REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.196 OF 2013

BETWEEN

MONICAH WANGU WAMWERE …….. PETITIONER

AND

THE HON. ATTORNEY GENERAL ……..... RESPONDENT

JUDGMENT

1. In her pleadings, the Petitioner, Monicah Wangu Wamwere, describes herself as an 85 year old woman popularly known as "Mama Koigi", a warrior of conscience and a scarred veteran of Kenya's democratization struggle. She avers that her human rights struggles date from the Mau Mau war of liberation prior to the struggle for, the 2nd liberation in the 1970s, 1980s and 1990s. Further, that she is a political activist in her own right and the mother of Koigi Wa Wamwere who she avers was detained by both the 1st and 2nd Presidents of Kenya in the 1970s and the 1980s. She in this regard alleges that the aforesaid two detentions and resultant court cases in the 1990s engendered to her great personal suffering, physical torture, and psychological torture.

2. Additionally, that her own political activism and political consciousness, her great personal suffering, her physical and psychological torture and economic and political life was intertwined with being the mother of Koigi. She has thus instituted the present Petition against the Attorney General (hereafter "AG"), the Government's representative in civil suits, alleging various violations of her constitutional rights and fundamental freedoms. In her Petition dated 15th April, 2013, she specifically prays for the following:

a. ***A declaration that the Petitioner's fundamental rights and freedom from torture were each contravened and grossly violated by the Respondent's Kenya Police 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 Petitioner's fundamental rights and freedoms were controverted and grossly violated by the Respondent's Kenya Police and General Service Unit officers who were Kenyan Government servants, agents, employees and in its institutions on diverse dates and time when her houses were demolished and she was evicted from her plots in 1986, 1987 and 1988.***

c. ***A declaration that the Petitioner is 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.***

d. ***General damages, exemplary and moral damages for torture.***

e. ***Any further orders, writs, directions as this Honourable Court may consider appropriate.***

f. ***Costs of the suit and interest***.

The Petitioner's Case

3. In her Affidavit in support of the Petition sworn on 15th April, 2013, her case was that in June, 1986 her house was razed down by Kenya Police officers accompanied by the then area Councillor, William Lasoi, in Bahati Forest Settlement where she had been living after she had refused to persuade her son Koigi Wa Wamwere to return to Kenya from Sweden where he had sought political refuge.

4. She further contended that in October, 1987, after she had been allocated land known as plot No. 308 at Migogo Chonjo area by the Kenya Government, she built a house and stayed on the said plot for only a year before the house was demolished and the plot re-allocated to a senior criminal investigations officer.

5. Her case was further that in August, 1988, together with her husband, they built a house at Mboroni area but the same was similarly demolished by police officers and the plot in which the house stood was grabbed and allocated to a senior police officer in the Office of the President.

6. She also claimed that on 3rd March, 1992 while at Uhuru Park's Freedom Corner, in a peaceful camp for the release of Koigi Wa Wamwere, Charles Kuria Wamwere and 53 other political prisoners, she was brutally battered with tear gas, boots, batons, slaps, rubber whips, kicks and blows all over her body by Police officers and General Service Unit officers. That on the same day at 9:45 pm, while still at Freedom Corner in a tent, fasting for the release of the political prisoners aforesaid, she was arrested by over 100 police officers and bundled into a police vehicle, the 'Black Maria', and taken to Embakasi Police Station where she alleges to have slept in a cold police cell without food for two days.

7. Her case was also that the brutality and atrocities she and other women and supporters of the campaign for the release of political prisoners were subjected to by the police officers and the General Service Unit officers was not justified because on 28th February, 1992, they had visited the then Attorney General and presented him with a Petition addressed to the Government for the release of all political prisoners who had been jailed for political offences of treason, sedition or belonging to unlawful organizations during the dictatorial KANU one party regime because political pluralism had just been re-introduced.

8. The Petitioner further contended that she, together with other women at the Freedom Corner, on 28th February, 1st March and 2nd March, 1992 had no weapons and the only possessions they had were their clothes, blankets, water, Bibles, Hymnbooks and a tent which had been donated to them by well-wishers among them Prof. Wangari Maathai who in addition gave them moral support, food, clothing and water while they waited for the Government, through the AG, to respond to their Petition.

9. She alleged that as peaceful as they were, the sudden and intense brutality that was unleashed on them on 3rd March, 1992 by officers took her and the other women by surprise. That they were attacked by over 100 officers with tear gas, batons, and guns while unarmed which left them badly injured and some of them, like Prof. Maathai, were taken to various hospitals, unconscious. In this

regard, it was her further deposition that the brutal attack was perpetrated on 3rd March, 1992 between 4 pm to 9.45 pm and using the cover of darkness, 50 police women raided the tents where the women and men were hurdled, arrested and bundled the women into police vans before dispersing them to various police stations in Nairobi and then deported them back to their home districts.

10. In addition, that the brutal breakup of their fasting by the officers 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 vowing that the brutal officers could as well kill them in solidarity rather than give up their crusade. In this regard, they were hosted and camped in a bunker at the All Saints Cathedral from 4th March, 1992 up to 19th January, 1993 when all the political prisoners were released. They asserted that all this time, the officers continued to attack them while at the Cathedral and inflicted various injuries on them.

11. She finally deponed that her physical, psychological and economic and political life was messed up as she was tortured for being Koigi and Charles Kuria Wamwere's mother and in that regard she suffered and continues to suffer trauma, pain, loss of her house, lands and properties and damage.

The Respondent's Case

12. By a Replying Affidavit sworn on his behalf on 22nd May, 2014, by Philip Ndolo, the Deputy Director of Operations in the Kenya Police Service, the AG opposed the present Petition.

13. Mr. Ndolo, while denying the allegations by the Petitioners, deponed that the allegations are misconceived, unsubstantiated, and bad in law thereby putting the Petitioners to strict proof thereof.

14. He further deponed that the Constitution does not apply retrogressively and that the Petitioner can only rely on rights under the **Repealed Constitution**. That in any event, the Petitioner was never in police custody and the Kenya Police Service is a stranger to her claims and she did not disclose the names and identities of the police officers who allegedly contravened her rights. Further, that the allegations that she was kicked and beaten do not meet the threshold of the definition of torture pursuant to **Section 74** of the **Repealed Constitution** as well as under the **1984 Convention against Torture**.

15. Lastly, he deponed that the AG is highly prejudiced in defending the Petition given that the alleged cause of action took place over twenty two years before the Petitioner filed the present Petition and that old newspaper articles are not admissible and neither are they conclusive evidence in a court of law. In any event, that the Petition does not disclose any cause of action against the AG and it should be dismissed with costs.

The Parties' Submissions

For the Petitioner

16. The Petitioner in her Written Submissions dated 27th July, 2015, submitted that she was physically and psychologically tortured for exercising her fundamental rights and freedoms which was contrary to **Section 74** of the **Repealed Constitution**. She further contended that whereas the Respondent's officers were entitled to arrest her on suspicion of committing a cognizable offence, they had no lawful power to torture her by razing down her house in Bahati Forest Settlement in June, 1986 where she was living after she refused to persuade her son Koigi to return to Kenya from Sweden where he had sought political refuge. This, she argued was in violation of her rights as guaranteed under **Articles 25 (a)** and **29 (c), (d) and (f)** of the **Constitution, 2010** which were formerly protected in **Section 74** of the **Repealed Constitution**.

17. Her other submission was that the officers had no lawful power to evict her from her piece of land known as Plot No. 308 at Migogo Chonjo and demolish her house in October, 1987 and re-allocate the plot to a senior Criminal Investigation Officer; and to demolish her house at Mboroni in August, 1988, grab her plot and re-allocate the same to a senior officer in the Office of the President. These she alleged, were acts in violation of her freedom to property and to deprivation of the security of a person arbitrarily or without just cause under **Article 29** of the **Constitution**.

18. According to the Petitioner, torture was and is outlawed under the **Constitution**, **Article 7** of the **International Covenant on Civil and Political Rights (ICCPR)**; and the **Convention Against Torture** and in any event, the **Repealed** and the **Current Constitutions** do not give a definition of the term "torture" and therefore 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, her submission was that she has proved her case on a balance of probabilities and she is entitled to the declaratory orders above and general damages for torture as well as exemplary damages to punish the Respondent for its agents' unconstitutional conduct and costs of the Petition as prayed. Further, that her evidence clearly shows that her torturers were Police and General Service Unit officers who were all employees and servants of the Kenya Government which in fact has not been rebutted or controverted by the AG.

19. On the question of transnational justice, her submission was that transnational justice is a judicial process within a period of constitutional transition from past authoritarian system characterized by bad constitutional system. In that regard, victims of past human rights abuses are facilitated to get reparation, redress and compensation, through this Court.

20. She furhter 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 narrow interpretation that favoured the perpetrators or the State which was the liable party. That **Article 22** of the **Constitution** also refers to all past human rights violations and fundamental rights and freedoms and that the door for transitional justice and redress of historical injustice actually commenced from 27th August, 2010 under the transitional justice clauses of the Constitution and Human Rights Law including the Bill of Rights itself. That transitional justice further ensures that historical injustice and wounds of the victims are healed through legal redress, the public officers in future inevitability avoid repeat of the human rights abuse and that there is hope for a peaceful future respect for human rights and the Rule of Law.

21. The Petitioner in addition 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. That this Court in that regard as well as 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. Her 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 the Bomas of Kenya as well as Kenyans during the public participation before the 2010 Referendum could have simply and expressly provided for a limitation period and also expressly excluded past violations in the current Constitution.

22. Lastly, she submitted that her evidence has not been rebutted and she is entitled to the prayers in her 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

23. The AG in his Written Submissions dated 7th August, 2015 submitted that the Petitioner's

assertions are baseless, obnoxious and vexatious and are borne out of malice, opportunism and herd mentality. That the Petitioner has not proved her case on a balance of probabilities as no medical notes of evidence have been tendered in that regard and that it is hard to comprehend how she survived the aforementioned torture and/or brutality from the police officers from 3rd March, 1992 until 19th January, 1993.

24. The AG's position was further that the lack of the aforesaid evidence is a strong indicator that the Petitioner's testimony must be subjected to strict legal scrutiny. That in any event, she was never tortured and if the incidents occurred, the police officers only did their duty to the State by dispersing an unruly crowd 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.

25. 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 by a scenario where one side alleges and the rival side disputes any assertions, the one alleging any fact assumes the burden to prove the said allegation. As such he contended that the Petitioner has a duty under **Sections 107** and **109** of the **Evidence Act, Cap 80** to prove her allegations on a balance of probabilities which she has not.

26. 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, as is the principle in tortuous claims, but to give just satisfaction. Further, that in granting relief, the court applies the principles 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. That the Court should also not award exemplary or aggravated damages and that an award should be of no greater sum than that necessary to achieve just satisfaction. In addittiion, that the quantum of damages should be moderate and normally on the lower side by comparison to tortuous awards.

27. The AG concluded by submitting that the doctrines of equity are still alive and he who comes to equity must come with clean hands. That the Petitioner in that regard is not entitled to the prayers sought as she has failed to prove her case on merit and whereas this Court has a constitutional mandate to protect and safeguard the rights and freedoms of the individuals, the Petitioner must demonstrate to the satisfaction of the Court that her rights were violated. Lastly, that the Kenyan judicial system is an adversarial system where parties to a suit are judged based on the evidence tendered before a court and the court should not allow itself to be arm twisted by litigants who take opportunities to reap where they did not sow.

Determination

28. The key issue for determination in the present matter is whether there has been a violation of the Petitioners' constitutional rights as alleged and the remedies available to her, if any. Before I proceed on to the substantive determination of the matter however, I must address my mind to the preliminary issue raised by the Respondent that the present matter 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 submissions by the AG in previous cases on this issue and to give guidance to Parties in the future on that contentious question.

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

29. Over the last twelve years or so in cases such as **Dominic Arony Amolo vs Attorney General and Others, Misc Case No. 1184 of 2003 (OS)**, Courts have been confronted with the question of limitation of time in regard to Petitions such as the one before me. For instance in **Joan Akinyi Kabasellah and 2 Others vs Attorney General, Petition No 41 of 2014** the Learned Judge

observed as follows in addressing the issue:

> ***"[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)

30. While in that case, the claim was admitted inspite of obvious delay in instituting it, in **High Court Petition No. 306 of 2012 Ochieng' Kenneth K'Ogutu vs Kenyatta University and 2 Others, the Court observed thus;**

> ***"[35]... 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."***

As regards the effect of such delays, the court noted thus:

> ***"[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."***

The Court therefore concluded that:

> ***"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."

31. Further in **Joseph Migere Onoo vs Attorney General, Petition No. 424 of 2013** the Court while dismissing the Petition 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***."

32. From the above decisions and others, while the High Court has generally stated that no limitation of time can be imposed in matters where violation of rights has been alleged, many Judges have decried the filing of such Petitions after a considerable length of time had lapsed since the alleged violations occurred and it seems to me that emphasis has shifted on the fact that each case must be examined and gauged on its own merits. The question whether the delay is inordinate is therefore left to the discretion of each court which is to examine each case on its merit. Of great importance therefore for consideration at all times is the justification for any such delay.

33. It is also now an accepted truth that Kenyan Courts like the Executive have accepted that in times past, they have failed to address violations of constitutional rights even in obvious cases and thereby caused injustice to deserving litigants. That is why the holding in ***Gerald Gichohi and 9 Others vs Attorney General Petition No. 487 of 2012*** *remains true today. The Judge stated thus:*

> ***"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."***

34. I am in total agreement with the above decision and I dare add that Kenya has now embraced certain measures that must be applied in the proper circumstances of each case to redress these historical anomalies. The measures to be undertaken in that regard include criminal prosecutions, truth and justice commissions, reparations programs, and various kinds of institutional reforms. It is however imperative for a Petitioner to demonstrate some justification for any 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. I hold so bearing in mind that as early as the year 2003, persons aggrieved by the acts of the Moi Regime where most claims emanated from, have approached the courts for redress pertaining to alleged violations of their constitutional rights and fundamental freedoms during that Regime. 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.

35. **Turning back to the present Petition therefore and from the material before this Court, no clear justification has been given pertaining to the inordinate delay in presenting the present matter which was filed on 16th April, 2013 alleging violations that occurred in 1986, 1987, 1988, 1992, and 1993. In very brief evidence before this Court (and I noted her age and state of mind) the Petitioner did not allude to the matter at all although it was properly raised by the Respondent who claimed prejudice in defending the claim. In Mombasa Civil Case No. 128 of 1962, Rawal vs Rawal [1990] KLR 275** the Court addressed such prejudice in the following terms**:**

> ***"The effect of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time. It is not to extinguish claims."***

36. *Further, in* **Abraham Kaisha Kanzika alias Moses Savala Keya t/a Kapco Machinery Services and Milano Investments Limited vs Governor Central Bank Of Kenya and 2 Others, Misc Civ Appil 1759 of 2004 the Court** *observed that:*

> *"**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 case 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 limitations periods...".***

37. Juxtaposing the varied positions taken by the High Court on this subject, 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 and stated thus:**

> ***"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***."

38. As I close on this question, I must state that length of delay is not the issue *per se* but the circumstances of each case and the acceptability of the explanation proffered by a party is only of the criterion which may warrant a Court to condone such delay. Whereas there are cases in other jurisdictions as alleged by the Petitioner pertaining to violations of rights by old regimes such as the Nazis among others, it must be noted that each case alleging violation of constitutional rights and fundamental freedoms must be determined on its own merits and in its own circumstances.

39. In the present case, I am aware, and it was so pleaded, that the Petitioner is the mother of Koigi Wa Wamwere whose release amongst others she was agitating for in 1992. It is also common knowledge that the said Koigi had his own claim against the State many years ago and in fact one matter is still pending before the Supreme Court. It is difficult to understand in the circumstances why he did not institute his mother's and his siblings claim at the same time if the claim was genuine and well founded.

40. But suppose I am wrong and I should interrogate the evidence on record and determine the Petition on its merits. In that regard, save for the evidence contained in her Affidavit, the Petitioner, like all others before her who made claims that they were tortured at Freedom Corner,

has placed reliance on a newspaper article in the ***The Society Magazine, 23rd March, 1992***, attached to her Petition, as part of the evidence in support of the Petition. In previous Petitions, I have asked the question, are newspaper articles admissible as evidence in Petitions alleging violations of rights and fundamental freedoms? Like in these Petitions, I must answer the question in the negative by first addressing the burden of proof expected of any claimant because **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***.

41. **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***.

42. In applying the above provisions, in **China Wuyi and Co Limited vs Samson K Metto [2014] eKLR, Civil Appeal No 181 of 2009**, the Learned Judge 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.***"

43. As regards documentary evidence generally, including newspapers, **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***;

44. Specifically, in **Tesco Corporation Ltd vs Bank of Baroda (K) Limited, Civil Case 182 of 2007** the Court was faced with a similar question on the admissibility of a report contained in a newspaper. The Learned Judge expressed himself as follows:

> "***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."

45. 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***."

46. The above position finds favour in this Court and 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***."

47. Without saying more, **Rules 9** and **10** do not depart from the requirements that only admissible documents should be the basis of any credible evidence. In any event, I do not find that the definition of "informal documentation" in these Rules applies to newspaper cuttings.

48. In that context and apart from the above, has the Petitioner otherwise discharged the burden of proof bestowed upon her? It is apparent that by dint of the **Evidence Act**, as I have reproduced herein above, the Petitioner is under an obligation to prove her case on a balance of probability. In this regard, whereas the Petitioner made various assertions that she was tortured, i.e. that she was subjected to ***"inhumane and brutal battery with boots, batons, slaps, rubber whips, kicks and blows all over her body; attacks by over 100 Kenya Police Officers and General Service Unit officers"*** which she further alleged occurred continuously from 3rd March, 1992 to 19th January, 1993, no material evidence was placed before this Court to corroborate those averments. Where are medical records to corroborate such a claim? Like in other such cases, the length of the alleged torture would certainly have had catastrophic effects on her physical well-being at her age but that allegation was very casually made. While referring to Prof. Wangari Mathai who was infact rendered unconscious during the incident of 3rd March, 1992 and was hospitalised, the Petitioner made no mention of any treatment she received after the serious injuries she claimed to have received. In fact she was quick to point that she immediately returned to Nairobi after being

deported to her rural home without any evidence of injury.

49. When a Party alleges torture, the expectation of the law is that;

i. There must be evidence of severity of pain and suffering – see **Article 1** of the **Convention against Torture.**

ii. There must be an intent in reckless indifference to the possibility of causing pain and suffering- see **J. Burgers and H. Danelius, *The United Nations Convention Against Torture*, (Martinus Nijhoff, 1988) page 118.**

iii. Acts that do not cause extreme pain and suffering to an ordinary person are normally outside the definition of torture – see **Sarah Joseph and Melissa Castain, The International Covenant on Civil and Political Rights, Third Edition, page 218**.

iv. The act of torture must involve a public official – see **Article 1** of the **Convention against Torture**.

50. While the Petitioner gave no evidence of any pain and suffering on the dates that she alleged that she was tortured, even the incidents of being slapped, kicked etc. will not amount to torture even if I had accepted that she was treated in that manner. In the end, noting the law and the facts before me, I am not satisfied that torture has been proved as alleged in this matter.

51. Regarding the allegation that various parcels of land belonging to the Petitioner were taken by the State, no evidence was produced pertaining to her ownership of the said parcels of land. In fact, nothing was placed before this Court to indicate that she indeed owned or had claim to the alleged parcels of land. How then can Prayer (b) of the Petition be interrogated in such a evidential vacuum. The claim, like all others were very casually made, with respect.

52. Based on my reasoning above, I am unable to reach the conclusion that the Petitioner has made out a case for violations of her rights as alleged and I so find.

Conclusion

53. 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 as much 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 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.

54. It is also my view that 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 sanction from this Court. Genuine claims will and must however continue receiving the attention of the Courts for years to come. The genuine claims must further test the test of credibility based on the evidence presented.

55. Of all claims regarding allegations of violations of constitutional rights on 3rd March, 1992 that have been filed before this Court, this particular Petition was surprisingly presented in a manner that would not favour the Petitioner because whereas there is no doubt from the evidence before me that she was at Freedom Corner on that day and that the fast for release of political prisoners led to her deportation to her rural homes, evidence of torture as claimed was completely lacking. The Petition and evidence was also exaggerated when the alleged torture was said to have

occurred for a year or so but the Petitioner, at her age, had no and has no visible injuries or evidence thereof. That single fact must deal a death blow to the Petition.

Disposition

56.I hereby dismiss the Petition but each Party shall bear its own costs.

57.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