REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO 400 OF 2014

FRANCIS MWANGI MUNYIRI.....PETITIONER

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

1. The Petitioner, **Francis Mwangi Munyiri**, is an ex-serviceman with the Kenya Air force, having been enlisted in the service in 1976 and given service **No 022357** After initial training, he was posted to Nanyuki Barracks where he worked as an air frame technician and rose to the ranks Corporal. He served up to the in famous August 1st 1982 Coup attempt when he was arrested for allegedly taking part in the coup.

2. According to the petition, the petitioner was detained at Nanyuki Police Post King'ong'o and late at Kamiti Maximum Security Prison for over one month and was transferred to other stations. He stated that during that period, the petitioner was kept in torturous conditions before he was transferred to Naivasha Prison where he was again held for another two months without charge and was again subjected to in human and degrading conditions, torture and starvation.

3. The petitioners stated that he later was transferred to Langata Army Barracks where he was court martialed on false and unfounded allegations of mutiny. He stated that he underwent a sham trial before the court martial where he was denied an opportunity to respond to the charges. The petitioner stated that after the charges were read to him, he was immediately convicted and sentenced to 6 months imprisonment.

4. The petitioner averred that his rights were infringed having been subjected to cruel and inhuman treatment torture, and was kept in degrading conditions in violation of sections 70(a) and 74(1) of the retired constitution. The petitioner further stated that during this period, he was mistreated, stripped naked, whipped and locked in water logged cells as well as made to walk on his knees on concrete floor.

5. The petitioner further averred that while in prison, he was mistreated locked in crowded cells and denied food. He stated that he was subjected to unlawful detention, deprived of protection of the law and fair trial contrary to sections 70(a), 72(3), 74(1) and 77 of the retired Constitution. He faulted the government for detaining him for 93 days without producing him in Court and a further 6 months at Shimo La Tewa prison which was unconstitutional

6. On the above basis, the petitioner sought the following reliefs.

a) A declaration that the cruel treatment, beatings, starvation detention in water logged cells in solitude and with insane convicts, being stripped naked and forced to walk on the knees on concrete that the petitioner was subjected to at the time of arrest and detention at King'ong'o, Naivasha and Shimo La Tewa Maximum Security Prisons Constituted a breach of his Constitutional and fundamental right not to be subjected to torture or to inhuman or degrading punishment or other treatment as guaranteed by section 74 of the former Constitution of Kenya repealed in 2010.

b) A declaration that detention of the petitioner at Nanyuki Police Post King'ong'o and Kamiti Maximum Security Prisons for about 33 days and for a further about 60 days at Naivasha Maximum Security Prisons and at Shimo La Tewa Maximum Security Prisons without a trial and or fair trial constitute a breach of his Constitutional and fundamental rights to liberty and not to be subjected to unlawful detention as guaranteed by sections 72 of the former constitution of Kenya a repealed in 2010.

c) A declaration that the arraignment and sentencing of the petitioner before the court martial at the Langata Military Barracks without being given an opportunity to answer to the charges against him constituted a breach of the petitioner's right to be afforded a fair hearing within a reasonable time by an independent and impartial court as guaranteed by section 77 of the former constitution of Kenya repealed in 2010.

d) General damages.

e) Costs and interests on the awards until payment in full.

Response

7. The respondent filed a replying affidavit by **Lt. Colonel Joseph Karbuali Kosen** sworn on 25th November 2014 and filed in court on 28th November 2014. **Lt. Col. Kosen** deposed that on or about 1st August 1982 there was coup attempt staged against the government of President Moi, that the petitioner was not carrying his lawful duties on that day at Nanyuki Air force Barracks, or that there was a random firing at the Barracks by Army Officers. **Lt. Col. Kosen** also denied that the petitioner was held incommunicado without access to the outside world, or without being told why he was being held. He deposed that if there was such arrest, it was due to commission of actual crimes.

8. Lt. Col Kosen further denied that the petitioner was subjected to torture or inhuman and degrading treatment. He also denied that the petitioner left his personal belongings and service documentations at Nanyuki Barracks. Lt Col. Kosen deposed that the petitioner participated in the August 1st 1982 by arming himself with a G3 Rifle and ammunition and patrolled the Base without lawful authority. He deposed that due to that, the petitioner was charged with the offence of mutiny contrary to section 25(2) of the repealed Armed Forces Act (Cap 199), convicted and sentenced to six months imprisonment by the Court Martial which was a legal sentence.

9. He further deposed that as a serving serviceman, the petitioner was subject to the repealed Armed forces Act and his rights were to that extent limited by that Act and could not therefore claim full and absolute entitlement to human rights under sections 70(a), 72(2) and 77 of the repealed constitution. He denied that the petitioner's rights and fundamental freedoms were violated. He deposed that there was inordinate delay in filing this petition.

Petitioner's evidence

10. During the hearing, the petitioner who testified as **PW1** told the court that he joined the Armed Forces in 1976 and after training, he was posted to Nanyuki, Eastleigh and back to Nanyuki again. He trained as an air craft technician and worked as such within the Air force. He told the Court that he was also trained for aircraft maintenance by technicians from America and given a certificate to that effect.

11. The petitioner testified that he was arrested on 1st August 1982 after the coup attempt and held at Nanyuki Police Post and other places before he was Court martialed at Langata Barracks and sentenced to six months imprisonment. He told the court that during his incarceration, he was initially not told why he had been arrested and was kept incommunicado for about five months before being produced in Court. He further testified that during the incarceration period, he was tortured during interrogation, kept in water logged cells and subjected to inhuman and degrading conditions, made to walk on his knees on concrete floor, whipped, and at the same time he was also denied food.

12. In cross examination, the petitioner told the Court that he did not have his service documents because he let them at Nanyuki Barracks when he was arrested. He told the court that he was kept together with insane people, kept in water logged cells and treated in inhuman and degrading manner, including torture by squeezing his private parts to extract a confession from him. In re-examination he however confirmed that his Service No was 022357 and that he was arrested on 1st August 1982.

Respondent's evidence

13. At the close of the petitioner's case, **Lt. Col Kosen** who testified as **PW1.** told the Court that he was the staff officer at the intelligence office and referred to his affidavit sworn 28th November 2014 and further affidavit sworn on 29th February 2016, **Lt Col. Kosen** testified that the petitioner was once a member of the armed forces up to 1982. He told the Court that the petitioner was arrested for taking part in the attempted coup, court martialed, convicted and sentenced to six months imprisonment which he served. The witness told the court that this information was contained in his personal filed.

14. The witness referred to the annextures to his affidavit of 28th November 2014 which contained a list of the officers who were charged before the court martial together with the petitioner with taking part in mutiny during the 1982 coup attempt. According to the witness, the petitioner was charged with the offences of arming himself with a G3 rifle and ammunitions, and patrolling the Airbase while armed. Lt Col. Kosen testified that when the petitioner was arrested, he was handed over to the police and later court martialed. He testified that the petitioner was tried, convicted and sentenced and that he was dismissed from the forces and issued with a discharge certificate.

15. In cross examination Lt Col. Kosen told the Court that he joined the military in 1989 and that he was in class 7 in 1982 when the coup attempt took place. He also told the court that the information he testified on was obtained from the petitioner's file. He testified that he was the records officer in 2014 hence he could access the record. He told the court that the court martial took place between 14th September 1982 and 9th March 1983 and that the court martial sentences were confirmed on 23rd June 1983.

16. Shown newspapers cuttings attached to the petitioner's supplementary affidavit sworn on 29th September 2015 (daily Nation of 11th December 1982, the witness told the Court that the newspaper cutting showed that the petitioner was sentenced on 10th December 1982. He told the Court that after the petitioner was arrested on 1st August 1982, he was taken to Langata Army Barracks. He confirmed that the petitioner had been stationed at Laikipia Air force Barracks (Nanyuki) where he was arrested while armed with a G3 rifle which he could only do with authority. The witness however told the Court that he was unaware that the petitioner had been held in different police stations. He however told the Court that the court martial proceedings were conducted in accordance with the law.

17. Lt. Col. Kosen admitted that he did not know when and how the petitioner was taken from Nanyuki to Langata Army Barracks. He also told the Court that the fact that the petitioner had been issued with a discharge certificate on 30th August 1983 at Nanyuki Airbase, was a clear indication that he had collected his personal items.

Petitioner's submissions

18. Mr. Wanyoike, Learned Counsel for the petitioner, submitted that the petitioner's rights and fundamental freedoms were violated. Learned counsel submitted that the petitioner who was enlisted with Kenya Air force in 1976 was posted to Nanyuki Airbase where he worked as an air craft technician but was dismissed after he was jailed by the court martial for allegedly taking part in the 1982 coup attempt.

19. Counsel contended that the petitioner was tortured as he was moved from one police station to another, and also while he was being forced to confess to having taken part in the mutiny. Counsel submitted that the petitioner was held incommunicado for 5 months between 1st August 1982 and 10th December 1982 when he was taken before the Court Martial at Langata Barracks. Counsel argued that during this period, the petitioner was tortured both physically and mentally.

20. Mr. Wanjohi further submitted that during the period the petitioner was held in solitude, he was subjected to gross inhuman and degrading treatment which violated his fundamental rights contrary to elections 70(a), 72(3), 74(1) and 77 of the retired Constitution. According to learned counsel, although the respondent's witness admitted that the petitioner was dismissed from service in December 1982, he could not tell where the petitioner was between 1st August 1982 and December 1982 when he was arraigned before the court martial and eventually sentenced. In counsel's view, failure to account for where the petitioner was for all that period buttressed the petitioner's testimony that his rights and fundamental freedoms were violated, was tortured and that he was tortured. He prayed for general damages of Ksh10 million, costs and interested. Counsel relied on a number of authorities to support his position. He relied on various decisions to support their case.

Respondent's submissions

21. Miss Irari, learned counsel for the respondent, while highlighting their written submissions dated and filed in court on 29th July 2017 submitted that there was no evidence to corroborate the petitioners' claim that he was tortured. Counsel contended that the petitioner participated in the 1982 coup attempt, that the court martial proceedings were conducted in accordance with the law and that in that regard, the validity of these proceedings was not challenged. Regarding personal effects that the petitioner alleged he did not collect, counsel submitted that the some were not specifically pleaded and were not proved.

22. Learned counsel contended that the petitioner's rights were not violated, that his right was not absolute as a serviceman since it was subject to the repealed Armed Forces Act thus were limited by the law as it then was. Counsel further argued that the petitioner did not prove his case since he did not call medical evidence to prove torture. Counsel relied on the decision in ***Bristestone pte Ltd v Smith & Associates Far East*** [2007] SLR® 855 cited in ***Hellen Wangari Wangechi v Carumers Muthoni Gathure*** [2015]eKLR for the proposition that the court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him. Learned counsel also contended that there was inordinate delay in filing the petition which had not been explained.

23. As to damages, learned counsel submitted that the sum of Kshs 10 million was exaggerated and had not been proved. Counsel relied on the case of ***Peter M Kariuki v Attorney General*** (CA No. 79 of 2014) for the submission that assessment of damages is a matter of the trial court's discretion which should be exercised judicially with regard to general conditions prevailing in the country and to prior relevant decisions. In that regard, counsel contended that general damages in the sum of Kenya shillings one million five hundred thousand is fair and reasonable.

Determination

24. I have considered this petition, the response there to, evidence on record, submissions by counsel for the parties and authorities relied on. Two issues arise for determination. (1) Whether the Petitioner's rights and fundamental freedoms were violated, and depending on the answer to this question, (2) whether the petitioner is entitled to compensation in the form of damages.

25. The petitioner's evidence is that he was enlisted to the armed forces and after initial training he was posted to Nanyuki Air force Barracks where he worked as an aircraft technician. According to the

petitioner on 1st August 1982, there was an alarm and that as usual once an alarm is raised every solider is supposed to take a firearm, and rush out which he did but the rifle did not have ammunitions. Later on that day he was arrested and taken to Nanyuki Police Post where he was detained for some time. He was later taken to various police stations and prisons facilities.

26. The petitioner told the Court that during this period, he was kept incommunicado in solitary conditions was denied access to his family, access to food and was held in waterlogged cells. He also told the Court that he was tortured and subjected to inhuman and degrading treatment in violation of the constitution. According to the petitioner, he was held in solitary condition for more than 3 months before he was produced before the court martial, that he was tortured while being forced to confess to taking part in the coup attempt, his private parts were squeezed, and was forced to walk on his knees on concrete floors

27. The respondent's witness on the other hand denied that the petitioner was mistreated, that he was held inhuman and degrading conditions or that he was tortured, He admitted however, that the petitioner was Court Martialed and that the Court Martial sentenced him on 10th December 1982. He also admitted that he did not know how and when the petitioner was transported from Nanyuki to Langata Army barracks. He could not also say where the petitioner was before he was produced before the Court Martial.

28. Human rights and fundamental freedoms are inherent and inviolable rights granted to each individual by the Constitution. They are protected by the same constitution and can only be limited by the constitution or in a manner permitted by the constitution.. The petitioner was entitled to his basic human rights and fundamental freedoms and was entitled to be treated to a manner acceptable under the Constitution and the law.

28. There is no doubt that the petitioner was arrested on 1st August 1982 but was only produced before the court martial in 10 December 1982. The petitioner stated that during the period of his incarceration, he was kept incommunicado, in solitude, was denied access to his family, kept in water logged cells and denied food. He stated that he was tortured and kept in inhuman and degrading conditions. This was a clear violation of his rights and fundamental freedoms under the retired constitution.

29. ***Section 70(a)*** of the retired Constitution provided that ***every person was entitled to life, liberty, security of the person and protection of the law. Section 72(3)*** of the some Constitution provided that:-

> [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 14 days of his arrest and detention where he is arrested or detained upon reasonable suspicion of his having committed or about for 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 sub section have been complied with.***

30. Section 70(a) protected liberty and security of the person. This protection guaranteed protection could not be violated in anyway as that amounted to a breach of fundamental rights. The petitioner was arrested on suspicion that he had committed a criminal offence namely; participating in a coup attempt. That brought him within the preview of section 72(3) of the retired constitution which required that he be produced before a court of law ***within twenty four hours*** from the date of arrest or ***within 14 days*** if he was suspected to have committed an offence punishable by death.

31. The petitioner was suspected of having committed mutiny and that is what he was eventually court martialed for. That being the case, he was required to be produced before a Court of law within ***twenty Four (24) hours*** from 1st August 1982 but that did not happen. According to the evidence on record, the petitioner was produced before the court martial sometime in December 1982 despite the fact that he had been arrested on 1st August 1982. It is therefore clear he was produced in court after three months in clear violation of the Constitution.

32. The petitioner also contended that during his incarceration, he was kept incommunicado and in solitary conditions, was not allowed access to his family members, was kept in waterlogged cells, was denied food, was whipped, tortured and kept in inhuman and degrading conditions in violation of his fundamental rights contrary to section 74 of the retired constitution. Section 74(1) provided that ***no person should be subjected to torture or to inhuman degrading punishment or other treatment.*** Torture and in human and degrading treatment was clearly out lawed by the Constitution and any such acts that violated clear provisions of the constitution are unacceptable.

33. Although the petitioner pleaded these facts and testified on the same, the respondent merely denied that this did not happen. Lt. Col. Kosen (DW1) was not employed at the time and he told the court that whatever he had testified to was contained in the file. The petitioner named some of the places he was held but the respondent never called witnesses from any of those stations to deny or controvert the petitioner's evidence. What is therefore before court is the petitioner's evidence on oath against mere denial by the respondent and his witnesses who were not present when the petitioner is said to have been treated in a manner that violated the constitution.

34. Torture is defined by ***Black's Law Dictionary 9th Edition*** to mean;

> ***"The infliction of intense pain to the body or mind to punish, to extract a confession or information or to obtain a sarcastic pleasure."***

35. In the case of ***Republic v Minister for Home Affairs and others Ex parte Stanze*** [2007} eKLR **Nyamu J** (as he then was) had the following to say with regard to torture-

> ***"Torture means inflicting of intense pain to the body or mind; to punish, to extract confession or information or to obtain sadistic pleasure. It means infliction of physical founded suffering or the threat to immediately inflict it, where such infliction or threat is intended to elicit or such infliction is incidental to means adopted to elicit, matters of intelligence or forensic proof and the motive is one of military, civic or ecclesiastical interest. It is a deliberate inhuman treatment causing very serious and cruel suffering "inhuman treatment" is physical or mental cruelty so severe that it endangers life or health. It is an intentional act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack or human dignity."***

36. Torture is has a relationship with cruel and inhuman treatment and was outlawed by section 77(1) of the retired constitution and any acts that had the semblance of torture were unacceptable since they went against the constitutional principles of protection of human rights and fundamental freedoms which were not derogable.

37. What amounts to cruel and inhuman treatment was dealt with by the Constitutional Court of Ugandan in the case of ***Salvatori Abuki and another v AG*** (constitutional Case No 2 of 1997) (1997) UGCC 5 where the court stated-

> ***"The common feature of this punishment is the causing of severe pains and suffering to the victim either physically or mentally. These may calling of one hand of a thief and castration which is often called for by some women rights in this country to punish defilers these are cruel and in human punishments. In my view, these are the types of punishments which articles 24 and 44 seek to prohibit"***

37. The word inhuman and degrading treatment was again interpreted in the **Greek Case 1969 Y.B Eur. Conv. on H.R. 186 (Eur. Comm'n on H.R) cited in Milka Wanjiku Kinuthia & 2 others v Attorney General [2013] eKLR)** where the European Commission on Human Rights stated;

> ***"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."***

38. The petitioner testified that he was subject to physical as well as mental torture when he was subjected to interrogation with a view to having him confess to taking part in the attempted coup. That clearly fell within the definition of inhuman and degrading treatment. Again as the court observed in ***Gerald Juma Gichohi & 9 others v Attorney General*** [2015]eKLR,

> ***"Torture is prohibited in all its forms and indeed, there can never be a justification for torture in any circumstances. Section 86(2) of the Repealed Constitution also recognized that fact and provided that the protection against torture is one of those rights that could not be abrogated from by the disciplined forces.***

39. There is no doubt that from the evidence on record, the petitioner was tortured kept in solitude and was not produced before court within the required 24 hours since he faced an offence that did not attract death penalty. This was in violation of the constitution. And as was held by the Court of Appeal in the case of ***Albanus Mwsia Mutua v Republic Criminal appeal No 120 of 2004[2006]eKLR.***

> ***"…there was undoubtedly a gross violation of the appellant's constitutional right guaranteed to him by section 72(3) (b) of the Constitution. He was brought before the trial Magistrate some eight months from the date of his arrest and no explanation at all was offered for that delay… Constitutionally, the burden was on the police to explain the delay. At the end of the day, it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place."***

40. This is also supported by the holding in the case of ***Salim Awadh Salim & 10 Others v Commissioner of Police & 7 Others*** that

> ***"There is no longer any room for dispute with regard to section 72 of the Constitution. For the state to hold any person beyond the constitutionally prescribed period is to violate the right guaranteed therein unless the state discharges the burden imposed by section 72(2) (b)." .***

41. The respondent's counsel has argued that the petitioner did not prove that he was tortured since he did not call or adduce evidence of medical nature to show the injuries he suffered and therefore corroborate his testimony. Well that may be so but it must be appreciated that the petitioner was arrested and kept under circumstances that were not conducive for gathering evidence including medical evidence. The petitioner stated, and it is not denied, that he was arrested on 1st August 1982 and kept incommunicado, in solitary conditions and was not allowed to see his family and definitely not a lawyer. He was not released for three months but was taken from wherever he was being held straight to the court martial where he was charged, tried and upon conviction he was sentenced and taken to prison. The only time he came into contact with the free world was in 1983 when he was released after serving the sentence.

42. It would be difficult in such circumstances to expect such a person to produce evidence expected by the petitioner to prove that he was tortured. He obviously could not have had an opportunity to gather medical evidence which he could have adduced to support his testimony that he was tortured while in custody. One would be too optimistic to expect that in the petitioner's circumstances. It must also not be lost that torture does not mean physical but also mental suppression.

43. I agree with the observation by ***Lenaola J*** **(**as he then was) in the case of ***Jeniffer Muthoni Njoroge & 10 others v Attorney General*** [2012]eKLR when the learned judge stated that;

> ***"The Onus of proving that the Petitioners were held within a reasonable period lies with the Respondent who has failed to do so and it is my finding that once the Petitioners were held beyond 24 hours and no explanation is offered, then their rights were violated. Similarly, once I have found that they were indeed tortured, held incommunicado and some not even taken to trial, then they were subjected to inhuman and degrading treatment and their rights under Section 74 of the Repealed Constitution were violated."***

44. The Learned Judge appreciated the difficulties persons held under such circumstances, like the petitioner herein, would have in adducing certain evidence in their cases and observed;

> ***"When one is arrested and tortured mercilessly, where is the opportunity to take photographs of the torturers, get medical reports to show the injuries inflicted and where is the opportunity to call eye witnesses"***

45. I am equally persuaded by the observation by the Constitutional Court of South Africa in ***AZAPO V President of Republic of South Africa (*** CCT 17/96) where **Mohamed DP** stated;-

> "***Most of the acts of brutality and torture which have taken place have occurred during an era in which neither the laws which permitted the incarceration of persons or the investigation of crimes, nor the methods and the culture which informed such investigations were easily open to public investigation, verification and correction. Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof. Loved ones have disappeared, sometimes mysteriously and most of them no longer survive to tell their tales. Others have had their freedom invaded, their dignity assaulted or their reputations tarnished by grossly unfair imputations hurled in the fire and the cross-fire of a deep and wounding conflict. The wicked and the innocent have often both been victims. Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible; witnesses are often unknown, dead, unavailable or unwilling. All that often effectively remains is the truth of wounded memories of loved ones sharing instinctive suspicions, deep and traumatising to the survivors but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigours of the law."***

46. It would therefore, be too much to expect from a petitioner kept incommunicado for several months and thereafter arraigned before a court martial and later sent to prison, to produce medical or other evidence to support his assertion that he was physically and mentally tortured in the hands of state agents. As seen above, torture does not mean physical punishment only. It cannot therefore be successfully argued that the petitioner did not suffer torture in hands of government agents which has not been sufficiently denied by the respondent.

47. The petitioner further contended that his trial before the court martial was not a fair trial since he was not given a reasonable opportunity to understand the nature of the charges he was to plead and defend himself. It is not denied that the petitioner was taken from custody to the Court Martial and within days he was convicted and sentenced. I am aware of the decision of the Court of Appeal in ***Peter M. Kariuki v Attorney General*** [2014]eKLR where the court dealt with the issue and stated that;

> ***"What constitutes adequate time and facilities or proper opportunity for preparation of a defence will certainly depend on the circumstances of each case…Before the court martial was an accused person who had been held incommunicado, without access to a lawyer for real over 147 days. He had less than ten hours in total and in a prison setting to instruct his lawyer and prepare his defence... on the facts before us. We would agree with the trial Judge without any hesitation that the appellant's rights to adequate time and facilities to prepare for his defence were blatantly violated."***

48. It would have been difficult to argue that the petitioner was given adequate time and facilities to defend himself before the court martial had the petitioner put before court facts to support his assertion. The petitioner did not state with clarity the actual date he was arraigned before the court martial and proceedings took to enable the court evaluate the circumstances of the case and determine whether indeed the proceedings a mere ritual and not a trial in the legal sense. I will therefore be hesitant to make a finding that he did not get a fair trial in the absence of clear evidence to that effect.

49. The respondent has also argued that there was inordinate delay in filing this petition and therefore, asked the court to dismiss it on that account. This is a constitutional petition filed by the petitioner seeking transitional justice for violations committed against him at a time he could not have sued due to the unfavourable conditions. The petitioner was released in 1983 having been accused of taking part in a coup attempt against the government of president Moi and it was not possible to file a suit against the same government at the time. That notwithstanding, he filed this petition in 2014 just about four (4) years after the promulgation of the Constitution of Kenya 2010. Taking into account the circumstance then existing, I am not persuaded that this is inordinate delay. Furthermore, this is a constitutional petition seeking redress over violation of fundamental freedoms and there are enough authorities on this issue and the court cannot disallow the petition due the delay alone.

50. There is no limitation in constitutional petitions seeking to challenge violation of constitutional rights and fundamental freedoms in our Bill of Rights and allowing the respondent's contention would be to deny a petitioner the right to challenge wrongful acts committed by the state against its citizen. What the court ought to consider in such a case is whether the petitioner had an opportunity to seek redress and failed to do so but not that the claim has been caught up with limitation. I agree with the observation by **Mativo J**. in ***Eliud Wefwafwa Luucho &4 others v Attorney General*** Petition No.121 of 2016(consolidated with Petition Nos. 122, 123, 124 and 125) that

> ***"[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 with a section of the judiciary holding that a court must always consider whether the delay in filing a petition alleging violation of fundamental rights is unreasonable and prejucial to the respondent's defence and further the state cannot shut its eyes on its past failings nor can the court ignore the dictates of transitional justice"***

51. That is would explain why in case of ***Jeniffer Muthoni Njoroge & 10 others v Attorney General*** (supra) the court observed that failures of the past should not be allowed to clog the court's duty and stated;

> ***"As the new Constitutional dawn continues to unravel its mysteries, one lesson is clear; the Kenyan Courts may have failed the people in the past but today it can be said with Mwendwa CJ in Okunda vs. Republic [1970] E.A 454 that like Dicey said of England, the supremacy of the Constitution rather than any organ of government is what guides the Courts and especially the High Court in executing its mandate under Article 165 of the Constitution, 2010. The Judiciary must therefore never slumber and should not fall into the obvious ignoring of the past."***

52. From the facts of this petition, the evidence and the law, and considering the jurisprudence from the decisions above, I come to the inescapable conclusion that the petitioner has proved his petition to the required standard with regard to the violation of his rights and fundamental freedoms under the retired constitution and must therefore, succeed.

53. In doing so, I draw guidance from the case of ***Tinyefuze v Attorney General of Uganda*** [1997] UGCC3 where the Court stated that; "***if a petitioner succeeds in establishing breach of a fundamental right, he is entitled to the relief in exercise of Constitutional jurisdiction as a matter of course."*** That means the court must declare which I hereby do that the petitioner's rights and fundamental freedoms were violated.

54. Having disposed of the question of violation of rights and fundamental freedoms, we turn to the issue of damages. Counsel for the petitioner submitted that a sum of Kenya shillings 10 million would be fair compensation while Counsel for the respondent offered a sum of Kenya shillings one Million five hundred thousand in damages. In his submission Mr. Wanjohi relied on the case of ***Peter M Kariuki v Attorney General*** (supra) where the court stated that ***where damages is for non or non-pecuniary loss, assessment does not entail arithmetical calculation because money is not in that respect awarded as a replacement for other money.*** The Court observed that compensation is awarded as ***substitution for what is even more important than money, and that is the best the court can do in the circumstances.***

55. In the case of ***Robert Gossens v Attorney General CA No 8 of 1999,*** the Court opined that the object of awarding damages is to give the plaintiff compensation for the damages, loss or injury he or she has suffered and that the latter head comprises all losses which do not represent inroad upon ***a person's financial or material assets such as physical pain or injury to the feelings.***

56. In this particular case, the petitioner suffered not only physical but also mental pain in the hands of state agents in violation of his fundamental rights. The violation was real and no amount of money can bring back the joy he lost due to the violations. That calls for compensation as the only way of appreciating that rights have inherent values and should be respected and protected and should never be violated.

57. In the case of ***Julius Kamau Mbugua v Republic*** [2010]eKLR, the Court of Appeal had the following to say with regard to the rationale for compensation:

> ***"If by the time an accused person makes an application to the court the right has already been breached, and the right can no longer be enjoyed, secured or enforced, as is invariably the case, then the only appropriate remedy under section 84(1) would be an order for compensation for such breach. The rationale for prescribing monetary compensation in section 72(1) was that the person having already been unlawfully arrested or detained such unlawful arrest or detention cannot be undone and hence the breach can only be vindicated by damages.***

58. And in the case of ***Mohammed Juma v Kenya Glass works Ltd*** (CA No 1 of 1986) the court observed that there must be some ***general consideration of human feelings and that the pain and anguish caused by an injury and resulting frustrations are felt in the same way by the poor, the not so rich and the rich. And further that inflation is not a respecter of person.***

59. As to the amount of damages to award, Learned counsel in asking that the petitioner be awarded Kenya shillings ten million, relied on the case of ***Jenifer Muthoni Njoroge & 10 others*** (supra) where awards of between Ksh.1.5million and 6.million were made in 2012, ***David Gitau Njau & 9 Others v Attorney General,*** [2013] where an awarded of general damages of Kshs5.5 million was made to each petitioner in 2013 and ***Koigi Wa Wamwere v Attorney General*** [2015]eKLR where the Court of Appeal enhanced an award of general damages from 2.5 million to Ksh12 million observing that award of damages is not an exact science and that ***no monetary sum can erase the scarring of the soul and the deprivation of dignity that some of the violations of rights entail.***

60. For my part, I have considered the case of ***Robert Njeru Nyaga v Attorney General*** [2014] eKLRdecided in 2015 where the court awarded 2.5 million , ***Stephen Gaitho Njihia & 5 others v Attorney General*** [2016] eKLR where Kenya shillings 2 million was awarded to the petitioners who had been held for between 5 and 8 months, ***Jamlik Muchangi Miano v Attorney General*** [2017] eKLR and ***Eliud Wefwafwa Luucho & 4 others*** (Petition No.121 of 2016 consolidated) where the court awarded Kenya shillings 5 million to each petitioner respectively for similar violations.

61. Taking the evidence into account, the guiding principles on the award of damages, the decisions above and inflation, and also considering that compensation, whatever the amount, cannot sufficiently redress the violations committed against the petitioner who had remained incarcerated for about three months, an award of damages of Kenya shillings five million (Kshs 5,000,000) is fair and reasonable in the circumstances.

62. Consequently, I enter judgment for the petitioner against the respondent as follows;

a) A declaration that the cruel treatment, beatings, starvation detention in water logged cells in solitude, being stripped naked and forced to walk on the knees on concrete that the petitioner was subjected to at the time of arrest and detention at King'ong'o, Naivasha and Shimo La Tewa Maximum Security Prisons Constituted a breach of his Constitutional and fundamental right not to be subjected to torture or to inhuman or degrading punishment or other treatment as guaranteed by section 74 of the former Constitution of Kenya repealed in 2010.

b) A declaration that detention of the petitioner at Nanyuki Police Post King'ong'o and Kamiti Maximum Security Prisons for about 33 days and for a further about 60 days at Naivasha Maximum Security prisons and at shimo La Tewa maximum security prisons without a trial and or fair trial constitute a breach of his Constitutional and fundamental rights to liberty and not to be subjected to unlawful detention as guaranteed by sections 72 of the former constitution of Kenya a repealed in 2010.

c) General damages of Kenya shillings 5,000,000.

d) Costs and interest.

Dated, Delivered and Signed at Nairobi this 24th day of November 2017

E C MWITA

JUDGE