidence against the Respondent is uncontroverted and therefore unchallenged.[\[26\]](#) In short, the petitioners evidence remained unchallenged.

38. The Respondent did not file an affidavit citing inability to trace records on account of the delay or prejudice on their part on account of the delay.

39. Each of the Petitioners narrated the torture and inhuman treatment subjected to each one of 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. I have on numerous occasions stated 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.[\[27\]](#)

40. The former constitution just like the 2010 constitution prohibited torture and acts of inhuman and degrading treatment. 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.[\[28\]](#) 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.[\[29\]](#) In my view, actions that amount to inhuman and degrading treatment are out rightly unconstitutional.[\[30\]](#)

41. 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.[\[31\]](#) 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.[\[32\]](#)

42. 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.[\[33\]](#) 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.[\[34\]](#) The actions visited upon the petitioners in my view amount to torture and a gross violation of their constitutional rights.

43. 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*.[\[35\]](#) His dignity cannot be allowed to be comatose.[\[36\]](#) 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.[\[37\]](#)

44. 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.[\[38\]](#) It would also include a treatment that is inflicted that causes humiliation and compels a person to act against his will or conscience.[\[39\]](#) 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.[40]

45. In the above cited case I stated *"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."*[41]

46. 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. 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."*[42]

47. 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." [43]

48. I have in numerous decisions of this court expressed the view that *"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."*[44]

49. 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." [45] I find that the police subjected all the petitioners to inhuman and degrading treatment which was not justifiable at all under the repealed constitution.

50. Fundamental rights and freedoms of the individual are inherent and not granted by the State. [46] They are to be respected, upheld and promoted so as to promote Constitutionalism. In the Indian case of *Rao and Company vs State of AP* [47] the court stated:-

"No legal or political system today can place the State above law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of officers of the State without any remedy. The modern social thinking of progressive societies and the judicial approach is to do away with archaic State protection and place the State of the Government at par with any other juristic legal entity"

On the question of damages

51. The petitioners claim general and exemplary damages as a result of breach of their fundamental rights. In the above cited case I rendered myself as follows:-

"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.

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.

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.^[48]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;^[49]

- 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.

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.^[50]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.^[51]

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.

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.^[52]

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.

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.^[53] 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.

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."

52. I am persuaded that the petitioners proved to the required standard that they were physically tortured and subjected to unwarranted cruel, inhuman and degrading treatment. Their rights were violated by the police. They suffered both psychological and physical harm. No amount of money can adequately compensate such suffering.

53. Considering the nature of the violations of the constitutional rights, the psychological and physical suffering visited on each one of them, 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.

54. Doing the best I can, I find that a global award of Ksh. 4,000,000/- to each Petitioner would be reasonable in the circumstances.

55. 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 Freedoms were contravened and grossly violated by the Special Branch Police officers who were Kenyan Government servants, agents and or employees on the dates enumerated in the petitions herein.

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. Chege Kuria Mwere alias Chege Kuria Wamwere.....Ksh.4,000,000/=

b. Isaac Kinyanjui Kang'ethe.....Ksh.4,000,000/=

c. Stanley Ngigi Mkimunge.....Ksh. 4,000,000/=

d. Muluma Onyango Cornelius.....Ksh. 4,000,000/=

e. Joab Hebson Otieno Ndonji.....Ksh. 4,000,000/=

f. Pascal Omilo Wandera.....Kash.4,000,000/=

Boniface Wambiri Wanjohi.....Ksh. 4,000,000/=

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 **31st** day of **October** 2017.

John M. Mativo

Judge

[1] Li Wen Jie & Others vs Cabinet Secretary, Interior and Coordination of the National Government & Others, Pet. No. 354 of 2016

[2] Richard B. Lillich, *The Human Rights of Aliens in Contemporary International Law*, 41 (Manchester University Press 1984); Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., Supp. No. 13, at 71, U.N. Doc. A/810 (1948).

[3] Universal Declaration of Human Rights, pmb., art. 7-11, 19, 20(1). G.A. Res. 217A(III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

[4] *Supra* note 1

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

[6] *Supra* note 1

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

[8] Louis Henkin, *The Age of Rights* (Columbia University Press, 1990) 4.

[9] {2017} eKLR

[10] *Ibid*

[11] 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.

[12] Cap 40, Laws of Kenya

[13] *Supra* note 9

[14] 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

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

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

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

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

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

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

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

[22] 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).

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

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

[25] 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>

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

[27] *Supra* note 9

[28] *Ibid*

[29] *Ibid*

[30] *Ibid*

[31] *Ibid*

[32] *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*

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

[34] *Supra* note 9

[35] *Ibid*

[36] *Ibid*

[37] *Ibid*

[38] *Ibid*

[39] *Ibid*

[40] Ibid

[41] Supra note 9

[42] Supra

[43] Supra note 5 (in the case of *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

[44] See Supra Note 9

[45] Ibid

[46] Article 19 (3) (a)

[47] {1994} AIR SC 2663, RM Sahai J

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

[49] 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>

[50] *Koigi Wamwere v Attorney General*{2015} eKLR

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

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

[53] 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)