



REPUBLIC OF KENYA

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

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO 147 OF 2015

In the matter of contravention of Fundamental Rights and Freedom under Articles 22 (a), 27 (1) & (2), 28, 29 and 31, 39 (1) and 40 (1) (a) of the Constitution of Kenya 2010 (previously provided under Section 72 (1), 72 (2), 72 (30), 72 (50) and 74 (1), 75 (1), 77 (1), 77 (2), 80 (1) and 81 (1) of the repealed Constitution.

BETWEEN

JOHN WAIRIMU MATHENGE

(PETITIONING ON BEHALF OF THE

ESTATE OF ADAM MATHENGE WANGOMBE).....PETITIONER

AND

THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

Petitioners case

1. The Petitioner as the administratrix of the estate of the late **Adam Mathenge Wang'ombe** (hereinafter referred to as the deceased) pursuant to a grant of letters of administration *ad litem* issued to her in succession cause number 5 of 2015- Malindi on 29th January 2015 instituted this Petition for and on behalf of the deceased's estate seeking a declaration that the deceased's Fundamental Rights and Freedoms were violated by the Government and or its security agents and for recovery of damages for and on behalf of the deceased's estate. The deceased died on 30th August 2010 at North Carolina, U.S.A.

2. The Petitioner avers that the deceased, who was a Kenya citizen aged 32 years, was in or about April 1975 unlawfully arrested and moved to various Police stations including Njoro, Bahati, and Narok and thereafter detained without trial. Her enquiries on the reasons for the arrest and whereabouts were to no avail. On 18th June 1975 the Petitioner was notified that the deceased had been notified.

3. She avers that the deceased was held in solitary confinement and in *communicando* at Kamiti Prison, that the family was denied access, and was subjected to torture, unlawful discrimination, and was denied basic rights such as family visits, proper medical attention, diet and access to information.

4. Upon release from detention, the deceased could not get a job and was subjected to constant

surveillance by state agents. As a consequence thereof, the deceased was traumatized and suffered post traumatic stress disorder, psychological and economic loss. The Petitioner further avers that and that prior to the promulgation of the 2010 constitution, it was not possible to get justice from the courts, hence, the reason why she could not file the case in court.

5. The Petitioner annexed documents to the Petition in support of the detention, among them letters the deceased wrote to the then President among others pleading for his release and also the letters the deceased addressed to the Detainee Review Tribunal. The Petitioner further avers that the deceased was the sole bread winner, hence, his detention brought untold suffering to the family.

6. In support of the Petition is the affidavit of Koigi Wamwere, a former political detainee filed on 3rd October 2016. He avers that the deceased was indeed was among the detainees.

7. He confirmed that:- they were held *incommunicado*, tortured; their rights were violated for exercising their freedom of speech, conscience, movement, association and assembly. He cited incidents when they wrote several letters to the Detainees Review Tribunal and other persons communicating their grievances.

Respondents grounds of opposition

8. The Respondent filed grounds of opposition stating:- **(a)** the Petition was brought after an inordinate delay of over forty years; **(b)** that the Petitioner has brought the Petition on behalf of the deceased on allegations she cannot verify; **(c)** the letters of administration only permit the deceased to sue or defend suits pegged on matters concerning the estate of the deceased, hence it does not extend to instituting Constitutional Petitions; **(d)** that Fundamental Rights and Freedoms can only be claimed by living persons.

Oral evidence

9. The Petitioner testified orally in court and reiterated the contents of the Petition and supporting Affidavit.

Analysis of the facts, Submissions, the law, issues and determination

10. Upon analysing the facts and counsels submissions, I find that the following issues fall for determination, namely, **(a)** whether the Petitioner has capacity to sue; **(b)** whether this case is time barred; **(c)** whether the deceased's fundamental rights and freedoms were violated; **(d)** whether the Petitioner is entitled to the reliefs sought.

(a) whether the Petitioner has the legal capacity to sue.

11. Counsel for Hon. Attorney General argues that the letters of administration *ad litem* only allows the petitioner to sue or defend suits pegged on matters concerning the estate of the deceased while the Petitioners' counsel submitted that the Petitioner has capacity to sue on behalf of her deceased husband.

[\[1\]](#)

12. Part **II** of the Law Reform Act[\[2\]](#) deals with "Survival of Causes of action." Section **2** thereof deals with effect of death on certain causes of action. It provides as follows:-

2. Effect of death on certain causes of action

(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate:

Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages

on the ground of adultery.

(2) Where a cause of action so survives for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person—

(a) shall not include any exemplary damages;

13. Under **Section 2** of the Law Reform Act[3] cited above and **Section 4** of the Fatal Accidents Act,[4] the person who is entitled to bring a cause of action in respect of the estate of a deceased person is a personal representative or an executor or administrator respectively. Such a person ought to first obtain an appropriate grant so as to have the *locus standi*[5] to institute the case. The grant may be a full grant or a limited grant.

14. Whereas a full grant of representation takes care of the entire administration of the estate of a deceased person, a limited grant, as the name suggests, is limited to a specific purpose in relation to the estate of a deceased person. The basis of a limited grant is found in **Section 54** of the Law of Succession Act[6] which states that:-

'54. A court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule to this Act.'

15. An administrator *ad litem* is defined as "A person appointed by a probate **court** to represent an estate during a lawsuit. (**Ad litem** is Latin for "during the litigation.") An **administrator ad litem** is appointed only if there is no existing executor or **administrator** of the estate, or if the executor or **administrator** has conflicting interests.[7]

16. The law provides for various forms of limited or special grants. They include, but not limited to, Limited Grant of Letters of Administration *Ad Litem*, Limited Grant of Letters of Administration *Ad Colligenda bona*, Limited Grant of Letters of Administration *Ad de bonis non*, Limited Grant of Letters of Administration *durante minore aetate*, Limited Grant of Letters of Administration *durante absentia*, Limited Grant of Letters of Administration *pendente lite*. Limited Grant of Letters of Administration purpose and due to their limited nature each such grant ought to be used for that specific purpose only. Given that more than one limited grant or a combination of grants can be issued depending on the circumstances of a case, there is every reason to deal with a limited grant as it specifically provides. That will undoubtedly bring order and decorum in dealing with an estate of a deceased person noting that there may be need to obtain a full grant in future.

17. Relevant to this case is a Limited Grant of Letters of Administration *Ad Litem* which is provided for under **Form 14** of the **Fifth Schedule** of the Law of Succession Act[8] and deals with suits. The said provision states as follows:-

"when it is necessary that the representation of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution". (Emphasis added)

18. From the foregoing, it is clear that a Limited Grant of Letters of Administration *Ad Litem* is usually used when the estate of a deceased person is required to be represented in court proceedings.[9] In this case the Grant *ad litem* is limited to the purposes only of defending and or filing suit on behalf of the estate. I find and hold that the Petitioner has the *locus standi* to institute this suit

19. In construing the above provisions, I was guided by the principal that the fundamental right of access to courts is essential for constitutional democracy under the rule of law.[10] In order to enforce one's

rights under the Constitution, legislation and the common law everyone must be able to have a dispute that can be resolved by the application of law, decided by a court. The right of access to courts is thus protected in the Constitution.[\[11\]](#)

(b) whether this case is time barred

20. On the question of limitation, the Petitioner's counsel submitted that there is no limitation for bringing a claim for violation of rights[\[12\]](#) while the Hon. Attorney General questioned cited the inordinate delay of 40 years. The alleged violation of Fundamental Rights took place in 1975. This Petition was filed 42 years later, and about five years after the promulgation of the 2010 Constitution. Actions against the government ought to be filed within one year as provided under the Government Proceedings Act.[\[13\]](#)

21. 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.

22. The common ground on 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.

23. This petition was filed on 17th April 2015, almost 5 years after the promulgation of the 2010 constitution. I appreciate that 5 years is a long period of time and the delay has not been explained at all. A also appreciate that prior to the promulgation of the 2010 constitution, the prevailing political situation made it impossible for victims of violation of Fundamental Rights to file cases against the same government that infringed their rights.

24. Our courts have since the promulgation of the 2010 Constitution been highly persuaded by the dictates of transitional justice. In particular, our courts have appreciated the need to uphold and strengthen the rule of law, and to hold the perpetrators of violations of human rights accountable, and also, the need to provide victims with compensation. Relevant to this is the need to effectuate institutional reform.

25. The Constitution of Kenya 2010 was a remarkable departure from the past and points to the future. It gives prominence to national values and principles of governance which include Rule of Law and observance of Human Rights. It clearly provides that the Fundamental Rights in the Bill of Rights belong to the individual and are not granted by the state and can only be limited in a manner prescribed by the law and only then, such a law must satisfy the limitation test which is it must be reasonably justifiable in a modern democratic society. The limitation must not take away the core content of the right and the burden lies on the state to establish that the limitation meets the criteria set out in Article 24.

26. 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.

27. 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.

28. With such a transformative and progressive Constitution, the key question that 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.

29. 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 focus the concept of transitional justice and its importance and relevance in addressing cases of violation of rights.

30. 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.

31. 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]

32. 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]

33. **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).^[21]

34. As stated above, the alleged violations took place close to 42 years. However, the court appreciates that it was only after the 2010 constitution that it became viable for citizens to agitate for their rights and file cases of this nature. However, it took the Petitioner close to five years to file this case. This delay has not been explained at all. The Petitioner had a duty to the court to explain the delay. This was not done. It now remains to the court to consider whether owing to the nature of the case, the court can entertain the claim notwithstanding the delay.

35. In exercising its discretion in this case, the court is bound to consider among others whether the delay is prejudicial to the state. No prejudice has been alleged. No evidence was tendered by the Respondent that due to the delay, they were unable to trace relevant evidence in support of their case.

36. The court should also bear in mind the need to encourage and welcome litigations in the human rights field and no human rights case may be dismissed or struck out unless for extremely good reason. This is consistent with the constitutional dictates that in exercising judicial authority, the court shall inter alia be guided by the purposes and principles of the constitution while article 259 requires the court to interpret the Constitution in a manner that promotes its purposes, values and principles, advances rule of law, human rights and fundamental freedoms in the Bill of Rights, permits development of the law and contributes to good governance.

37. Also, the court is required under the rules to constantly and conscientiously seek to give effect to the overriding objectives of the rules at every stage of human rights action, especially whenever it exercises

any power given it by the Rules or any law and whenever it applies or interprets any rule.

38. The Constitution especially Chapter four, shall be expansively and purposely interpreted and applied with a view to advancing and realizing the rights and freedoms contained in them and affording the protections intended by them.

39. For the purposes of advancing but never for the purposes of restricting the Petitioner's rights and freedoms, the Court shall respect all the relevant laws of the land and international law and conventions which for part of the law of Kenya, which include the African Charter on Human Rights and Peoples Rights and other instruments (including protocols) in the African regional Human Rights system and the Universal Declaration of Human Rights and other instruments (including protocols) in the United Nations Human Rights system.

40. For the purposes of advancing but never for the purpose of restricting the Applicant's rights and freedom, the court may make consequential orders as may be just and expedient. The Court shall proactively pursue enhanced access to justice for all classes of litigants.

41. Guided by the considerations enumerated above, I find and hold that it would be unfair to uphold the defence of limitation in this case. I find that even though the delay of five years after the promulgation of the 2010 Constitution has not been explained, the Respondent has not cited prejudice nor did they file Response to the Petition to dispute the contents.

(c) whether the deceased's fundamental rights and freedoms were violated

42. The Respondent opted not to file a Response to the petition. Thus, the only evidence on record is the evidence tendered by the petitioner and his witness. Failure to adduce any evidence means that the evidence adduced by the Plaintiff against the defense is uncontroverted and therefore unchallenged.^[22] In short, the petitioners evidence remained unchallenged.

43. In the case of *Interchemie EA Limited vs. Nakuru Veterinary Centre Limited*^[23] it was held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted.

44. A similar position was held in the case of *Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others*^[24] that it "is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged."

45. The Respondent in this case did not adduce evidence, but cross-examined the Petitioner. The purpose of cross-examination is three-fold; **(a)** *To elicit evidence in support of the party cross-examining;* **(b)** *To cast doubts on, or undermine the witness's evidence so as to weaken the opponent's case;* **(c)** *to undermine the witness's credibility;* **(d)** *To put the party's case and challenge disputed evidence.* But once a party cross-examines an opponent's witness, he can only rebut the issues raised during cross-examination by calling witnesses.

46. The Petitioners' counsel cited the violation of the deceased's rights to liberty;^[25] failure to be arraigned in court as soon as is reasonably practical^[26] as the law required, infringement of the right to conditional release^[27] and in humane and degrading treatment; breach of the right to a fair hearing^[28] and urged the court to award damages.^[29] The Hon. Attorney General cited inconsistencies in the Petitioner's evidence among them the document from Alfa Medical Clinic which shows that the deceased last visited the facility on 4th December 2010 yet his death certificate shows that he died on 30th August 2010 and argued that there was no evidence that the deceased while in detention was treated at Kenyatta National Hospital and that the Petitioner was allowed to visit the deceased in prison and insisted that the alleged violations were not proved.

47. 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.[30]

48. The Petitioner was detained without trial. The law then permitted detention without trial. However, the Constitution prohibited torture, inhuman or degrading treatment. The repealed Constitution guaranteed a fair trial[31] and provided that a person arrested for an offence shall be presented to court as soon as is reasonably practicable.

49. This court cannot deviate from its own duty of determining acts which amount to infringement of constitutional rights of the citizens. 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 deceased was held incommunicado for long before being presented in court and was subjected to inhuman and degrading treatment and denied basic need. I have no doubt in my mind that the repealed constitution out rightly outlawed such inhumane and degrading treatment.

50. 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.

51. 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.[32]

52. 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.

53. I have in my previous decisions stated that when a citizen is arrested on suspicion of committing an offence, his fundamental Rights are not abrogated in *toto*. His dignity cannot be allowed to be comatose. The right not to be subjected to inhuman treatment, includes the right to be treated with human dignity and all that goes along with it.

54. I have also in several decision stated that 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.

55. 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. 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.

56. 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.

57. 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." [34]

58. 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." [35]

59. The law enjoins the police and prison authorities to be scrupulously fair to arrested or detained persons and to ensure that the citizens constitutional and fundamental rights are not violated. I find that the police and prison authorities subjected the petitioner to inhuman and degrading treatment which was not justifiable at all.

60. 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.

61. 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.*" [36]

62. 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.

(d) whether the Petitioner is entitled to the reliefs sought

63. The petitioner claim damages as a result of breach of the deceased's 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.

64. 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.

65. 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.

66. 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.

67. 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.^[37] 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.

68. Arriving at the award of damages is not an exact science. No monetary sum can really erase the scarring of the soul and the deprivation of dignity that some of these violations of rights entailed. ^[38]When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened.

69. 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.^[39]

70. 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.

71. 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.^[40]

72. 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.

73. 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.^[41] 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.

74. 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.

75. I am persuaded that the petitioner has proved to the required standard that the deceased's fundamental rights were violated by the police and prison authorities. The Petitioner had to fend for herself and the children. The deceased was tortured, treated to inhuman and degrading treatment. He was denied the opportunity to be with his family which is painful and cannot be quantified.

76. The medical evidence adduced is not helpful to the court but in my view, the violations disclosed in this petition, including hurt feelings, psychological trauma, stress, degrading treatment, anxiety and the

mental suffering caused by separation from the family is sufficient to warrant an award of damages.

77. Considering the nature of the violations of the constitutional rights, the applicable legal principles and bearing in mind the fact that it may not be easy to quantify denial of fundamental rights and freedoms nor is it to quantify hurt feelings, I find that the petitioner is entitled to an award of damages. Doing the best I can, I find that an award of **Ksh. 5,000,000/=** would be reasonable in the circumstances.

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

i. ***A declaration*** be and is hereby issued that the petitioners' Fundamental Right and Freedom from torture, degrading and inhuman treatment was violated by the police and prison authorities..

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

iii. ***That*** judgement be and is hereby entered in favour of the petitioner against the Respondent by way of general damages in the sum of **Ksh.5,000,000/=**.

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

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

Orders accordingly.

Signed, Dated, Delivered at Nairobi this 20th day of November 2017.

John M. Mativo

Judge

[1] Counsel cited Article 22 of the Constitution and Section 82 of the Law of Succession Act, Cap 160, Laws of Kenya

[2] Cap 26, Laws of Kenya

[3] Ibid

[4] Cap 32, Laws of Kenya

[5] See the Court of Appeal cases of **Virginia Edith Wamboi vs. Joash Ochieng Ougo & Another (1982-88)1 KAR** and **Trouistik Union International & Another vs. Jane Mbeyu & Another, Civil Appeal No. 145 of 1990**).

[6] Cap 160, Laws of Kenya

[7] https://www.law.cornell.edu/wex/administrator_ad_litem

[8] Supra

[9] See the case of **Greenway vs. Mc Kay (1911) 12 CLR 310**.

[10] According to Article 4(1) of the Constitution, the Republic of Kenya is founded on national values and principles of governance referred to in Article 10 among them the rule of law.

[11] Article 48 of the Constitution

[12] Counsel cited *Wachira Waihere vs The Hon. Attorney General*, Misc Civil Case No. 1184 of 2003

[13] Cap 40, Laws of Kenya

[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] 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>

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

[23] {Milimani} Hccc no. 165b of 2000

[24] *Nairobi (Milimani) HCCS No. 1243 of 2001*

[25] Section 72 (1) & (5) of the Repealed Constitution

[26] Section 72 (3) of the Repealed Constitution

[27] Section 72 (5) of the Repealed Constitution

[28] Section 77 (2) of the Repealed Constitution

[29] Section 84 of the Repealed Constitution

[30] See *Mudholkar J in Sakal Papers vs Union of India AIR 1962 SC 305 at p 311*

[31] Section 77 of the Repealed Constitution

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

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

[36] 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.

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

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

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

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

[41] 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)