



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

PETITION NO.595 OF 2012

BETWEEN

PROF. MAINA WA KINYATI PETITIONER

AND

THE HON. ATTORNEY GENERAL RESPONDENT

JUDGMENT

Introduction

1. In his Petition dated 31st December, 2012, together with his affidavit in support sworn on the same date, the Petitioner, Prof. Maina Wa Kinyati, describes himself as a male adult of sound mind, a professor of History and Director of the Mau Mau Research Centre, Nairobi. He has filed the present Petition against the Attorney General of the Republic of Kenya in his capacity as the Principal Legal Advisor to the Government, alleging violation of his constitutional rights as a consequence of the actions of the Moi Regime in 1982. He therefore seeks *inter alia* compensation for the various atrocities he alleges were committed on him.

The Petitioner's Case

2. In his Affidavit, the Petitioner deponed that on the night of 2nd June, 1982, a squad of plain cloths police officers without any search warrant stormed his house at Kenyatta University Campus and in his absence but in the presence of his wife, Mumbi Wa Maina, unlawfully and forcibly searched the house and unlawfully seized his assorted properties that included a typewriter, 29 files whose contents included research works on the Mau Mau movement, 23 books including the works of Karl Marx, Engels, Lenin, Castro, Che Guevera, Ngugi wa Thiong'o and his own book titled "Thunder from the Mountains". That after conducting the said search, the officers informed his wife that he was wanted by the police and that he should report at the Criminal Investigations Department headquarters.
3. Further, that on 3rd June, 1982, he reported at the CID headquarters but only to be promptly arrested and taken to the Special Branch Police Officers headquarters and between 3rd and 7th June, 1982, he remained in police detention where he was psychological tortured by being subjected to ceaseless interrogation on false accusations of being a communist, refusing to follow the Nyayo philosophy, teaching his students Marxism-Leninism with the intention of indoctrinating them to overthrow the Government and doing research on Mau Mau without

permission from the Government and making and/or spreading anti-government leaflets at the Kenyatta University.

4. The Petitioner also stated that during the said period, the police subjected him to untold physical and psychological torture including being stripped naked, spat on, denied food, chained on a seat while naked, blind folded, denied blankets and beddings in the cells, and being threatened that he would be shot dead. That after being held for five days *incommunicado*, on 7th June, 1982 he was arraigned before the Chief Magistrate's Court at Nairobi in **Criminal Case No. 1239 of 1982**, and charged with a false and fabricated charge of being in possession of a seditious publication, without the charge particularizing the alleged publication, but later on, the charge was amended to read that the publication was entitled "Moi's Divisive Tactics Exposed."
5. In the Petitioner's view, the offence that he was charged with was *ab initio* an inherently unconstitutional and anachronistic offence contrary to the Bill of Rights as well as the republican, multi-party and democratic status of the Republic of Kenya. Furthermore, that the said offence was a prior restraint to the freedoms of conscience and expression guaranteed by the **Repealed Constitution** and the **International Covenant on Civil and Political Rights**.
6. The Petitioner contended further that he was denied bail as a result of which he was remanded in prison for 136 days until 18th October, 1982 when the Court found him guilty of the offence, convicted and sentenced him to six years' imprisonment without the alleged seditious publication either in its entirety, or in excerpts, ever being shown to him or read out in Court and that he has to date never seen the alleged document. In that regard, he argued that the trial Magistrate having privately read the document and subjectively analysing the same and passing a conviction, acted in gross violation of the right to a fair trial.
7. The Petitioner also alleged that upon instructing his lawyer, the late S.M Otieno, to undertake a constitutional challenge of the law of sedition, the lawyer advised him that it was not in his best interest, under the prevailing circumstances, to challenge the outcome of his trial as he risked being detained without trial and without ever knowing when he would be released from prison. That his lawyer later appealed against his conviction and sentence at the High Court and the Court of Appeal and the issue of the unconstitutionality of the offence of sedition was never dealt with by either Court, which subsequently dismissed his appeals.
8. It was the Petitioner's other contention that he was denied any remission by the Prison authorities and his application to the High Court challenging the denial of the remission was dismissed and as a result, he ended up serving the entire prison term of six years. In that regard, the Petitioner alleged that during the 136 days of his imprisonment in violation of his fundamental rights against torture, cruel inhuman and degrading treatment and punishment, he was subjected to frequent random beatings, verbal insults by prison warders, fed on food not fit for human consumption being half cooked, detained in the same block with raving mad prisoners and confined in unsanitary cells with extremely dirty toilets overflowing with human waste.
9. In his Supplementary Affidavit sworn on 10th July, 2013, the Petitioner stated further that between the time of his trial for the political offence of possession of seditious publication until the regime change in 2003, he was in fear of the then ruling regime and could not approach the Courts for redress. Further, that in 1989, immediately after his release, he fled Kenya and lived in exile in the United States of America until 2003 when the KANU regime was voted out of power. He asserted further that before the adoption of the Constitution, 2010 and the subsequent reform of the Judiciary, he had no confidence in the judiciary and verily believed his complaints had no chance of a fair hearing.
10. The Petitioner maintained that his complaints herein are directed against institutions of the State that are still in existence to date, and whose records are kept in accordance with the law and since the same can still be found, the Respondent cannot claim any prejudice in the filing of the Petition in 2012. Additionally, the Petitioner urged the Court to take judicial notice that Kenya is presently righting her past wrongs and records and witnesses of past violations stretching for more years

than his complaints have been readily available and accessible.

11. The Petitioner has for the above reasons urged the Court to grant the following orders:

- i. ***A declaration that the entry into and search of the Petitioner's home and seizure of his assorted possessions by police officers on 2nd June, 1982 without warrants was unconstitutional and a violation of the Petitioner's fundamental rights to inherent human dignity, protection of the law and privacy guaranteed by Sections 70 (c) and 76 (1) of the Repealed Constitution.***
- ii. ***A declaration that the taking of possession and confiscation by police officers of the Petitioner's assorted possessions on 2nd June, 1982 without orders of the court was an unconstitutional confiscation of property of the Petitioner in violation of the Petitioner's fundamental right as to protection of property guaranteed by Sections 70 (c) and 75 (1) of the Repealed Constitution.***
- iii. ***A declaration that the arrest of the Petitioner on 3rd June, 1982 based on investigation of an unconstitutional crime of possession of seditious publication and his pre-trial police custody of five days upto 7th June, 1982 was unlawful and unconstitutional in violation of the Petitioner's fundamental right to personal liberty guaranteed by Sections 70 (a) and 72 (3) (b) of the Repealed Constitution.***
- iv. ***A declaration that the conditions and mistreatment of the Petitioner whilst in incommunicado police detention between 3rd and 7th June, 1982 including ceaseless interrogation on false accusations, being stripped naked, being blindfolded, denied food and bedding or blankets, chained to a seat whilst naked, mocked of being shot dead and being spat on, and the frequent random beatings, verbal insults by prison warders, being fed on half cooked food unfit for human consumption, detention in the same block with raving mad prisoners and in unsanitary cells with filthy toilets overflowing with human waste for 136 days whilst in remand custody were violations of the Petitioner's fundamental freedom from torture, cruel, inhuman and degrading treatment or punishment guaranteed by Section 74 (1) of the Repealed Constitution.***
- v. ***A declaration that the repealed Section 57 (2) of the Penal Code that provided for the offence of being in possession of seditious publications was at all times unconstitutional in violation of the Petitioner's fundamental freedoms of conscience and expression guaranteed by Sections 70 (c), 78 (1) and 79 (1) of the Repealed Constitution and to that extent the said Section was null and void in violation of Section 3 of the Repealed Constitution and contrary to the inherent republican and democratic State of Kenya.***
- vi. ***A declaration that the trial of the Petitioner in Criminal Case No. 1239 of 1982 before the Chief Magistrate's Court at Nairobi was not a fair trial in violation of his fundamental right to a fair hearing guaranteed by Sections 70 (a) and 77 (1), (2) (e) of the Repealed Constitution and his conviction and imprisonment for six years on account of the unconstitutional offence of possession of seditious publication was unconstitutional deprivation of personal liberty in violation of Sections 70 (a) and 72 (1) of the Repealed Constitution.***
- vii. ***An award of general and exemplary damages for violations of the fundamental rights and freedoms of the Petitioner in prayers (i) to (vi) above as may be assessed by this Honourable Court.***
- viii. ***Costs of this Petition.***
- ix. ***Interest on all monetary awards.***

The Respondent's Case

12. The Respondent opposed the Petition through his Grounds of Opposition dated 12th March, 2013

- and Written Submissions dated 4th June, 2014 and his objection to the Petition was on the basis that the Petition has been filed over thirty one years after the alleged violations were allegedly committed and that he shall be gravely prejudiced if the Petition is allowed to proceed as he cannot procure any witnesses to counter the Petitioner's allegations of fact.
13. Further, in his view, the Petitioner was lawfully tried and convicted by a Court of competent jurisdiction and the sentence was confirmed by both the High Court and the Court of Appeal, and therefore, the Petition is an abuse of the Court process and ought to be dismissed.
 14. In his Written Submissions, the Respondent asserted that all trial related matters now raised by the Petitioner were dealt with or could have been dealt with either by the trial Court or the High Court exercising its appellate jurisdiction and cannot be reopened for further examination through a Petition filed to enforce fundamental rights and freedoms. While relying on **Methodist Church in Kenya registered Trustees and Another vs Rev. Jeremiah Muku and Another, Court of Appeal No. 233 of 2008 (Unreported)**, the Respondent argued that the remedy for errors, if any, in the trial Court rest in an appeal only. In any event, the Respondent further argued, the trial Court was legally right in its holding and did not commit any errors of law or fact.
 15. The Respondent further maintained that the Petitioner was lawfully tried and convicted by the trial Court, appealed to the High Court and subsequently to the Court of Appeal and as such he cannot now purport to claim that his rights were infringed when he had the opportunity under the law to challenge his conviction and sentence as well as the conditions under which he was lawfully placed in police custody or prison. Relying on the decisions in **Tony Gachoka vs Attorney General [2013] eKLR** and **Frankline Kithinji Muriithi vs Loyford Muriungu Muriithi and 4 Others [2014] eKLR**, it was the Respondent's other submission that the Petitioner was charged and convicted in the Chief Magistrate's Court where after, he appealed unsuccessfully both to the High Court and the Court of Appeal and as such, the High Court cannot now sit as an appellate Court over the decision of the Court of Appeal.
 16. As regards the violation of the Petitioner's rights to property, the Respondent asserted that the books and other documents allegedly confiscated were used as evidence in the Petitioner's trial and he has not demonstrated that he requested for the same to be returned to him when his case was closed and that the request was denied. The Respondent in that regard placed reliance on the decision in **Adetoun Oladeji (Nig) Ltd vs Nigeria Breweries Plc, S.C 91/2002**, and argued that the Petitioner has not adduced any evidence to show that his property taken during the search was not returned to him and therefore his complaints ought to be disregarded.
 17. Further, according to the Respondent, the right to personal liberty is not unlimited both under the **Constitution, 2010** and the **Repealed Constitution** and his detention was therefore sanctioned by the law and specifically by dint of **Section 57 (2)** of the **Penal Code**. Additionally, that if the Petitioner felt that the said Section as it then was, was unconstitutional, he ought to have applied to the High Court to declare the same as being inconsistent with the Constitution. That in any event, the evidence on record indicates that at no time did his Counsel S.M Otieno, raise any issue in respect to the unconstitutionality of the said Section.
 18. The Respondent's other submission was that Kenyan prisons in 1982 may have been in deplorable condition, a position recognized by the Courts in **Koigi Wamwere vs Attorney General [2012] eKLR** and **Hon. Gitobu Imanyara and 2 Others vs Attorney General, Petition No. 78 of 2010**, and as such, much as the alleged treatment and conditions of the prison that the Petitioner was subjected to were appalling, the same was experienced by every other prisoner at the time and are not at all special with regard to the Petitioner's situation.
 19. Furthermore, that the right to privacy as well as the right of protection from arbitrary search and entry were not absolute rights under the **Repealed Constitution** and that the evidence tendered at the Petitioner's trial indicates that the Petitioner's wife consented to the search by the police officers and she further led them where the Petitioner's Study Room was, therefore rebutting the

assertions that the police forcefully conducted a search on the Petitioner's house. In any event, from the records of the trial Court, the issue was never raised and no witness was cross-examined on that issue.

20. Additionally, the Respondent denied any violations of the Petitioner's rights and relied on the decision in **Lt. Col Peter Ngari Karume and Others vs The Attorney General, Constitutional Application No. 128 of 2006** to make the submission that the Petitioner has not adduced any concrete evidence to illustrate the manner in which his rights were violated.
21. The Respondent furthermore sought the aid of the decisions in **Maharaj vs Attorney General of Trinidad and Tobago (1979) AC 385 (PC)** and the New Zealand case of **Simpson vs Attorney General (1994) 3 NZLR 667 (CA)** in support of his submission that the intention to award compensation under **Article 23 (3) (g)** of the **Constitution** is to vindicate the Constitution and act in determining the amount of damages payable and therefore, the Court should balance the Petitioner's interests with that of the public. Further, that the Court should be reminded of the compelling claim on the scarce resources of the State and ensure that the interests of the Petitioner and those of the public are both served when awarding such compensation.
22. The Respondent finally urged the Court to dismiss the Petition with costs for lacking in merit but in the event that the same is allowed, the Court ought to take judicial notice of the changed political circumstances and the democratic space available to all Kenyans and thereby award a token judgment of Kshs.1,000,000/= as was done in the **Tony Gachoka case (supra)**.

Determination

23. Based on the Parties' respective pleadings and submissions, the main question for determination is whether there has been a violation of the Petitioner's rights and the remedies available to him, if any.
24. The first issue that I must however dispose is whether this Petition ought to be dismissed on the basis of the prolonged delay in its filing. In that regard, whereas the alleged violations are said to have occurred in the year 1982, it would appear that the Petitioner waited for about 30 years to institute these proceedings. Is it therefore in order for this Court to entertain the Petition in light of the said delay?
25. In that regard, the jurisprudence of our Courts has demonstrated that questions of such delays are to be determined on a case by case basis with the Courts' main consideration being the justification in the filing of suits after such prolonged delays. That is why in **Maurice Oketch Owiti vs Honourable Attorney General, Petition No. 227 of 2014**, the Court having analysed previous decisions in the subject, stated that:

“[35] It is evident from the above cited authorities that courts have expressed dissatisfaction in the filing of petitions alleging violations of fundamental rights and freedoms after a considerable length of time has lapsed since the alleged violations occurred. The principle that emerges is that a court must examine each case and gauge the length of time taken before presenting such petitions, and the reason for the delay. A court is also entitled to consider whether justice will be served by permitting a respondent, whether an individual or the State in any of its manifestations, to be vexed by an otherwise stale claim.”

26. While persuaded by the above reasoning, I am mindful of the fact that the promulgation of the **Constitution, 2010** was partly driven by the need to remedy past injustices and a window of opportunity was thereby opened to enable litigants institute claims alleging violation of constitutional rights from events that occurred in past regimes. While also the intentions of the framers of the Constitution remain noble, the question of addressing past injustices should also call for thorough scrutiny of each case by the Courts and each such case has to be looked at in its

own special circumstances. In doing so, Courts ought to take into consideration various factors, for instance, whether a litigant had means of addressing the alleged violations at the said time that they allegedly occurred? Did a litigant exhaust such mechanisms as were available to him? Has a litigant demonstrated that the remedy then available to him was not appropriate or adequate in addressing his concerns? Is it justifiable to vex a respondent with otherwise stale claims? Will justice be served in terms of availability of any such evidence to be relied upon by either Party? Such questions need to be taken into consideration before a Court can admit a claim alleging constitutional violations that particularly occurred ten years or so ago and before a clear change of political regime.

27. Further, in **Michael Maina Kamami and Another vs Attorney General, Petition No.209 of 2013** this Court made the following observation with regard to that issue:

“[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 obvious, that 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.” (Emphasis added)

28. I must reiterate that the above findings albeit made *per incuriam* and would only add that the length of delay is not the issue *per se* but the acceptability of the explanation proffered by a party should be one of the criterion which may warrant a Court to condone such delay. In the circumstances of this case, and in that context, the Respondent has not rebutted the assertions by the Petitioner that between the 1980s until the regime change in 2003, he was in fear of the Moi regime and could not file the instant Petition. Furthermore, that between 1989, immediately after his release from prison, he fled the country and lived in exile in the United States until 2003 and that therefore, he had no faith in the Judiciary until judicial reforms that began around 2011 while his Petition was filed in 2012. I am thus satisfied that there are reasonable grounds that warranted the delay in the filing of the present Petition and I shall therefore proceed to determine the Petition on its merits.

29. In that regard, the Petitioner has alleged that his rights under **Sections 70 (a) and (c), 72 (1) and (3) (b), 74 (1), 75 (1), 76 (1), 77 (1), (2) (e), 78 (1) and 79 (1) of the Repealed Constitution were violated?** Has the Petitioner made out a case for the alleged violations?

Violation of Section 70 (a) and (c) on the Freedom from Discrimination

30. **Section 70 of the Constitution, 1969**, provides that:

Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely—

- a. *life, liberty, security of the person and the protection of the law;*
- b. *freedom of conscience, of expression and of assembly and association; and*
- c. *protection for the privacy of his home and other property and from deprivation of property without compensation,*

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

31. As can be seen above this provision guarantees to every individual the right to protection of the law in all aspects with the necessary limitations imposed by the law without any discrimination.

32. In that regard, the Court in **Peter K. Waweru vs Republic [2006] eKLR** defined discrimination as follows:

“...Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions by... sex whereby persons of one such description are subjected to... restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured”

33. The questions then that beg for answers are: where is the evidence of discrimination in the present Petition? On what grounds was the Petitioner discriminated upon and what restrictions were placed in his way that other persons did not have? I submit none. The Petitioner has therefore not demonstrated how he was discriminated against and the basis of such discrimination and as such, I am unable to find any violation of his right in that regard.

Violation of Section 72 (1) and (3) (b) on the Right to Personal Liberty

34. **Section 72** of the **Constitution, 1969** guarantees the protection of the right to personal liberty and it stipulated that:

1. *No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases –*
 - a. *in execution of the sentence or order of a court, whether established for Kenya or some other country, in respect of a criminal offence of which he has been convicted;*
 - b. *in execution of the order of the High Court or the Court of Appeal punishing him for contempt of that court or of another court or tribunal;*
 - c. *in execution of the order of a court made to secure the fulfillment of an obligation imposed on him by law;*

- d. *for the purpose of bringing him before a court in execution of the order of a court;*
- e. *upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law of Kenya;*
- f. *in the case of a person who has not attained the age of eighteen years, for the purpose of his education or welfare;*
- g. *for the purpose of preventing the spread of an infectious or contagious disease;*
- h. *in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community;*
- i. *for the purpose of preventing the unlawful entry of that person into Kenya, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Kenya or for the purpose of restricting that person while he is being conveyed through Kenya in the course of his extradition or removal as a convicted prisoner from one country to another; or*
- j. *to such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within Kenya or prohibiting him from being within such an area, or to such extent as may be reasonably justifiable for the taking of proceedings against that person relating to the making of any such order, or to such extent as may be reasonably justifiable for restraining that person during a visit that he is permitted to make to a part of Kenya in which, in consequence of the order, his presence would otherwise be unlawful.*

2. ...

3. *A person who is arrested or detained—*

- a. *for the purpose of bringing him before a court in execution of the order of a court; or*
- b. *upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.*

4. ...

33. In that context, it is uncontested that the Petitioner indeed was arrested and held in custody from 3rd June, 1982 to 7th June, 1982 without being arraigned in Court within the stipulated period of within 24 Hours as the offence that he was arrested for was certainly a misdemeanour hence the sentence that he ultimately received and, upon the arrest of the Petitioner on 3rd June 1982, he ought to have been taken to Court within 24 hours. The failure to do so amounted to a contravention of his rights under **Section 72 (3) (b) of the Repealed Constitution**, the equivalent of **Article 49 (1) (f) of the Constitution, 2010**. That is why in the celebrated case of **Albanus Mwasia Mutua vs Republic [2006] eKLR** the Court of Appeal held that the Appellant's constitutional rights guaranteed under **Section 72 (3) (b) of the Repealed Constitution** had been grossly violated because he was taken before the trial magistrate some eight months from the date

of his arrest and no explanation at all was offered for that delay. The court in doing so expressed the view that:

“At the end of the day, it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place. The jurisprudence which emerges from the cases we have cited in the judgment appears to be that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge. In this appeal, the police violated the constitutional right of the appellant by detaining him in their custody for a whole eight months and that, apart from violating his rights under section 72 (3) (b) of the constitution also amounted to a violation of his rights under section 77 (1) of the constitution which guarantees to him a fair hearing within a reasonable time. The deprivation by the police of his right to liberty for a whole eight months before bringing him to court so that his trial could begin obviously resulted in his trial not being held within a reasonable time. The appellant’s appeal must succeed on that ground alone.”

34. It follows therefore that the Petitioner, upon being arrested, ought to have been arraigned in Court on the 4th of June 1982, and therefore, his detention from 4th to 7th June was unconstitutional.

35. Additionally, it is my finding that the denial of bail by the trial Court cannot in any way be said to be in violation of the Petitioner’s right as the law by then granted the Court discretionary powers in regard to bail and in any event, the Petitioner had the right to appeal against the denial and as a result of the failure to do so, he cannot allege that his right to liberty was violated.

36. To the above extent only, the right to personal liberty was violated.

Violation of Section 74 (1) on the Right not to be Subjected to Torture, Cruel, Degrading and Inhuman Treatment

37. **Section 74** of the **Repealed Constitution** provided that:

1. ***No person shall be subject to torture or to inhuman or degrading punishment or other treatment.***
2. ***Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in Kenya on 11th December, 1963.***

38. The above right is also guaranteed under **Article 29** of the **Constitution, 2010**, which prohibits the treatment of persons in a cruel, inhuman or degrading manner. The European Court of Human Rights has defined torture and inhuman treatment in the **Greek Case 1969 Y.B. Eur. Conv. on H.R. 186 (Eur. Comm’n on H.R)** in the following terms;

“The notion of inhuman treatment covers at least such treatment as deliberately causes suffering, mental or physical, which, in the particular situation is unjustifiable. The word “torture” is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be de-grading if it grossly humiliates him before others, or drives him to an act against his will or conscience.”

39. Further, in **Samwel Rukenya Mburu vs Castle Breweries, Nairobi HCC 1119 of 2003**, the Learned Judge commented that:

“Prohibition against torture, cruel or inhuman and degrading treatment implies that an “action is barbarous, brutal or cruel” while degrading

punishment is “that which brings a person dishonour or contempt”

40. I also note that **Article 1** of the **Convention against Torture** defines ‘torture’ to mean:

“... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person...” -see also Rojas Garcia vs Colombia 687/96 at the Human Rights Committee

41. Applying the foregoing to the present case, the Petitioner’s key grievance is that he was subjected to inhuman prison conditions such as being fed on half cooked food unfit for human consumption, detention in the same block with raving mad prisoners and in unsanitary cells with filthy toilets overflowing with human waste. In that regard, I must reiterate the holding of the Court in **Koigi Wamwere vs Attorney General, Petition 7373 of 2009** where the Learned Judge stated thus on a similar complaint:

“[44] I have set out in detail some of the averments of the petitioner with regard to what he considers to be acts of torture committed against him by state and state agents during his detention and incarceration in his two trials. Weighed the definition of torture set out above, I must, regretfully, find that there were no acts of torture as recognised in law committed against the petitioner during his detention in prison. What the petitioner was subjected to was the same deplorable conditions to which other prisoners in Kenya are subjected to. The poor diet, lack of adequate medical and sanitation facilities, lack of an adequate diet, have been hallmarks of prison conditions in Kenya. The discriminatory dietary regulations that the petitioner refers to, if they were indeed in force as the petitioner avers, are doubtless a carry-over from the discriminatory colonial regulations which independent Kenya inherited and has not seen fit to question and change. To find that the poor prison conditions amount to torture which entitles the petitioner to compensation would open the door for similar claims by all who have passed through Kenya’s prison system. Looked at against the definition of torture, however, I find and hold that there was no violation of the petitioner’s rights under section 74 with regard to the above instances cited as illustrations of the torture he was subjected to while in detention.” (Emphasis added)

42. Similarly, the Court of Appeal in **Koigi Wamwere vs Attorney General, Civil Appeal No. 86 of 2013** made the observation that:

“We take the view, as did the learned judge, that whereas prison conditions as picture-squarely described by the appellant left a lot to be desired and cried out for reform, the treatment suffered by the appellant in common with the other inmates, whether in detention or in prison, did not amount to torture as legally defined. We do not understand the learned judge to have been speaking as an apologist for, or gatekeeper for the State in stating, obiter, that to hold that the appellant had been tortured would be opening floodgates of litigation on the same basis by all persons who passed through the Kenya prisons system at the time. Such an avalanche of litigation would, of course, have grave and deleterious effects which the judge, as a responsible judicial officer, could not afford to be oblivious to.”

43. I am duly guided and it therefore follows that the prison conditions under which the Petitioner was detained bad as they were cannot be said to be in any way in contravention of his constitutional rights and as such, I am unable to find any violation of the Petitioner’s right in that regard.

44. I should also add that generally, the evidence of torture was lacking in the Petition and I would

have had difficulty sustaining the claim. I say so because an educated man and a historian as that, would have kept records of his treatment notes for his injuries and since he may not have had access to them during his incarceration, what of medical notes and reports after his release? Surely, if he was so seriously injured as a result of the physical or psychological torture, he must have been subjected to medical examination and/or treatment after his release. Without evidence of such an action, his claim must fail.

Violation of Section 75 (1) on the Right to Property

45. **Section 75** provided for the right to own property in the following terms:

1. ***No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied —***
 - a. ***the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit; and***
 - b. ***the necessity therefor is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and***
 - c. ***provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.***
2. ***Every person having an interest or right in or over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the High Court for—***
 - a. ***the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled; and***
 - b. ***the purpose of obtaining prompt payment of that compensation: Provided that if Parliament so provides in relation to a matter referred to in paragraph (a) the right of access shall be by way of appeal (exercisable as of right at the instance of the person having the right or interest in the property) from a tribunal or authority, other than the High Court, having jurisdiction under any law to determine that matter.***
3. ...
4. ...
5. ...
6. ***Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) or (2)—***
 - a. ***to the extent that the law in question makes provision for the taking of possession or acquisition of property—***
 - i. ***in satisfaction of any tax, duty, rate, cess or other impost;***
 - ii. ***by way of penalty for breach of the law, whether under civil process or after conviction of a criminal offence under the law of Kenya;***
 - iii. ***as an incident of a lease, tenancy, mortgage, charge, bill of sale, pledge or contract;***
 - iv. ***in the execution of judgments or orders of a court in proceedings for the determination of civil rights or obligations;***

- v. *in circumstances where it is reasonably necessary so to do because the property is in a dangerous state or injurious to the health of human beings, animals or plants;*
 - vi. *in consequence of any law with respect to the limitation of actions; or*
 - vii. *for so long only as may be necessary for the purposes of an examination, investigation, trial or inquiry or, in the case of land, for the purposes of the carrying out thereon of work of soil conservation or the conservation of other natural resources or work relating to agricultural development or improvement (being work relating to the development or improvement that the owner or occupier of the land has been required, and has without reasonable excuse refused or failed, to carry out), and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society; or*
- b. *to the extent that the law in question makes provision for the taking of possession or acquisition of—*
- i. *enemy property;*
 - ii. *property of a deceased person, a person of unsound mind or a person who has not attained the age of eighteen years, for the purpose of its administration for the benefit of the persons entitled to the beneficial interest therein;*
 - iii. *property of a person adjudged bankrupt or a body corporate in liquidation, for the purpose of its administration for the benefit of the creditors of the bankrupt or body corporate and, subject thereto, for the benefit of other persons entitled to the beneficial interest in the property; or*
 - iv. *property subject to a trust, for the purpose of vesting the property in persons appointed as trustees under the instrument creating the trust or by a court or, by order of a court, for the purpose of giving effect to the trust.*
7. *Nothing contained in or done under the authority of an Act of Parliament shall be held to be inconsistent with or in contravention of this section to the extent that the Act in question makes provision for the compulsory taking possession of property or the compulsory acquisition of any interest in or right over property where that property, interest or right is vested in a body corporate, established by law for public purposes, in which no moneys have been invested other than moneys provided by Parliament.*

46. The right to own property is also protected under **Article 40** of the **Constitution, 2010**, which gives every individual the right to own property and prohibits the State from enacting laws to arbitrarily deprive a person of property of any description or any interest in, or right over, any property of any description. In **Multiple Hauliers East Africa Limited vs Attorney General and 10 others, Petition No. 88 of 2010**, it was stated with regard to the constitutional provisions on the right to property that:

“[34] What is clear from these provisions is that private property is protected and may not be taken arbitrarily without due process. It is also clear that the protection afforded to property does not extend to property that has been unlawfully acquired...”

47. In that context, can it then be said that the Petitioner’s right to property was violated? The Petitioner has deponed to the loss of his possessions namely, a typewriter, 29 files of his research work on the Mau Mau freedom struggle, 23 assorted textbooks and his book titled “Thunder from the Mountains”. Other than his own assertions, no additional evidence was adduced in support of those allegations. However, I note that according to the records of the trial Court in which the Petitioner was charged, it is evident that indeed the Petitioner’s files and 23 books had been seized by the police. I say so because at page 5 of the decision rendered by the said Court, it is stated that:

“Of the 23 books only the following were produced in the Court in a bundle-

1. *Marxist Leninist Philosophy*
2. *Karl Marx and Fredrick Engels- Selected Works*
3. *Marxism by Lictheim*
4. *History of U.S.S.R (in 2 Vols)*
5. *Short History of the CPSU*
6. *Lenin in Profile*
7. *Lenin- Selected Works- in 3 Vols*

All these books have the accused's name on the inside pages.

The police left the house for the C.I.D Head-quarters with the above exhibits and other material not produced in the court..."

With the above uncontested evidence coming from a Court record, I am satisfied that the Petitioner's books and files were taken away by the police officers prior to his arrest and I am unable to agree with the Respondent's contention that the Petitioner was merely under a duty to apply for the return of his property. In my view, it was the duty of the State to ensure that such property was returned to the Petitioner as it was his lawful entitlement to have them and it is also clear that they did not form part of the evidence against him. I am therefore satisfied that the Petitioner has made out a case for violation of his right to property following the confiscation of the said items which were later never returned to him.

Violation of Section 76 (1) on the Right against Arbitrary Search, or Entry

48. **Section 76 of the Repealed Constitution** stated that:

1. *Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.*
2. ...

49. The guarantee against arbitrary searches or entry is similarly provided for under **Article 31 of the Constitution, 2010**, which entitles to every individual, the right to privacy. In **Standard Newspapers Limited and Another vs Attorney General and 4 others, Petition No. 113 of 2006** the Court stated thus in that regard:

"[38] It is a necessary incident to democracy that citizens must be protected from unjustified intrusions of privacy and property by agents of the state. Otherwise, arbitrary state actions could severely affect the personal freedoms and associated fundamental rights that are intended to be a predominant feature of democratic society. While I agree that the right to privacy is not absolute and must be balanced against the intended purpose for intrusion, such limitation should not be one that will risk stripping off the very core of the right or freedom. The manner in which the search and seizure is carried out must not expose persons to further violation of other rights. I am persuaded in this regard by a consideration of the provisions of international conventions to which Kenya is a party, as well as judicial precedents on this issue from other jurisdictions.
(Emphasis added)

50. I am in agreement and in the present case, it is uncontested that the alleged search at the Petitioner's premises was conducted in his absence. At the material time, the Petitioner's wife was however present. In that regard, I have seen the records of the proceedings before the lower Court in **Criminal Case No. 1239 of 1982**, in which the Petitioner was charged. In his testimony before the Court, the 3rd Prosecution Witness, Mr. Fredrick Mukangu submitted that:

"C.I. Wanjau was in charge of the party. We went to search the house of Maina Kinyati. We arrived there at about 4:00 p.m at house No. 9. We knocked on the door. A lady

opened it. We introduced ourselves as police. We asked if Maina was in. she told us he was around in the campus but was not at home. We were invited into the sitting room. We waited then for about two hours waiting for him. She was with us in the same room. He did not turn up and we decided to carry out the search. She allowed us to search. She took us to the study room. We all went there including Mrs. Maina.”

51. Additionally, in her testimony as the 2nd Defence Witness, Mrs Mumbi Wa Maina, the Petitioner’s wife submitted that;

“... On 2.6.82 police officers came to my house. I opened for them. They were five officers. I had not known any of them before. They asked me if my ... was at home. Two of them went to look for him at his office as I directed them....”

One of the officers wanted to look into our study. I led them- three of them only. They started looking through the files. I asked them if they had a search warrant. I was told it was not needed. The other two joined us. They also started looking for files...”

52. It is thus apparent that whereas the Petitioner’s wife made an inquiry in regard to the search that was being conducted, she did not object to the same as she was informed that no search warrant was needed. Was the Petitioner’s right under **Section 76 (1)** thereby infringed by the said search? My answer to this question is in the affirmative. I say so because, pursuant to **Section 118** of the **Criminal Procedure Code**, the then applicable law, the police were under an obligation to make an application to the Court for the grant of a search warrant before conducting any search in private premises. The Section states that;

“Where it is proved on oath to a Court or a Magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the Court or a Magistrate may by written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and, if the thing be found, to seize it and take it before a Court having jurisdiction to be dealt with according to law.” (Emphasis added)

53. Without a search warrant as is obvious and without any credible defence to his claim, I am satisfied that the search in question was conducted in disregard of the Petitioner’s right and freedom from arbitrary search.

Violation of Section 77 (1) and (2) (e) on the Right to the Protection of the Law

54. Section 77 of the **Repealed Constitution** provided that:

1. *If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.*
2. *Every person who is charged with a criminal offence—*
 - a. *shall be presumed to be innocent until he is proved or has pleaded guilty;*
 - b. *shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged;*
 - c. *shall be given adequate time and facilities for the preparation of his defence;*

- d. *shall be permitted to defend himself before the court in person or by a legal representative of his own choice;*
 - e. *shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and*
 - f. *shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge, and except with his own consent the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence.*
3. *When a person is tried for a criminal offence, the accused person or a person authorized by him in that behalf shall, if he so requires and subject to payment of such reasonable fee as may be prescribed by law, be given within a reasonable time after judgment a copy for the use of the accused person of any record of the proceedings made by or on behalf of the court.*
 4. *No person shall be held to be guilty of a criminal offence on account of an act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.*
 5. *No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of that offence, save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.*
 6. *No person shall be tried for a criminal offence if he shows that he has been pardoned for that offence.*
 7. *No person who is tried for a criminal offence shall be compelled to give evidence at the trial.*
 8. *No person shall be convicted of a criminal offence unless that offence is defined, and the penalty therefor is prescribed, in a written law:*

Provided that nothing in this subsection shall prevent a court from punishing a person for contempt notwithstanding that the act or omission constituting the contempt is not defined in a written law and the penalty therefor is not so prescribed.
 9. *A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.*
 10. *Except with the agreement of all the parties thereto, all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other adjudicating authority, including the announcement of the decision of the court or other authority, shall be held in public.*
 11. *Nothing in subsection (10) shall prevent the court or other adjudicating authority from excluding from the proceedings persons other than the parties thereto and their legal*

representatives to such extent as the court or other authority—

- a. *may by law be empowered to do and may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice or in interlocutory proceedings or in the interests of public morality, the welfare of persons under the age of eighteen years or the protection of the private lives of persons concerned in the proceedings; or*
- b. *may by law be empowered or required to do in the interests of defence, public safety or public order.*

12. *Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of—*

- a. *subsection (2) (a) to the extent that the law in question imposes upon a person charged with a criminal offence the burden of proving particular facts;*
- b. *subsection (2) (e) to the extent that the law in question imposes conditions that must be satisfied if witnesses called to testify on behalf of an accused person are to be paid their expenses out of public funds; or*
- c. *subsection (5) to the extent that the law in question authorizes a court to try a member of a disciplined force for a criminal offence notwithstanding a trial and conviction or acquittal of that member under the disciplinary law of that force, so, however, that a court so trying such a member and convicting him shall in sentencing him to any punishment take into account any punishment awarded him under that disciplinary law.*

13. *In the case of any person who is held in lawful detention, subsection (1), paragraphs (d) and (e) of subsection (2) and subsection (3) shall not apply in relation to his trial for a criminal offence under the law regulating the discipline of persons held in lawful detention.*

14. *Nothing contained in subsection (2) (d) shall be construed as entitling a person to legal representation at public expense.*

15. *In this section “criminal offence” means a criminal offence under the law of Kenya.*

The above stated rights of accused persons, although modified, are currently provided for under **Article 50** of the **Constitution, 2010**.

55. In the present case, the Petitioner is aggrieved by the manner in which his trial was conducted and he further impugns the charge of having a seditious publication, that was preferred against him, alleging that the same is unconstitutional and contrary to the Bill of Rights. In that respect, having undergone a trial at the trial court, it is uncontested that he appealed against the decision both to the High Court and the Court of Appeal. The latter was by then the highest Court of the land. That being the case, in my view, this Court does not have the jurisdiction to reopen the matter and question the charges and his subsequent conviction as that would amount to this Court sitting as an appellate Court over the decision of the then apex Court. I therefore decline the invitation by the Petitioner to do so. Furthermore, that jurisdiction may only be exercised when this Court is properly moved under **Article 50 (6)** of the **Constitution**, which is not the Petitioner’s desire in the present case.

56. In any event, owing to the fact that the charge of possession of a seditious publication was by then an offence in the laws of Kenya, this Court cannot retrospectively apply the Constitution and declare the same to be unconstitutional. At the material time it was a crime in our statute books and its constitutionality or otherwise had never been challenged until the repeal thereof and therefore, I cannot find any fault on the part of the State for charging and having the Petitioner convicted of the same. As a consequence therefore, I am unable to find any violation of the Petitioner’s right under **Section 77 (1) and (2) (e)** of the **Repealed Constitution**.

Violation of Section 78 (1) and 79 (1) on the Freedom of Conscience

57. **Section 78** of the **Repealed Constitution** stipulated that:

1. ***Except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this section that freedom includes freedom of thought and of religion, freedom to change his religion or belief, and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.***
2. ...

58. Under the **Constitution, 2010**, the right to freedom of conscience is guaranteed under **Article 32** which states that:

1. ***Every person has the right to freedom of conscience, religion, thought, belief and opinion.***

59. The protection of freedom of expression was also guaranteed under **Section 79** which was to the effect that:

1. ***Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.***
2. ...

60. The same protection of freedom of expression is guaranteed under **Article 33** of the **Constitution, 2010**.

61. Based on my finding above that the offence of possession of a seditious publication was in 1982 a crime sanctioned by the law, I shall dismiss the Petitioner's contention that the offence contravened and placed a restraint on his freedoms of conscience and expression as the restraint was sanctioned by law. That is all there is to say on that matter.

Conclusion

62. Based on my reasoning above and the materials placed before me, I have so far made a finding that the Petitioner's right to property, freedom from arbitrary search and seizure of property, and the right not to be held in custody for more than 24 hours was violated and as such I am inclined to grant the appropriate relief that commends itself in the circumstances. For avoidance of doubt, all other claims in the Petition are hereby dismissed.

63. As for the proper remedy for the above violations, I agree with the Respondent that noting the period for which the Petitioner was held in unlawful custody, the sentimental intellectual and real value of the items illegally seized without a search warrant and looking at the decision in **Tony Gachoka vs Attorney General (supra)**, an award of **Kshs.1.5 Million** is appropriate as compensation for the violations aforesaid.

Disposition

64. In that regard, the following are the orders I deem appropriate in the circumstances:

- a. **It is hereby declared that the holding of the Petitioner from 3rd June 1982 by police officers without taking him to officers without taking him to court was a violation of his right to**

perusal liberty contrary to Section 72(3) of the Repealed Constitution.

- b. It is hereby declared that the entry into and the search of the Petitioner's home and seizure of his assorted possessions by police officers on 2nd June, 1982 without warrants was unconstitutional and a violation of the Petitioner's fundamental right to privacy guaranteed under Section 76 (1) of the Repealed Constitution.**
- c. It is hereby declared that the taking of possession and confiscation by police officers of the Petitioner's assorted possession on 2nd June 1982 without Court orders was unconstitutional and in violation of the right to property as was enshrined under Section 75 (1) of the Repealed Constitution.**
- d. An award of Kshs.1.5 Million is hereby made as general damages for compensation for the violations of the Petitioner's rights as stated above.**
- e. The costs of this Petition shall be borne by the Respondent.**

65. Interests on (c) and (d) above is awarded to the Petitioner, from the date of Judgment to the full settlement.

66. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Miss Gikonyo for Petitioner

Mr. Kamunya for Respondent

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE