



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

PETITION NO. 517 OF 2013

WELLINGTON NZIOKA KIOKOPETITIONER

VERSUS

ATTORNEY GENERALRESPONDENT

JUDGMENT

Introduction

1. The petitioner approached this Court by way of his petition dated 29th October 2013 in which he alleged violation of his rights by state agents following his arrest and incarceration in Naivasha and Kamiti Prisons in 1982. In the said petition, he seeks the following orders:

(a) A declaration that the petitioner's fundamental rights and freedom were contravened and grossly violated by the respondent's Kenya Army and Prisons Officers for 8 months with effect from 1st August 1982 upto March 1983 at Kamiti Maximum Prison, Naivasha Maximum Prison and Kahawa Garrison.

(b) A declaration that the petitioner is entitled to payment of damages and compensation for the violations and contravention of his fundamental rights and freedoms.

(c) General damages, exemplary damages and aggravated damages under section 84(2) of the constitution of Kenya (1969) be awarded.

(d) A declaration that the petitioner merits payment of withheld salary, emoluments, terminal benefits and pension.

(e) Costs of this petition

(f) Interest on items (c), (d) and (e) above

(g) Any further orders, writs and directions as this Honourable Court may deem just and fit to grant.

2. The petition is supported by an affidavit sworn by the petitioner on 29th October 2013. The petitioner also gave oral evidence in support of his case, and called one witness, a Dr. Frederick Owiti, to give medical testimony on his behalf.
3. The petitioner's case is that he was employed by the Kenya Air Force on the 9th February 1979, and was trained in Israel as Technical Class 1. He was arrested on 1st August 1982 at around 6.00 p.m. on his way from Nanyuki town where he had gone for a haircut. His arrest was allegedly in connection with his alleged involvement in a plot to overthrow the government of Kenya.
4. He contends that although he was entitled to due process of the law in accordance with the Armed Forces Act, he was not subjected to such process and instead was dismissed from the service. He alleges that the date of dismissal was misconstrued as 1st August 1982, instead of March 1983. After his arrest, he was not taken before a court martial but was discharged from prison and dismissed from the service.
5. The petitioner alleges that the Kenya Air Force which had been established by an Act of Parliament, namely the Armed Forces Act, Chapter 199 of the Laws of Kenya, was unlawfully disbanded on 12th August 1982 and '82 Air Force, a body not founded on any law made by Parliament, created. His case is that the '82 Air Force which terminated his services and denied him his emoluments was a non-entity as there was a vacuum between 12th August 1982 and 25th August 1993 when Kenya Air Force, which had initially employed him, became operational again. He contends that this was because of numerous court cases challenging the legality of '82 Air Force and that it was considered prudent to restore Kenya Air Force, which he had a contractual relationship with, with effect from 25th August 1993.
6. The petitioner contends that the Defence Council abused its authority by conducting summary trials, which he avers was due to the illegal membership of the '82 Air Force commander, Major General H.M Mohammed, as a purported member of the Council.
7. The petitioner avers that he was unlawfully incarcerated at Naivasha Maximum Prison, Kahawa Garrison and Kamiti Maximum Prison for 8 months, and that while in Naivasha Maximum Prison, he was held in a flooded cell. He also alleges that he was mentally and physically tortured, which resulted in physical deformity of his left lower jaw. It is also his deposition that his health was adversely affected and continued to deteriorate due to the illegal incarceration as well as, mental and physical torture in an isolated prison cell.
8. The petitioner further avers that he was transferred from the Naivasha Maximum Prison in or about March 1983 after about 8 months of unlawful imprisonment. He was taken from the Naivasha Prison by soldiers from Naivasha and taken to Kahawa Garrison where he slept for two hours, was served soda and biscuits and subsequently relocated to Kamiti Maximum Prison for an overnight incarceration. He was released the following day, given Ksh1,400 and dropped in the city centre to travel to Machakos. He states that he was also instructed to collect his Certificate of Discharge from the Department of Defence, Nairobi, after two weeks, which he did, but noted that it had many anomalies.
9. The petitioner avers, on the advice of his Counsel, that his petition is not time barred. He implores the Court, on the basis that he is married and unemployed, that due to the unlawful discharge or dismissal from the Kenya Air Force which remains an impediment to his employment, to grant him the orders sought in his petition. In particular, he asks that the Court should compel the government to compensate him for the suffering and torture that he was exposed to in his youth; rehabilitate him so that he can be economically socially and health wise sound; compel the Armed Forces to accord him a proper discharge, and to condemn and punish through criminal proceedings those who abused their authority to cause him torture and suffering.
10. He produced in evidence his Certificate of Service, a summary of his withheld earnings, a

statutory notice of his intention to sue the state dated 20th December 2012, a reply from the Senior Deputy Solicitor General dated 2nd January 2013, and a medical report from Dr. Fredrick Owiti.

11. In his oral evidence, the petitioner adopted and reiterated the averments in his affidavit in support of his petition, and produced the documents filed in support of his claim. He testified that he was arrested unlawfully on 1st August 1982 while on his way back from Nanyuki to the Laikipia Base.
12. His testimony was that he was arrested by Kenya Army officers who asked him to identify himself, and upon realizing that he was an Air Force man, they started beating him, with other men who were in the back of their truck, while naked. He further testified that he and the other men were taken from Laikipia Air Force Base to Kamiti Maximum Prison. On finding that it was full, they were moved to Naivasha Maximum Prison, divided and put in cells. He testified that he was in his own exclusive cubicle which was flooded with water so he had to remain standing in water that was above the knee, and sometimes one would fall and stay in the water.
13. He further testified that during the torture, when they were draining the water from the cell, the prison warders would beat him because they wanted him to tell them what was going on, and what he knew about the government of Kenya and the plot to overthrow it.
14. His testimony was further that he did not encounter any army officers, and neither was he put through a court martial. He was released towards the end of March 1983 and relocated to Kamiti Prison for another night of incarceration, where he was subjected to kicks and blows by other prison warders and thrown into a cell. He was released the next day and given a discharge slip containing two service numbers. The number he was identified with in the Air Force was 023884. The discharge slip indicated that he had been “discharged without prejudice.”
15. According to the petitioner, when he reported to the Department of Defence and presented his Discharge Slip, he was given a Discharge Certificate or a Certificate of Service with many anomalies. The petitioner identified the anomalies as including the fact that it was handwritten, that it indicated that he had once served in '82 Air Force, which he termed as false as 82 Air Force was created when he had been incarcerated in Naivasha Prison; that he was discharged on 31st January 1983 which was also incorrect as his date of discharge was the date of his arrest, 1st August 1982.
16. He also testified that the torture he underwent affected him mentally and he would talk to himself and see things coming after him and in the night he would talk to people he could not see.
17. The petitioner also testified that the swelling on his lower jaw did not develop when he was in custody, but a year after his release; that it started on the right lower jaw and he was treated at Bishop Kioko Hospital in Machakos. After a couple of years another one developed on the left hand side and was treated at Lang'ata St. Mary's Hospital where he was admitted from 21st August 2014 and discharged on 9th September 2014. He underwent an operation and the swelling was removed. His testimony was that the swelling developed after he left prison.
18. In cross-examination by Mr. Kamunya for the respondent, the petitioner maintained that he was arrested by Army Officers. He also confirmed that he was aware of the judicial process under the Armed Forces Act under which he would be subjected to a court martial, but was denied due process under the Armed Forces Act. He also testified that he did not raise the issues that he now raises with his commanders, explaining his failure to do so on the basis that his background was very poor and he was chased from the camp. He also confirmed that he had raised the issues more than 31 years after the event, which he again put down to his background as he was very poor, did not have parents and his family depended on him.
19. The petitioner also conceded that he did not have any documents regarding his treatment at Bishop Kioko Hospital, or to prove that he was arrested. He stated that the document he had was

retained at the Department of Defence, and he did not go back to obtain documents to show that he had been in prison.

20. With regard to his ill-treatment in prison, the petitioner testified that he was kicked around the abdomen area, mouth and nose. He had a swelling on both sides of his face, which he stated developed sometime after he was released. While the one on the right developed about a year after his release, the one on the left was recent and started developing around 2013 – 2014.
21. Upon re-examination by his Counsel, the petitioner stated that the service number in the Certificate of Service is 102151, which is not his correct service number. He had raised the issue with the officer at the Department of Defence but had been told not to complain. He further testified that he had had no opportunity to raise issues with his superiors, and he also did not know that he could raise the issues in Court. He further testified, in reference to his statutory notice, that the AG did not deny that he had been in custody.
22. The petitioner's second witness, Dr. Owiti, testified that he is a psychiatrist with a degree in medicine from the University of Nairobi and a Masters in psychiatry from the Royal College, London. He had practiced as a psychiatrist for 35 years. His testimony related to the alleged torture of the petitioner, and the consequences of the torture.
23. Dr. Owiti stated that he examined the petitioner on 11th October 2012 in his office. The petitioner came to his office, according to Dr. Owiti, with a long standing history of torture. That he said he had been working for the Kenya Air Force in Nanyuki and following the failed coup of 1982, he was beaten by Kenya Army officers and slept in dirty water; that he developed a swelling on the right cheek, and that he was summarily dismissed from work without any certificate to help him secure another job.
24. According to Dr. Owiti, his findings and conclusions were that the petitioner's symptoms pointed to post traumatic stress disorder. Further, that the petitioner had a cyst-like swelling, not an abscess, on the mandible joint. He stated that it can occur after one is hit on the joint, that it develops slowly and can exist for years. He had prepared a report to document his findings, dated 27th November 2012, which he produced in evidence.
25. In cross-examination by Mr. Kamunya, Dr. Owiti stated that he had examined the petitioner on 11th October 2012, and that he was aware that this was 30 years after he allegedly sustained the injury. He maintained that his examination was conclusive as post-traumatic stress disorder can last a long time. It was his evidence also that the petitioner had a swelling at the time of the examination, which had now been removed, but there was no original wound.
26. He stated that he did not examine the petitioner when he sustained the wounds, though he testified that he would say that he got the wounds from the torture. He also confirmed that the petitioner would require further evaluation and treatment, noting that his injuries were severe and humiliating, and that he had aged faster, which is a sign of stress. In response to a question from the Court, he stated that he drew the inference that the petitioner's swelling was from the injury he said he encountered during that period, though it could also have been sustained afterwards.

The Case for the Respondents

27. The respondent opposes the petition and has filed grounds of opposition dated 14th May 2014 and an affidavit sworn by Lieutenant Colonel Paul Mwangemi Kindochimu on 22nd May 2014. The Attorney General also filed submissions dated 13th October 2015.
28. In his affidavit, Colonel Kindochimu, A Staff Officer One at the Kenya Defence Headquarters in charge of all personnel records, denies the allegation by the petitioner that his fundamental rights were violated as alleged, either by Kenya Army or Kenya Prisons Officers. He also denies the

- allegation that the petitioner was wrongfully arrested on 1st August 1982 at around 6.00p.m. as alleged. If such arrest occurred, it is his deposition that the arrest was due to commission of an actual crime by the petitioner.
29. It is also his deposition that the discharge of the petitioner from service was lawful and was made in accordance with the provisions of the Armed Forces Act, Cap 199 of the Laws of Kenya (now repealed). He avers, further, that all summary trials, discharges and court martial trials conducted during the 1982 attempted coup were done pursuant to and strictly in compliance with the provisions of the Armed forces Act, and he therefore denies any abuse of its powers by the Defence College. He also denies all the averments of fact by the petitioner relating to his incarceration at Naivasha and Kamiti Prisons, and the torture he allegedly suffered there.
30. Further, he deposes that there was no gap in the petitioner's service in the armed forces between 12th August 1982 and 25 August 1993, his deposition being that at all material times until their discharge or dismissal, the members of the Kenya Air Force or '82 Air Force were members of the Kenya Armed Forces and were subject to the Armed Forces Act.
31. It is therefore averred on behalf of the respondent that if at all the petitioner was arrested, detained, and confined as alleged, such actions were lawfully done by the state security organs who had the responsibility to so deal with the petitioner due to his involvement in the failed coup.
32. While further denying responsibility for the health problems that the petitioner alleges he suffered, the respondent avers that the petition has been brought after an inordinately long period of time, approximately 31 years, and with no explanation for the delay being offered.
33. With respect to the petitioner's claim for terminal benefits and salary, the respondent avers that the petitioner having been discharged or dismissed for involvement in the failed coup of 1982, he is not by law entitled to benefits. Further, it is its position that there is no salary due to the petitioner that has been withheld by the respondent.
34. Its position therefore is that the petition is an abuse of the court process and should be dismissed.

The Submissions

35. In his submissions dated 29th September 2015, the petitioner contended that he had established that he was unlawfully arrested on 1st August 1982 and incarcerated at Naivasha and Kamiti Prisons, and at the Kahawa Garrison, for a cumulative period of eight months. While at Naivasha, he was tortured and as a result developed a cyst on his left lower jaw. He was neither subjected to a court martial nor any other proceedings, and was subsequently discharged on the basis that his services were no longer required.
36. The petitioner alleges violation of sections 71(1) and 72(3), (5) and (6) of the 1969 constitution. He claims that he was held in a dark flooded cell as a result of which he was unable to sleep and was constrained to remain standing throughout the period of incarceration. His submission was that this amounted to torture contrary to the provisions of the former constitution.
37. The petitioner disputed the contention by the respondent that the petition has been brought after inordinate delay, arguing, in reliance on the case of **David Gitau Njau & 9 Others, High Court Petition No. 340 of 2012**, that section 7 of the former constitution excludes the operation of the Limitation of Actions Act, Cap 22, to claims under section 84 of the former constitution. He also relied on the decisions in **Grace Wanjira Miano & Another vs The Attorney General Petition No. 226 of 2013** and **Wachira Waheire vs The Attorney General, High Court Misc. Case No. 1184 of 2003(OS)** to support his argument with respect to limitation periods on constitutional petitions. He asked the Court to make an award of Kshs.10,000,000 for the violation of his rights under sections 72 and 74 of the former constitution.

Submissions in Response

38. The respondent filed submissions dated 13th October 2015 in which the AG argues, *inter alia*, that the Court lacks the jurisdiction to hear and determine the petition. The basis of this contention is, first, that the petitioner has joined two causes of action, one alleging violation of his fundamental rights, while the other is a claim for unlawful dismissal and entitlement to his withheld salary, and terminal benefits. The respondent submits that while the Court has jurisdiction to determine questions relating to the alleged violations or threatened violation of fundamental rights under Articles 165 and 23 (1) and (3), it lacks jurisdiction to determine matters relating to employment, which are reserved by the Constitution to the Employment and Labour Relations Court by Article 162 and 165 (5) and section 12 of the Industrial Court Act, 2011.
39. The respondent contends, in reliance on the decision in **United States International University (USIU) vs Attorney General [2012] eKLR**, that the Employment and Labour Relations Court also has jurisdiction to determine matters relating to violations and threatened violations of a person's rights and freedoms.
40. The respondent argues secondly, that the petitioner has failed to follow the statutory complaint mechanisms which has been available to him for the last 33 years, choosing to ignore such process and instead lodge the present petition. The AG's submission is that in accordance with the principle set out in the case of **Harrikson vs Attorney General (1979) WLR 62** and **Peter Ochara Anam & 3 Others vs Constituencies Development Fund Board & 3 Others [2011] eKLR**, the petitioner should have exhausted the mechanism open to him before lodging a constitutional petition. Such mechanism, according to the respondent, is set out in sections 225 (1) and 226 (1) of the Armed Forces Act. It is the respondent's submission that the Court's constitutional jurisdiction should not be invoked where there are other remedies provided by statute.
41. The respondent submits, thirdly, that the petitioner fails to establish a proper nexus of the facts. According to the respondent, the petitioner asks the Court to assume that he was arrested because he was an Air Force officer at the time and that there was an attempted coup blamed on some members of the Air Force, an assumption that the Court cannot make. The respondent refers the Court to the decision in **Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272** and **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others, Civil Appeal No. 290 of 2012** for the proposition that facts must be pleaded with precision. He notes that the petitioner has not provided any evidence at all in support of his allegations of arrest, detention, torture and subsequent release.
42. A fourth objection by the respondent to the present petition relates to the inordinate delay in filing it. The AG's argument is that the petition has been filed after a delay of over 30 years after the alleged violations were committed. According to the respondent, the petitioner's attempt during cross-examination to explain the delay on the basis that there were no courts around his area of residence was not a legally acceptable reason. The respondent submitted that whereas the Court has previously allowed petitions despite being filed decades after the cause of action arose on the basis that there is no limitation, it should reconsider the prejudice this position occasions the respondent.
43. According to the respondent, while the petitioner has had 30 years to prepare for his case by gathering evidence, the respondent has been destroying what it would have used as evidence through the ordinary, in some cases the statutory practice, of termination of seemingly obsolete public documents. Further, according to the respondent, it is gravely prejudiced as its witnesses have either retired, left service, died or are otherwise untraceable.
44. Finally, the respondent argues that the petitioner's evidence does not support his allegations that he suffered injuries as a result of torture, noting that he was examined by the doctor in 2012, and that the medical report notes that he requires further evaluation. It is the respondent's submission

that any number of things could have caused the petitioner's alleged injuries within the 30 years between his arrest and the date of filing the petition, nor can it be ruled out that the petitioner had pre-existing conditions which started occurring prior to his arrest.

45. The respondent further highlights the variance between the evidence given by the petitioner and his doctor's evidence. The doctor's evidence was that the petitioner suffered post-traumatic stress disorder, while the petitioner testified that he suffered swellings in his mandible joints. Further, that one swelling occurred a year after his release from prison, while the other occurred in 2013/2014, 31 years after his release.

Determination

46. The petitioner has set out in his submissions the issues he considers as falling for determination as being:

1. *Whether the Petitioner personally and actively participated in the attempted Coup on 1st August, 1982.*
2. *Whether the Petitioner was unconstitutionally and unlawfully incarcerated at Kamiti Maximum Prison, Naivasha Maximum prison and Kahawa Garrison from 1st August, 1982 up to March, 1983.*
3. *Whether the Petitioner was tortured contrary to the Constitution of Kenya.*
4. *Whether the petitioner's salary and terminal dues were unconstitutionally and unlawfully withheld.*
5. *Whether the Petitioner's employment service was unconstitutionally terminated.*
6. *Whether the Petitioner merits an award of remedies sought in the Petitioner together with costs.*

47. I have, however, considered the respective pleadings and submissions of the parties, as well as the oral testimony given by the petitioner and his witness. The petitioner's claim relates to events that occurred over 33 years ago today. His case is that he was an Air Force officer who was arrested in Nanyuki on 1st August 1982, held in Naivasha and Kamiti Prisons, and discharged from service. He alleges that he was tortured upon his arrest and during his incarceration at the Naivasha Prison, and that he was unlawfully discharged from service by an entity he had no contractual relationship with.

48. The petitioner's case thus falls into two limbs: the alleged violation of his constitutional rights under the former constitution, and the entitlement to his terminal benefits and withheld salary.

Termination of Employment and Entitlement to Benefits

49. The respondent has opposed the petition on various grounds which I have set out above. With respect to the petitioner's second cause of action pertaining to his employment, the AG's argument is that the Court cannot deal with the matter as the issues of employment are reserved for the Employment and Labour Relations Court by Article 162 of the Constitution.

50. In the **USIU case (supra)** relied on by the respondent, Majanja J expressed the following view:

[45.] "In light of what I have stated, I find and hold that the Industrial Court as constituted under the Industrial Court Act, 2011 as (a) court with the status of the High Court is competent to interpret the Constitution and enforce matters relating to breach of fundamental rights and freedoms in matters arising from disputes falling within the provisions of section 12 of the Industrial Court Act, 2011."

51. It appears to me that the petitioner would have been well advised, should he have desired to litigate his employment claim, to have lodged his matter before the Employment and Labour Relations Court which has the jurisdiction to determine the issue of employment, as well as the alleged violation of constitutional rights.

52. However, the court is also limited by the nature of evidence placed before it. I find that aside from the pleadings with respect to the alleged benefits and the allegations relating to the certificate of discharge, and the summary of salary alleged to have been withheld by the state, there is very little before the Court that can enable it to determine the issues related to the petitioner's employment, even had it the jurisdiction to do so. I will therefore say no more on this issue.

Violation of Constitutional Rights

53. The second core issue relates to the alleged violation of rights under the former constitution. The petitioner alleges that he was arrested, detained and tortured in Naivasha and Kamiti Prisons.

54. It is not, I believe, disputed that the former constitution prohibited the arbitrary deprivation of liberty or the infliction of torture, cruel and degrading treatment or punishment. Section 72 contained the provision with respect to the right to liberty as follows:

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

55. The section then gave the instances in which deprivation of liberty was permissible, which include the execution of a sentence or order of a Court in respect of a criminal offence, for contempt of court, or in execution of the order of a court made to secure the fulfilment of an obligation imposed on a person by law. In addition, section 72(3) provided that a person held with a view to bringing him before a court was to be so brought within reasonable time, and if not brought within 24 hours except with respect to a capital offence, where the period provided was fourteen days, the state had a responsibility to explain why he was not so brought.

56. With respect to the prohibition against torture, section 74 provided as follows:

74. (1) No person shall be subject to torture or to inhuman or degrading punishment or other treatment.

57. In the present case, there is nothing placed before the Court to support the petitioner's allegation that he was arrested, detained and tortured. He alleges that he was arrested in Nanyuki, then was held at Naivasha and Kamiti Prisons, during which period he was tortured. He alleges that he was arrested on 1st August 1982, and released on a date in March, 1983. He testified that he did not have any documents to establish this claim, nor had he made any effort to procure such documents.

58. With respect to the alleged torture, he states that he suffered two swellings on his jaw, one of which started a year after his release from prison, and the other sometime in 2013/2014. He states that he was treated in hospital, but did not have medical records to show the connection between the alleged torture and the swellings that he testified occurred a year and thirty two years respectively after the alleged acts of torture.

59. The Court has sympathy for those who were indeed victims of the inhumane acts perpetrated on citizens by state agents in the aftermath of the 1982 coup attempt and the two decades of dictatorship that followed it. However, it recognizes that it cannot accept every claim, however tenuous, simply because a party lodges it against a state entity. At the end of the day, a party alleging violation of rights must bring some evidence on the basis of which the Court can reasonably say that a claim has been made out.

60. In this case, not only is there no evidence of the petitioner's arrest, but the testimony of witnesses before the Court with regard to the alleged torture of the petitioner and the consequences thereof is so contradictory that it cannot possibly be given any credence. The petitioner alleges that he suffered two swellings as a result of torture, one a year after his release, the other 33 years later. His medical evidence is that he suffered post-traumatic stress disorder as a result of torture. No linkage is made between the swellings and the post-traumatic stress disorder, or how the swellings and the times of their occurrence can be linked to the alleged torture. I am therefore unable, in the circumstances, to find a violation of the petitioner's rights as alleged.

Whether there has Been Inordinate Delay in Lodging this Petition

61. I now turn to consider the last issue that arises in the petition: the question of inordinate delay in lodging the petition. There is no dispute that the events complained of took place in 1982, 32 years prior to the filing of the petition. The respondent argues that there has been inordinate delay in lodging the petition, while the petitioner argues that there is no time limitation with respect to constitutional petitions. The respondent has argued, however, that the Court ought to reconsider the position in which it has allowed petitions that have been brought inordinately late. However, in my view, the statement of the jurisprudence on this position by both the petitioner and respondent are, in my view, mistaken, as a consideration of several decisions will illustrate.

62. In **Petition No. 468 of 2014- Wamahi Kihoro Wambugu vs The Attorney General**, this Court expressed the following view:

*“Then there is the period it has taken the petitioner to file this petition. It was filed on 18th September 2014, more than 28 years after the alleged events. The petitioner alleges that he did not file his claim because there was a repressive government in place. However, as pointed out by the respondents, there have been more than three changes in government in the twelve years or so preceding the filing of the petition. A large number of petitions alleging violation of constitutional rights have been filed as far back as 2003 and 2004 by persons who had been arrested, held in Nyayo House, tortured and jailed. Cases in point include the two decisions relied on by the petitioner in his submissions- that of **Mugo Theuri vs Attorney General** and **Simon Maina Waweru vs Attorney General**. The delay may have been as a result of the petitioner's own doubts about the credibility of his claim. Whatever the reason, however, this is one of the cases in which I would agree with the reasoning of Nyamu J (as he then was) in the case of **Lt. Col. Peter Ngari Kagume vs Attorney General (supra)** when he stated:*

“I do not wish to give a specific time frame but in my mind there can be no justification for the Petitioners delay for 24 years. A person whose constitutional rights have been infringed should have some zeal and motivation to enforce his or her rights. In litigation of any kind, time is essential as evidence may be lost or destroyed and that is possibly the wisdom of time limitation in filing cases.”

63. In **High Court Petition No. 306 of 2012 Ochieng' Kenneth K'Ogutu vs Kenyatta University and 2 Others**, it was observed that:

“[35] As I conclude this matter, I will address the issue of delay in filing this petition. The respondent has argued that the petitioner is guilty of inordinate delay, and I am inclined to agree with it. The events complained of took place more than 12 years ago. There is nothing before the court that explains or justifies the delay in coming to court to vindicate his rights. The petitioner's counsel submitted that he was so traumatised that he could not come to court before, but I can see no basis for this submission. While the petitioner alleges that he was arrested and charged, and that he served for 15 days before his fine was paid, I cannot see any basis for alleging that he was so traumatised that it has taken him 12 years to recollect that he had a claim against the respondents. While the

reason for delay in cases such as those involving the Nyayo House torture cases may be acceptable, at least for a time, that they were not able to file claims because of the politically repressive climate then prevailing, there is no such justification in this case. Even had I found that the facts demonstrated a violation of the petitioner's rights (which I have not), I would have had difficulty in excusing the 12 years' delay in this matter.

[36] There is a great danger that parties are abusing the constitutional protection of rights to bring claims before the court whose sole aim is enrichment rather than vindication of rights. A delay of 10 years or more before one comes to court to allege violation of rights is clearly not justifiable. As Nyamu J observed in Abraham Kaisha Kanzika and Another vs Central Bank of Kenya (supra): "Even where there is no specified period of limitation it is proper for the court to consider the period of delay since the accrual of the claim and the reasons for the delay. An applicant must satisfactorily explain the delay. In this case a delay of 17 years is inordinate and it has not been explained. The prosecution of the claimant took 6 years and although he gives this as the reason for the delay he has not explained the balance of eleven years.

In my view failure by a Constitutional Court to recognize general principles of law including, limitation expressed in the Constitution would lead to legal anarchy or crisis. It would also trivialize the constitutional jurisdiction in that applicants would in some cases ignore the enforcement of their rights under the general principles of law in order to convert their subsequent grievance into a "constitutional issue" after the expiry of the prescribed limitation periods." (Emphasis added)

64. In **Joseph Migere Onoo vs Attorney General, Petition No. 424 of 2013** this Court held that the petition was barred owing to the fact that it had been filed 27 years later. Here the petitioner had filed the suit against the Government of Kenya alleging violations of various constitutional rights, violations which he averred occurred following his alleged arrest and torture in various places in 1986, when he was a student at Egerton University. In this case, this Court, while dismissing the petition, made the following observation:

[39] "The principle that emerges from the cases cited above is 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 defence.

[40] In the present case, the acts complained of took place some 29 years ago, and the petition was filed 27 years after the alleged events. No explanation has been proffered for the delay, or to explain or justify the institution of proceedings at this point in time. The petitioner contented himself with maintaining that there is no limitation in petitions such as this."

65. In the case of **James Kanyiita Nderitu v Attorney General and Another, Petition No. 180 of 2011**, Majanja J held as follows:

[45.] "Before I consider the facts as presented, I must state that it is well established the law concerning limitation of actions cannot be used to shield the State or any person from claims of enforcement of fundamental rights and freedoms protected under the Bill of Rights (See Dominic Arony Amolo v Attorney General Nairobi HC Misc. 494 of 2003 (Unreported), Wachira Waheire v Attorney General Nairobi HC Misc. Civil Case no. 1184 of 2003 (OS) [2010]eKLR, Otieno Mak'onyango v Attorney General and Another Nairobi HCCC No. 845 of 2003 (Unreported)). Although there is no limitation period for filing proceedings to enforce fundamental rights and freedoms, the court in

considering whether or not to grant relief under section 84 of the Constitution, is entitled to consider whether there has been inordinate delay in lodging the claim. The Court is obliged to consider whether justice will be served by permitting a respondent, whether an individual or the State in any of its manifestations, should be vexed by an otherwise stale claim. Just as a petitioner is entitled to enforce its fundamental rights and freedoms, a respondent must have a reasonable expectation that such claims are prosecuted within a reasonable time. The words of Didcott J. in *Mohlomi v Minister of Defence* [1996] ZACC 20, 1997 (1) SA 124, 129 are apposite in this regard, "Inordinate delays in litigating damage the interests of justice. They protract the disputes over rights and obligations sought to be enforced, prolong the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of those whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken." (See also *Kenya Bus Service Limited and Another v Minister for Transport and Others* HCCC No. 504 of 2008 [2012]eKLR)."

66. In determining that the petition before him was not merited, the Honourable Judge concluded as follows:

[46.] "Whether such a claim should be permitted is a question of fact dependent on the circumstances of each case. In the matter of *Lt. Col. Peter Ngari Kagume & Others vs Attorney General, Nairobi Constitutional Application No. 128 of 2006* [2009] eKLR where Nyamu J. considering the issue of delay in filing a suit for the enforcement of fundamental rights and freedoms observed that, "The petitioner had all the time to file their claim under the ordinary law and the jurisdiction of the court but they never did and are now counting on the constitution. None of the petitioners has given any explanation as to the delay for 24 years. In my view the petitioners are guilty of inordinate delay and in the absence of any explanation on the delay; this instant petition is a gross abuse of the court process In view of the specified time limitation in other jurisdictions the court is in a position to determine what a reasonable period would be for an applicant to file a constitutional application to enforce his or her violated fundamental rights. I do not wish to give a specific time frame but in my mind, there can be no justification for the petitioners delay for 24 years. A person whose constitutional rights have been infringed should have some zeal and motivation to enforce his or her rights. In litigation of any kind, time is essential as evidence may be lost or destroyed and that is possibly the wisdom of time limitation in filing cases."

[47.] The petitioner has held his grievance about his arrest and detention since 1985. These facts were known to him throughout the trial and appeal from the conviction. I also note that during the time the petitioner was fighting criminal proceedings, he was also pursuing litigation through his companies in *Intercom Services Ltd, Interstate Communications and Services Ltd, Swiftair (K) Ltd, Kenya Continental Hotel Ltd and James Kanyiita Nderitu v Standard Chartered Bank Kenya Limited Nairobi HCCC No. 761 of 1985* (See *Standard Chartered Bank Ltd v Intercom Limited and Others CA Civil Appeal No. 37 of 2003* [2004] eKLR which determined the matter). I have perused the pleadings in that case which have been amended several times. In the further re-amended plaint 26th September 2000, the plaintiffs aver at paragraph 14. "As a result of the said breach, the 5th plaintiff in his official capacity as the managing director of the 1st, 2nd, 3rd and 4th Plaintiffs was arrested, charged and prosecuted in the Chief

Magistrate's Court at Nairobi Criminal Case No. 1716 of 1985. The accused (5th plaintiff) was subsequently acquitted on appeal."

[48.] The reason I have cited a part of the plaint in HCCC No. 761 of 1985 is that even at the time the suit was filed, the petitioner as the 5th plaintiff was clearly aware of the facts relating to his complaint. I do not think the petitioner has justified why he waited to lodge this claim after 26 years. In other cases where the period has been excused, the parties have justified the reasons why the case could not be filed for a long period of time."

67.I take the view that the correct position in law is that the Court must consider the facts and circumstances in each case in determining whether a matter has been brought after inordinate delay, and in doing so, it must bear in mind the explanation given for the delay. In this case, no explanation was proffered. As was submitted by Counsel for the state, it is prejudicial to the state, and therefore to the general public, for parties to sleep on their rights and then wake up, decades later, with no explanation for the delay, and allege violation of rights.

68.In the circumstances, I am constrained to find that not only has the petitioner in this case failed to establish a violation of his constitutional rights, he was also guilty of inordinate delay in lodging his petition.

69.The petition is therefore dismissed, but with no order as to costs.

Dated Delivered and Signed at Nairobi this 29th day of February 2016

MUMBI NGUGI

JUDGE

Mr. Jaoko instructed by the firm of Achola Jaoko & Co. Advocates for the petitioner.

Mr. Kamunya instructed by the State Law Office for respondent.