REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.209 OF 2013

BETWEEN

MICHAEL MAINA KAMAMI…….. 1ST PETITIONER

KOIGI WAINAINA…….. 2ND PETITIONER

AND

THE ATTORNEY GENERAL……..... RESPONDENT

JUDGMENT

1. The Petitioners in their Petition dated 15th April, 2013 describe themselves as male adults of sound mind and have instituted the present proceedings against the Attorney General (hereafter 'AG') of the Republic of Kenya as the legal representative of the Government in civil proceedings, alleging various violations of their constitutional rights as a result of events that occurred sometime in 1992.

The Petitioners' Case

2. Their cases are contained in their respective affidavits sworn by them on 13th April, 2013 in support of the Petition. Their Affidavits are similar in content.

3. Their case was that on 3rd March, 1992, when they were at Uhuru Park's Freedom Corner in a peaceful campaign for the release of Koigi Wa Wamwere and 53 other political prisoners in Kenya, they were brutally battered with boots and batons, slaps, rubber whips, kicks and blows all over their bodies by Police Officers and General Service Unit Officers. They were also tear gased and on the same day at 9:45 pm, while at Freedom Corner, in a tent, fasting for the release of the said prisoners, they were brutally arrested by over 100 Police Officers and General Service Unit officers and bundled into a police vehicle, the 'Black Maria', and taken to their respective rural homes in Nakuru County.

4. They alleged that the brutality and atrocities they and supporters of the release of political prisoners' campaign were subjected to was not justified because on 28th February, 1992, they and others had visited the Attorney General's office and presented a Petition addressed to the Government for the release of the said political prisoners. They further argued that they, peacefully without any weapons, camped and stayed at the Freedom Corner on 28th February, 1st

March, and 2nd March, 1992 while waiting for the Government, through the AG, to respond to their Petition.

5. Their case was also that as peaceful as they were, the sudden and intense brutality that was unleashed on them on 3rd March, 1992 by the Police Officers and General Service Unit officers took them by surprise; the level of the brutality and violence was horrifying and left them badly injured and some like the late Prof. Wangari Maathai, were taken to hospital, unconscious. They contended further that the brutal breakup of their peaceful campaign was an exercise in futility because after one to five days in their rural homes they went back to Nairobi and began their peaceful campaign and hunger strike afresh at the All Saints Cathedral Church compound vowing that the brutal Police forces could as well kill them in solidarity rather than give up their crusade. In this regard, their deposition was that they were hosted in a bunker at the said Cathedral from 4th March, 1992 to 19th January, 1993 when all the 53 political prisoners were released between 24th June, 1992 and 19th January, 1993; and that the aforesaid officers continued to attack and inflict injuries on them while inside the Cathedral and outside the bunker for all the ten months they had camped there.

6. Based on the foregoing, their case was that their physical, psychological and economic and political lives were gravely affected as they were tortured for being human rights activists/supporters of the release of all political prisoners and as a result, they suffered, and continue to suffer torture, trauma, pain and damage.

7. For the above reasons, the Petitioners pray for the following orders:

> ***"(a) A declaration that the two Petitioners' fundamental rights and freedoms from torture were contravened and grossly violated by the Respondent's Kenya Police Officers and General Service Unit Officers, who were Kenyan Government servants, agents, employees and in its institutions on diverse dates and times on 3rd March 1992 up to 19th January, 1993.***
>
> ***(b) A declaration that the two Petitioners are entitled to the payment of general damages, exemplary and moral damages and compensation for the violations and contraventions of their fundamental rights and freedoms from torture under Article 23 (3) of the Constitution, 2010.***
>
> ***(c) General damages, exemplary and moral damages for torture for each Petitioner.***
>
> ***(d) Any further orders, writs, directions, as this Honourable Court may consider appropriate.***
>
> ***(e) Costs of the suit, and interest."***

The Respondent's Case

8. In a Replying Affidavit sworn on his behalf on 21st July, 2014, by one, Philip Ndolo, the Deputy Director of operations in the Kenya Police Service, the AG opposed the Petition.

9. Mr Ndolo deponed in that regard that the contentions by the Petitioners are misconceived, unsubstantiated, and bad in law and they are put to strict proof thereof. That the **Constitution 2010** does not apply retrogressively, and so, the Petitioners can only rely on rights in the **Repealed Constitution** and not the current one. Further, that they were never in police custody and the Kenya Police Service is a stranger to the allegations by them in that regard. In any event, that the Petitioners have not disclosed the names and identity of the plain clothed police officers who allegedly arrested them and so their allegations cannot be attested to.
10. The AG's further case was that there are no medical reports to ascertain/prove the Petitioners'

alleged torture claims or that they suffered police brutality and without such documents to corroborate their averments, the same remain mere allegations, and the Court cannot prove the authenticity of the said claims. Further, that he is highly prejudiced in defending the Petition given that the alleged cause of action occurred over twenty three years ago and in any event, the Petition does not disclose any cause of action against him and should be dismissed with costs.

The Parties' Submissions

For the Petitioners

11. In their Written Submissions dated 27th July, 2015, the Petitioners stated that a number of their rights were infringed including their rights under **Section 74** of the **Repealed Constitution**, which has been transited and is preserved in **Articles 25** and **29** of the **Constitution, 2010**. Their submission in that regard was that whereas the Kenya Police and General Service Unit officers were entitled to arrest them on suspicion of committing any cognizable criminal offense, they had no lawful power to unleash violence, torture, throw tear gas at them, brutalize or batter them with boots, batons, slaps, rubber whips, kicks and blows all over their bodies. These actions, they argued, amounted to a deprivation of their fundamental rights and freedoms arbitrarily or without just cause. Further, that whereas the police officers had powers to arrest and charge them before a competent Court as is provided in **Article 49** of the **Constitution**, they had no lawful power to deprive them of and violate their freedoms and security.

12. According to the Petitioners, torture was and is outlawed under the **Constitution 2010**, **Article 7** of the **International Covenant on Civil and Political Rights (ICCPR)**; and the **Convention Against Torture** and that although, the Repealed and the **Constitution 2010** do not give a definition of the term "torture", a plain meaning of the term must be sought from a dictionary and domesticated Human Rights Statutes, Human Rights Instruments and Human Rights Conventions which have proffered the definition of the term. In this regard, they submitted that they have proved their case on a balance of probabilities and they are entitled to the declaratory orders set out above and general damages for torture, exemplary damages to punish the Respondent for its agents' unconstitutional conduct and costs of their Petition as prayed.

13. On the question of transnational justice, while defining transnational justice as a judicial process after a period of constitutional transition from a past authoritarian system characterized by bad constitutional arrangements, and where the victims of past human rights abuses are facilitated to get reparation, redress and compensation, it was their submission that the issues of redress for violation of the fundamental rights and freedoms which are also human rights fall under the doctrine of transnational justice where historical injustices are redressed through *inter alia*, this Court. They thus contended that **Article 20** of the **Constitution** mandates this Court to adopt an open-door policy to human rights litigation and not the previous gate-keeper policy where human rights litigation was checked by a narrow interpretation that favours the perpetrators or the State as the liable party.

14. That **Article 22** of the **Constitution** also refers to all past human rights violations and fundamental rights and freedoms hence claims for violations committed in 1992 and 1993 can still be filed by litigants and that the door for transitional justice and redress of historical injustice actually commenced from 27th August, 2010 under the transitional justice clause in the Bill of Rights itself. That transnational justice in that context ensures that the wounds of victims are healed through legal redress, the public officers in future inevitability avoid repeat of the human rights abuses of the past and that there is hope for a peaceful future respect for human rights and the Rule of Law.

15. The Petitioners also expressed the view that the **Constitution, 2010** and even the **Repealed Constitution** do not limit the time for filing constitutional references and human rights cases founded on violation of fundamental rights and freedoms; and that this Court and the Court of Appeal have in over 100 torture cases ruled that there is no limitation period envisaged in the

Repealed and the current Constitutions and in international human rights law and conventions and all human rights instruments which are the basis of the present Petition. In this regard, their argument was further that if there was any strong intention to limit the period for litigation over fundamental rights and freedoms, the drafters of the Constitution at Bomas of Kenya as well as Kenyan citizens during the public participation before the 2010 Referendum could have simply and expressly provided for a limitation period and also expressly excluded past human rights violations in the current Constitution.

16. Lastly, they submitted that their evidence has not been rebutted hence they are entitled to the prayers in their Petition and that the Court should be guided by the decision of the Court of Appeal in **Nairobi, Civil Appeal No 86 of 2013, Koigi Wa Wamwere vs The Attorney General**, in determining the quantum of damages to award them.

For the Respondent

17. The Respondent on his part, through his Written Submissions dated 25th June, 2015, controverted the Petitioners' assertions and submitted that their allegations are baseless, obnoxious and vexatious and are borne out of malice, opportunism and herd mentality. That the Petitioners have also not proved their case on a balance of probabilities as no medical notes as evidence have been tendered and that it is difficult to comprehend how any of them survived the aforementioned torture and/or brutality from police officers from 3rd March, 1992 until 19th January, 1993, a period of close to one year.

18. The AG also took the position that the lack of the aforesaid evidence is a strong indicator that the Petitioners' testimonies must be subjected to legal scrutiny so that they prove their assertions on a balance of probabilities. That in any event, they were never tortured and the police officers only did their duty to the State by dispersing unruly crowds on the material dates and the same cannot amount to torture since it is the duty of the police to maintain law and order at all times and demonstrations are dispersed every other day in Kenya and such demonstrators do not go to court alleging that the act of dispersing them amounted to torture.

19. While relying on **Lt Col. Peter Ngari Kagume and Others vs Attorney General, Petition No. 128 of 2006**, the AG asserted that when a court is faced with a scenario where one side alleges something and the rival side disputes the same, the one alleging assumes the burden to prove the allegation. As such he contended that the Petitioners have a duty under **Sections 107** and **109** of the **Evidence Act, Cap 80** to prove their allegations on a balance of probabilities which they have failed to do.

20. While placing further reliance on **Maharaj vs Attorney General of Trinidad and Tobago**, **(No 2) PC [1979] AC 385**, the AG submitted that damages in constitutional matters are not meant to restore a person to the state that they were in before the alleged incident as is the principle in tortuous claims but to give just satisfaction. Further, that in granting relief, the Court should apply the principle that if there is any other remedy in addition to damages, that other remedy should usually be granted initially and damages should only be granted in addition, if necessary, to afford just satisfaction. The Court should not also award exemplary or aggravated damages and that any award should be of no greater sum than that necessary to achieve just satisfaction and the quantum of damages should be moderate and normally on the lower side in comparison to tortuous awards.

21. The AG concluded by submitting that the doctrines of equity are still alive in our realm and therefore he who comes to equity must come with clean hands and the Petitioners are not entitled to the prayers sought as they have failed to prove their cases to the required standard. That whereas this Court also has a constitutional mandate to protect and safeguard the rights and freedoms of the individual, the Petitioners must demonstrate to the satisfaction of the Court that their rights were violated but they have failed to do so.

22. Lastly, that the Kenyan judicial system is adversarial and where parties to a suit are judged based

on the evidence tendered before Court and the Court should not allow itself to be arm twisted by litigants who take opportunities to reap where they did not sow. That therefore the Petition ought to be dismissed.

Determination

23. I should note that this is only one in a series of Petitions where allegations of violations of rights are made in the same words, circumstances and pleadings. The pleadings and submissions are infact a replica of each other. I am making specific reference to Petitions such as **No. 196 of 2013, (Monica Wangu Wamwere vs Attorney General)** and **No. 197 of 2013 (Priscilla Mwara vs Attorney General)**. Save for one or two alterations, they are all a cut and paste job of each other. That fact notwithstanding, each Petition must be determined on its own merits and in its own circumstances, and I note that in the present Petition, the key issue for determination is whether there has been a violation of the Petitioners' constitutional rights and the remedies available to them, if any. Before I proceed on to that substantive issue, I must address my mind to the preliminary issue raised by the Respondent that the Petition is time-barred having been brought more than 20 years after the incident complained of. This is an important issue to address in view of the continued submission by the AG on this issue and to give guidance to Parties in the future.

The Doctrine of Limitation of Time in Constitutional Petitions alleging violations of fundamental Rights and Freedoms

24. What is the position of our Courts in addressing the above issue? In **Joan Akinyi Kabasellah and 2 Others vs Attorney General, Petition No 41 of 2014** the Learned Judge observed that:

> **"[24]** ***Nonetheless, I take into account the views of the court with regard to limitation in respect of claims for enforcement of fundamental rights. In a line of cases such as 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 (unreported), Courts have consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights.***
>
> **[25]** ***I note also the sentiments of the court in James Kanyiita vs Attorney General and Another, Nairobi Petition No. 180 of 2011 that: 'Although there is no limitation period for filling 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.'***
>
> **[26]** ***In the present case, I am satisfied that no prejudice has been occasioned to the respondent by the filling of the present claim***." (Emphasis added)

25. I agree with the Learned Judge and I also note that in **High Court Petition No.306 of 2012 Ochieng' Kenneth K'Ogutu vs Kenyatta University and 2 Others, the Court stated thus;**

> ***"[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."

The Court then addressed the effect of such delays, in the following terms:

"[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."

It then concluded thus:

"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."

26. In addition to the above, I note that in **Joseph Migere Onoo vs Attorney General, Petition No. 424 of 2013** while dismissing the Petition, the Learned Judge made the observation that:

"[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***."

27. I have further noted that in ***Gerald Gichohi and 9 Others vs Attorney General Petition No. 487 of 2012*** *the Court appreciated that in a time of constitutional transition such as the present times, the Courts and the State ought to look to the past and address any historical injustices that are brought to their attentition. The Learned Judge stated* thus in that regard:

"It is true that the State today cannot shut its eyes for the failings of the past. It must pay the price for its historical faults. I must also agree with the Petitioners' submission that the instant petition should be approached in the context of transitional injustices especially now that there is a new dispensation under Constitution 2010. Time is ripe for addressing past injustices that included gross violations of fundamental rights and freedoms as witnessed in the past."

28. In agreeing with the above decisions, I also understand that the constitutional spirit is premised on the dictates of transitional Justice which refers to the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human

rights abuses, with Kenya being no exception. These measures include criminal prosecutions, truth and justice commissions, reparations programs, and various kinds of institutional reforms. This however, in my view, cannot be a carte blanche for raising stale claims after a number of years without a justification for the delay in filing such claims. It is imperative for a Petitioner to demonstrate some justification for such prolonged delays especially in light of the fact that the avenues and mechanisms for addressing such violations were already in existence after the change of the alleged oppressive regime of governance.

29. I hold so bearing in mind that as early as the year 2003, persons aggrieved by the acts of the Moi Regime approached the courts for redress pertaining to alleged violations of their constitutional rights and fundamental freedoms. These include **Stanley Waweru Kariuki vs Attorney General, Petition 1376 of 2003; Gitari Cyrus Muraguri vs Attorney General, Miscellaneous Case No.1185 of 2003 (OS); Harun Thungu Wakaba vs Attorney General, Nairobi, Miscellaneous Application 1411 of 2004; Rumba Kinuthia vs Attorney General; Nairobi HCCC 1408 of 2004, Mugo Theuri vs Attorney General, HC Misc. Civil Case No 565 of 2005; David Njuguna Wanyoike vs Attorney General**, **Petition No. 729 of 2006; Oduor Ong'wen and 20 Others vs Attorney General, Petition No. 777 of 2008; Charles Gachathi Mboko vs Attorney General**, **Civil Case No. 833 of 2009 (O.S.); James Omwega Achira vs Attorney General, Petition 242 of 2009; Mwangi Mathenge vs Attorney General, Petition 240 of 2009; and Koigi Wamwere vs Attorney General, Petition 737 of 2009 among many others.**

30. **The foregoing further indicates that the cases alleging violations by the oppressive regime have been filed from 2003 onwards even before the promulgation of the Constitution of Kenya, 2010.**

31. It is however becoming the obvious, the above notwithstanding, that there is now a clear pattern of parties, who had an opportunity to come to Court in good time, to do so after many years of inaction and give no reasons for so doing. That is why the Court in **Charles Gachathi Mboko vs Attorney General, Civil Case No.833 of 2009 (O.S.), warned against the dangers of allowing claims brought long after the fact without explanation. The Court stated as follows:**

> ***"It must however go on record that although this Court has been lenient on parties that seek redress for violation of fundamental rights in past political regimes, it is obvious that the Court's indulgence is being abused by parties that have slept on their rights and give no serious explanations for the delay. In subsequent matters, obviously that issue will be at the fore of the Court's consideration of any claim***."

32. I agree and as I close on this question, I must state that the length of delay is not the issue *per se.* Acceptability of the explanation proffered by a party should only be one of the criterion which may warrant a Court to condone such delay. Is there any such explanation in this Petition? I submit that no explanation has been given by the Petitioners to warrant any favourable finding but like this Court has done in previous cases of this kind, it will proceed and examine the evidence tendered and determine whether, despite the obvious delay, the alleged violations were such that in addressing historical injustices, this Court nonetheless has to give a remedy.

33. In that regard, I have read the evidence contained in the Petitioners' Affidavits and I also note their oral testimony before this Court. I also note that, like others before them, they placed substantive reliance on a newspaper article in ***The Society Magazine of 23rd March, 1992***, attached to their Petition, as part of their evidence in support of their Petition the said article merely referred to the fact that the police dispersed, violently, a group of people at Freedom Corner who were agitating for release of political prisoners. Are newspaper articles admissible as evidence in Petitions alleging violations of rights and fundamental freedoms? I must answer the question by making reference to **Section 107** of the **Evidence Act** provides that:

> ***"(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

34. **Section 109** of the **Evidence Act** further stipulates that:

> ***The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person***.

35. The above provisions have received judicial pronouncements for instance in the case of **China Wuyi and Co Limited vs Samson K Metto [2014] eKLR, Civil Appeal No 181 of 2009**, where it was stated that:

> "***The cardinal principle of law that, 'he who alleges must prove' is also well captured in Sections 107 to 109 of the Evidence Act."***

36. As regards documentary evidence, **Section 35** of the **Evidence Act** is to the effect that:

1. ***In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, in production of the original document be admissible as evidence of that fact if the following conditions are satisfied that is to say-***

a. ***If the maker of the document either-***

i. ***Had a personal knowledge of the matter dealt with by the statement; or***

ii. ***Where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters***;

37. In **Tesco Corporation Ltd vs Bank of Baroda (K) Limited, Civil Case 182 of 2007** the Court was then faced with the question of the admissibility of a report contained in a newspaper. The Learned Judge expressed the view thus:

> "***The real question for consideration and decision by this court is as to whether on the evidence it has been satisfactorily established that the plaintiff did part with the possession of the premises or any part thereof to any one in a manner to constitute a breach of contract. The only evidence relied upon by the applicant is a newspaper report contained in the Daily Nation of 19th November, 2007. The issue here is admissibility of documentary evidence as to the facts in issue.***
>
> ***The provisions of Section 35 of the Evidence Act are clear on this issue…***
>
> ***Having considered the application in light of the affidavit evidence and submissions by both counsel and the relevant law, I am not persuaded that the newspaper report is covered under the provisions of Section 35 of the Evidence Act***."

38. Similarly in **Kituo Cha Sheria and Another vs Central Bank of Kenya and 8 Others, Petition No 191 of 2011, Consolidated with Petition No 292 of 2011,** it was noted that:

> **"[32]** ***As correctly pointed out by the Attorney General and the 1st respondent, the petition has its basis in a newspaper article and documents which have not been executed. Clearly, therefore, the primary documents that the petitioners rely on are of doubtful probative value, as submitted by the respondents in reliance on the case of Wamwere vs The***

A.G and Randu Nzau Ruwa and 2 Others –vs- Internal Security Minister and Another (2012) eKLR. If I may borrow the words of the court in the Ruwa case, with tremendous respect to the petitioners, these media articles, taken alone, are of no probative value and do not demonstrate any effort on the part of the petitioners to demonstrate violation of the Constitution by the respondents.

[33] ***The first is a newspaper article from the Daily Nation of October 19 2011. The second is an unsigned, undated agreement referred to as a "Share Sale and Purchase Agreement". The third is the lease between Central Bank and Thomas De La Rue Kenya Limited entered into in 1992, while the fourth document is titled "De La Rue Currency and Security Print Limited Statement of Financial Position as at March 2009".***

[34] ***The petitioners have alleged violation of public procurement laws. On the basis of the documents before me, it is difficult to see how such violation occurred. There is no evidence that the alleged contracts had been entered into, and if they had, whether the process was indeed in violation of the law that regulations procurement***."

(See also **Michael Sistu Kamau and 12 Others vs Ethics and Anti-Corruption Commission and 4 Others [2016] eKLR**)

39. The foregoing makes it quite clear on the inadmissibility of newspaper articles and cuttings and I do not see any reason to depart from the holding therein. I say so well aware that **Rule 10 (3)** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules** provides as follows:

> "***Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom***."

Rules 9 and **10** do not depart from the requirements that only admissible documents should be the basis of any credible evidence.

40. Further to the above and even if newspaper cuttings were to be admitted as evidence, by dint of the **Evidence Act**, as I have reproduced herein above, the Petitioners are under an obligation to prove their case on a balance of probability. In this regard, whereas the Petitioners made various assertions that they were tortured, i.e. that they were subjected to **"inhumane and brutal battery with boots, batons, slaps, rubber whips, kicks and blows all over their bodies; attacks by over 100 Kenya Police Officers and General Service Unit officers"** which they further alleged occurred continuously from 3rd March, 1992 to 19th January, 1993, no material evidence was placed before this Court to corroborate their averments. Perhaps medical records would have sufficed in that regard but none were produced. The length of the alleged torture would certainly also have had catastrophic effects on their physical well-being but that allegation was very casually made.

41. Interestingly however, in their oral evidence and during cross-examination, the Petitioners admitted that they did not seek any medical attention despite the aforesaid attacks by over 100 officers for a continuous period of about ten months. This in itself raises a lot of questions in regard to their assertions. I saw them in Court and I am convinced that their assertions were less than candid.

42. Based on my reasoning above, I am unable to reach the conclusion that the Petitioners have made out a case for violations of their rights as alleged.

Conclusion

43. It is now no longer a matter of debate that in 2002 after the change of regime in Kenya, hundreds

of claims have been filed by genuine victims of historical injustices. The Kenyan Judiciary, admitting its role in shutting out many claims in the past, and in the spirit of transitional justice, opened its doors, relaxed its application of strict rules of evidence and granted appropriate reliefs under both the **Repealed Constitution** and the **Constitution, 2010**. One of the rules evidently relaxed was that of limitation of time. By this judgment, I have opined that whereas limitation of time may not be strictly applied, Parties coming to Court ten (10) years or more after the opening up of the floodgates of justice must explain themselves. It would therefore be very difficult for this Court to accept at face value claims filed after 2012 without clear and justifiable explanations for the delay. This is of course in addition to them providing credible evidence of the violations they may allege.

44. Abuse of the Court process by Parties intent on making money from the State relating to incidents that happened twenty or thirty years ago without proper explanations for the delay in instituting the claims may in fact face sanction from this Court. Genuine claims will and must however continue to receive the attention of the Courts for years to come.

Disposition

45. For the above reasons, i hereby dismiss the Petition herein but each Party shall bear its own costs.

46. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF APRIL, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Mr. Gitau for Petitioners

Mr. Obura for Respondent

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE