



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**  
**PETITION NO. 514 OF 2013**

**BETWEEN**

**STEPHEN GAITHO NJIHIA .....1<sup>ST</sup> PETITIONER**

**ROGERS KIMOSO RIGHA .....2<sup>ND</sup> PETITIONER**

**BENSON SOKIO LEKALAU.....3<sup>RD</sup> PETITIONER**

**HUSSEIN AMBROSE MATSILA.....4<sup>TH</sup> PETITIONER**

**SAMUEL NDUNGU GATUA.....5<sup>TH</sup> PETITIONER**

**FREDRICK WAFULA OBETELE.....6<sup>TH</sup> PETITIONER**

**AND**

**THE ATTORNEY GENERAL.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petition was filed by the six ex-servicemen. All men, they claimed a violation of their rights by the State following a failed *coup de tat* in 1982. The claim was lodged some thirty years after the alleged violations took place.
2. Two basic questions are brought to the fore by the Petition: how long could the Petitioners wait before filing their claims and, secondly, were their rights and any violations, thereof transitioned to the new Constitution from the old.
3. The Petition was opposed.

**Basic background facts**

4. On 1<sup>st</sup> August 1982 Kenyans woke up to the news that in the wee hours of the same date, officers and

servicemen of the Kenya Air force had through an unconstitutional means overthrown the Government of the Republic of Kenya then led by President Daniel Arap Moi.

5. The mutiny and attempted *coup de tat* was however quickly repulsed and suppressed by forces loyal to the Government. Officers and servicemen of the Kenya Airforce as well as several civilians were arrested in the aftermath of the suppressed coup. Lives were lost. Several persons were detained. The Petitioners were amongst the officers and servicemen arrested and detained, between 1<sup>st</sup> August 1982 and 30<sup>th</sup> March 1983. Ultimately the Petitioners were released without any charges being preferred against them.

6. The Petitioners were also discharged from the armed forces but not before allegedly being confined incommunicado and tortured.

### **Petitioners' case and evidence**

7. The Petitioners respective cases are similar. Their respective affidavits detail their cases which they also repeated during the oral hearing.

#### ***1<sup>st</sup> Petitioner***

8. Stephen Gaitho Njihia, the 1<sup>st</sup> Petitioner, swore an affidavit in support of his case on 26 August 2013. He stated that he was employed in July 1974 as a serviceman with the Kenya Air Force. He was dishonorably discharged on 31<sup>st</sup> January 1983 after having been arrested and detained for over 5 months. He contends that his rights were violated as he was not only stripped naked and searched in public but was also physically tortured and held incommunicado before being dishonorably discharged without any pension or terminal dues.

9. In his oral testimony, the 1<sup>st</sup> Petitioner testified that he worked for 10 years and rose to the rank of a Sergeant. He added that he was dismissed without a reason and was ridiculed before members of the public. He also testified that he was tortured and suffered mental anguish and further that he was never able to get any employment.

10. He produced a Certificate of Service to prove his employment and dismissal. He also produced a medical legal report prepared by Dr. Geoffrey Mucee on 15<sup>th</sup> May 2009.

11. The 1<sup>st</sup> Petitioner seeks by way of relief, damages for the torture he allegedly underwent besides his terminal dues and pension.

12. In cross-examination, the 1<sup>st</sup> Petitioner testified that he was nursed in 1983. He could not however remember the doctor. He also stated that he never reported the torture. He confirmed that following his discharge from the armed forces he took up employment as a teacher.

13. The 1<sup>st</sup> Petitioner contended that his rights under Articles 28, 29, 48, 49, 50 and 51 of the Constitution had been violated and he was entitled to appropriate relief.

#### ***The 2<sup>nd</sup> Petitioner***

14. The 2<sup>nd</sup> Petitioner Rogers Kimosa Righa also swore an affidavit on 26<sup>th</sup> August 2013.

15. The 2<sup>nd</sup> Petitioner's case is similar to the 1<sup>st</sup> Petitioner's.

16. It is the 2<sup>nd</sup> Petitioner's case that having been employed as a serviceman on 29 March 1973 he diligently served the Air force rising the ranks to the position of a senior Sergeant. Then on 1 August 1982 he was arrested, unlawful confined incommunicado for eight months and tortured on the false accusations that he had participated in an abortive attempt to overthrow the Government. He was later to

be discharged from the service dishonorably after he had been released on 22 March 1983 without any charges being preferred against him. The 2<sup>nd</sup> Petitioner denied that he participated in the attempted coup.

17. In his oral testimony the 2<sup>nd</sup> Petitioner re-affirmed his case. He further testified that he was stripped naked in the presence of others. The 2<sup>nd</sup> Petitioner who is now a salesman stated that he suffered mental anguish and torture.

18. On being cross-examined by Mr. Moimbo for the Respondent, the 2<sup>nd</sup> Petitioner stated that he saw a Dr. Mucheru on or about 13 May 2009. He also confirmed that he never reported his torture or mistreatment to any police station and that he had no evidence to show that his medical condition was caused by any torture during his confinement for eight months. He produced in evidence his certificate of Service and a copy of the medico-legal report by Dr. Mucheru of 15 May 2009.

### ***The 3<sup>rd</sup> Petitioner***

19. Benson Sokio Lekalau is the 3<sup>rd</sup> Petitioner. His case may be retrieved from both the affidavit sworn in Support of the Petition on 26<sup>th</sup> August 2016 and from oral evidence he gave in court on 13<sup>th</sup> October 2015.

20. The 3<sup>rd</sup> Petitioner's case is that he was illegally arrested, detained, searched in public and then held for several days incommunicado before being discharged dishonorably from the armed forces. He states that he was held in a dark cell for 74 days. He says that he suffered mental torture and that his discharge was by an illegal entity. He admits that he was court martialled and jailed for 5 years but denies ever participating in the attempted coup. He claims damages as well as his earning of Kshs. 5,372, 856/= for the torture he underwent.

21. In his oral testimony, the 3<sup>rd</sup> Petitioner relayed the events of 1 August 1982 as he witnessed the same. He testified that he was commanded to get into a lorry which he did but later on he stayed out of town only to get into an ambulance that took him to the Langata Barracks. Thereafter he did time in Kamiti and Naivasha Maximum Prisons before being court martialled and jailed for 8 years, a jail term which was later revised to 5 years. He stated that being stripped naked robbed him of his dignity.

22. In cross-examination, the 3<sup>rd</sup> Petitioner stated that he only saw a doctor in 2009. The doctor, Dr. Mucheru, prepared a medico-legal report on the 3<sup>rd</sup> Petitioner which was produced through affidavit evidence. The 3<sup>rd</sup> Petitioner also confirmed that he never reported his torture anywhere.

23. The 3<sup>rd</sup> Petitioner seeks damages and his pension besides the terminal dues for the 33 years he served the armed forces.

### ***The 4<sup>th</sup> Petitioner***

24. The 4<sup>th</sup> Petitioner was also until 1<sup>st</sup> August 1982 a serviceman with the Kenya Airforce. He was serving at Nanyuki Airbase when the attempted coup took place. He was arrested in the aftermath of the failed attempt and retained in various maximum prisons. He had been on the day of his arrest searched by being stripped naked. Later he was held incommunicado for over two months before being court martialled. He was not sentenced to prison but was discharged dishonorably.

25. In his oral testimony in chief, the 4<sup>th</sup> Petitioner stated that he joined the Kenya Airforce in 1968 and that he was detained incommunicado from the time of his arrest in August 1982 until March 1983. He also stated that he was stripped naked and beaten. In cross-examination he stated that a male doctor examined him in 2009 and 15<sup>th</sup> May 2009. He also availed Certificate of Service which was issued to him in 1985.

26. The 4<sup>th</sup> Petitioner contends that his Constitutional rights were violated through the detention as well as being stripped naked. He seeks damages and his outstanding pension as well.

### ***The 5<sup>th</sup> Petitioner***

27. The 5<sup>th</sup> Petitioner Samuel Ndungu Gatua is currently a farmer and businessman in Kiambu. He was employed in the Armed forces on 29<sup>th</sup> November 1965. He complains that in the aftermath of the 1982 failed *Coup de tat*, he was arrested on 1<sup>st</sup> August 1982, detained for seven (7) months incommunicado, tortured, stripped naked before finally being discharged from duty dishonourably. He claims to have been beaten during investigations.

28. In his oral testimony in chief, the 5<sup>th</sup> Respondent testified as much. He also confirmed having worked for Kenya Airways for 9 years after 1983. In cross-examination, the 5<sup>th</sup> Petitioner insisted that he was tortured whilst in detention but could not have brought any claim earlier as the environment was not conducive. He denied taking part in the attempted *Coup de tat*. He also stated that he had been tortured and stripped naked, denied food as well as medication. He stated that he was examined by Dr. Muceru in 2009.

29. The 5<sup>th</sup> Petitioner seeks damages and compensation for the torture and cruel treatment meted whilst in detention and also additionally his terminal dues and pension.

### ***The 6<sup>th</sup> Petitioner***

30. The 6<sup>th</sup> Petitioner is a farmer. Prior, he was a serviceman with the Kenya Airforce from 20<sup>th</sup> December 1968 until 1982. He was arrested in 1982 following the failed *Coup de tat*. He was then based at the Eastleigh Airbase. He denied having taken part in the coup but he was detained, court martialled and sentenced to jail for 15 years. The sentence was later reduced to 4 years.

31. The 6<sup>th</sup> Petitioner complains that he was detained incommunicado and humiliated. According to his oral testimony, he was tortured when he was put in dark cells full of water. He also testified that he has problems with his eyes and saw a doctor who prepared a report. The medical examination he stated was arranged by the Independent Medical Legal Unit.

32. The 6<sup>th</sup> Petitioner states that his rights were violated and all his dues and terminal benefits also withheld. He seeks due compensation.

### **The Respondents' case**

33. The Respondent's case is straight forward and is not pegged on any facts.

34. The Respondent states that the Petitioner is barred as there had been inordinate delay on the part of the Petitioners in filing the same. Thirty (30) years without any reason is a delay which cannot be excused, so states the Respondent

35. The Respondent further states that the Petition is based on generalities and contradictions and that the Petitioners have not tendered any evidence to prove their case.

### **Arguments by the Parties**

36. The Petitioners were represented by Mr. Wachira who urged their case. Mr. Moimbo Momanyi represented the Respondent.

### ***Petitioners' submissions***

37. The Petitioners submitted that their Constitutional rights had been grossly violated. Counsel submitted that the Petitioners had been unlawfully detained, had lost their liberty and properly beaten. Contrary to Sections 70, 71, 72, 73, 74, 77 and 81 of the retired Constitution. Counsel further submitted that the Petitioners had been deprived of food and communication with their family members as well as the right of legal representation. Counsel argued that the Petitioners discharge was unlawful.

38. With regard to the 1<sup>st</sup> Petitioner, counsel stated that enough evidence had been tendered to show that his rights had been violated and that as a result of the violations, the 1<sup>st</sup> Petitioner suffers from traumatic stress and disorder.

39. With regard to the 2<sup>nd</sup> Petitioner it was also submitted that his detention without trial or any charges being preferred was illegal and unconstitutional. Counsel stated that there was enough evidence to show that the 2<sup>nd</sup> Petitioners rights had been violated.

40. The same submissions were also made with regard to the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Petitioners with stress being placed on the fact that the Petitioners were all subjected to mental and physical torture.

41. Counsel relied on the case of **Ann Njogu & 5 Others –vs- Republic [2007]eKLR** for the proposition that the long detention of the Petitioners incommunicado without being taken to court was a violation of their rights under the repealed Constitution as detention beyond the time prescribed by law was itself unlawful. Counsel additionally relied on the case of **Cpt. Geoffrey Kujoga Murungi –vs- The Attorney General Misc. App No. 293 of 1993** for the proposition that the Petitioners dismissal by an illegal entity namely the 82 Airforce was void .

42. Counsel submitted that the Petitioners were entitled to lumpsum damages for breaches and violations of their rights and relied on the case of **Peter M. Kariuki –v- Attorney General C.A.C.A No. 79 of 2012** to quantify the Petitioners damages at kshs. 15,000,000/= each.

#### *Respondent's Submissions*

43. Mr. Moimbo submitted that the Petitioners had failed to prove their claim to the required standard. Counsel pointed out that the claims by the Petitioners were time barred. It was also submitted that the Petitioners evidence was also contradicting and conflicting as their oral testimony differed substantially from the affidavit evidence on record, making the testimony unreliable.

44. More specifically, the Respondents counsel attacked the 1<sup>st</sup> Petitioner's evidence as being unreliable and wanting with regard to the 2<sup>nd</sup> Petitioner, it was submitted that his claim was imprecise and purely general.

45. On the 3<sup>rd</sup> Petitioner, the Respondent states that the confirmation that he was arraigned and presented before a court martial was good confirmation that the rule of law and the Constitution was observed. The 3<sup>rd</sup> Petitioner's claim was also stated to be imprecise. The same submissions were made in respect of the 4<sup>th</sup> Petitioner's claim.

46. On the 5<sup>th</sup> and 6<sup>th</sup> Petitioners claim counsel submitted that their respective evidence was neither credible nor believable.

47. The Respondent's counsel also submitted that the Petitioners claim for unpaid salaries and pensions was also time barred under the Public Authorities Limitation Act (Cap 39) and further that, in any event, where one was unsuitably dismissed he was only entitled to a cumulative amount of 12 months' salary/wages. Any payments above such an amount would be tantamount to unjust enrichment as was held in the case of **P.J.O –vs- F.A.C.L [2015]eKLR**.

48. Mr Moimbo urged the court to dismiss the Petitioners claims for being pegged on a defective Petition

and also for want of satisfactory evidence.

### **Discussion and Determinations.**

49. A reading of both the Petition and the Grounds filed in opposition thereto as well as the submissions by the parties' advocates would reveal that there are four issues for determination. Firstly, is the claim competent. Secondly, are the claims by the Petitioners time-barred by statute or otherwise. Thirdly, were the Petitioners rights or any alleged rights were violated what is the appropriate remedy in the circumstances.

#### ***Competency of the Petition***

50. The Respondent contends that the Petition, even without a consideration of its merits ought to be dismissed for not meeting the minimum competency threshold. It is stated that the Petition is not precise enough and does not reveal with the requisite degree the Articles of the Constitution violated as well as the manner of violation.

51. There is no doubt that the principle of the law is that where a person alleges constitutional violations and infringements and brings a claim to court, the Constitutional violations must not only be pleaded with a reasonable degree of precision but must also be particularized in a precise manner. The aggrieved party must also enumerate the Articles of the Constitution granting the rights complained to have been violated and the manner in which the rights have been violated or threatened with violation: see the cases of **Anarita Karimi Njeru –vs- Republic [1976] -80] KLR 1272** and the Court of Appeal decision in **Trusted Society of Human Rights Alliance –vs- The Attorney General & 2 Others [2014] eKLR**.

52. The precision required is however not absolute precision and where the court can painlessly identify the Petitioners claim then the claim must be heard on its merits. The idea around the reasonable precision rule is to let the Respondent be aware of the case it is faced with. The sentiments expressed by both the Court of Appeal in **Peter M. Kariuki –v- Attorney General [2014] eKLR** and **Nation Media Group Ltd –vs- Attorney General [2007] 1 EA 261**, that a Constitutional court should be liberal in the way it dispenses justice is relevant. As long as a party is aware of the case he is faced with, the matter ought to proceed to substantive hearing and determination on its merits.

53. I have perused the Petition as drawn. It is easily discernible what the Petitioners claim is about. The claim may, be easily aligned to both the retired Constitution as well as the Constitution 2010. The Petitioners claim illegal detention. They claim torture-both mental and physical. They claim abuse of their dignity. They also claim a denial of their social economic rights. The Petitioners have identified Articles 28, 29, 48, 49, 43 and 50 of the Constitution as read together with Sections 70, 71, 72, 74 of the retired Constitution. The Petition also describes in detail the manner of the alleged violations.

54. I am unable to return the verdict as requested by the Respondent that the Petition fails to meet the competency threshold. Instead, I find that the Petition was drafted with the requisite precision which enables one to painless identify the Petitioners' claims.

#### ***Time barred claims?***

55. The Respondent further contends that the claims by the Petitioner for violation of their Constitutional rights have been filed so late in time to be accepted as genuine claims.

56. The Petitioners claim as I understood them are two-fold. Firstly, the Petitioners claim that their Constitutional rights were violated. They pin point the violations including abuse of their dignity and torture. They also point to illegal detention. Secondly, the Petitioners claim that they were unlawfully dismissed from the armed forces and denied their terminal benefits.

57. The alleged violations as well as the dismissal from the Armed forces took place in 1983. That is well over thirty years prior to the filing of the instant Petition. The Petitioners offered no explicit explanation

save to point out that the “atmosphere was not conducive enough” to file any claim during the regime of the second President of the Republic of Kenya. This could be clearly picked from the testimonies of the 4<sup>th</sup> and 6<sup>th</sup> Petitioners.

58. The Constitution does not provide any time limit for the filing of claims alleging violations of any of the guaranteed rights and fundamental freedoms. The law, as I understand it, however is that a person who claims that his Constitutional rights or freedom has been violated must however move with the necessary alacrity and expedition to enforce or protect the same through the court process. A party must have some zeal in enforcing or standing up for his rights: see **Attorney General of Uganda –vs- Omar Awadh & 6 Others [EACJ] No. 2 of 2012**. The court is enjoined consequently to enquire into the circumstances leading to such late filing of the Petition where there appears to exist some unreasonable delay: see **Masai Mara (Supa) Ltd –v- Narok County Government [2016] eKLR**.

59. The concept behind limitation of actions and statutes of limitation is that a party is not to be prejudiced in his case or in defending a claim. Elongated delays lead to absence of witnesses and also even where witnesses are present, memory slips and memory drifts. Evidence generally dissipates the longer a claim takes to be filed. Even the claimant may be disadvantaged and the course of justice itself would then be perverted. Generally as well it is in the interest of the administration of justice that litigation is expeditiously brought and expeditiously disposed of. No party ought to be allowed to sleep on his rights with a resultant prejudice to the others when he ultimately wakes up.

60. With regard to claims for enforcement of fundamental rights not only is there no limitation period but the issue whether there has been any inordinate delay must be considered alongside the question of prejudice to either party to the claim. The individual concerned may be vexed by the now scattered evidence that has probably frittered away. The State on the other hand may also be vexed by the same inability to call evidence.

61. The events and alleged violations now complained of took place thirty years ago. In an attempt to explain the delay the Petitioners advanced the argument that the atmosphere was not conducive enough until after the year 2013. The delay was blamed on the political climate obtaining between the years.

62. It is true the courts have recognized the fact that prospective and genuine claimants may not be able to fill claims if there prevails “a politically repressive climate”: see **Ochieng Kenneth K’Ogutu –v- Kenyatta University & 2 Others HCCP No. 306 of 2012**. Where the delay is inordinate and no reason is advanced to explain the delay, the court will shut out the claim. Thus is **Joseph Migere Oloo –v- Attorney General HCCP No. 424 of 2013** a delay of 29 years was held inexcusable. In **Ochieng Kenneth K’Ogutu –v- Kenyatta University & 2 Others (Supra)** a delay of 17 years without any reason advanced was also held inexcusable.

63. In the instant case, the Petitioners have stated that the existence of a politically repressive regime led to the delay in filing the claim. They testified as much on oath. I have no reason to doubt the Petitioners testimony that a repressive regime was not conducive to the filing of a constitutional claim given that the origin of the claim was a failed coup seeking to overthrow the allegedly repressive regime. I hasten however to add that the repressive regime’s tenure came to a halt in 2002, yet it took the Petitioners another ten years to file suit. Did they need to wait that long again?

64. The Petition is to be noted was filed in the aftermath of the new Constitution adopted by the people of Kenya in 2010. It has been severally stated that Kenyans transited. The Constitutional dispensation was shoved for the better. The democracy widened. I have myself no doubt on that. In the process Kenyans as well as the State organs submitted to the concept of transitional justice.

65. In the case of **Gerald Gichoki & 9 others vs. Attorney General HCCP No. 487 of 2012**, the court stated as follows:

***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.”*

66. In *Njuguna Githiru vs. Attorney General [2016]eKLR* the concept of transitional justice was even expounded further by the court when the court stated as follows:

*“[37]...the dictates of transitional Justice cannot be ignored. Transitional justice is a set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses, with Kenya being no exception. This Court in previous decisions has stated that these measures include criminal prosecutions, truth and justice commissions, reparations programs, and various kinds of institutional reforms. Having so said however, it is imperative for a Petitioner to demonstrate some justification for prolonged delays in instituting claims 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 say so because 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. The foregoing further indicates that the cases alleging violations by the oppressive regime have been filed from 2003 onwards and even before the promulgation of the Constitution of Kenya, 2010. Transitional justice cannot however be a matter *ad infinitum* or a process without end as the Petitioner seems to have argued. Whereas such a claim may not be extinguished, the need to explain inordinate delay is a necessary requirement even if there is in fact no limitation of time for filing constitutional Petitions as the authorities above have clearly shown. That is why in *Mombasa Civil Case No. 128 of 1962, Rawal vs Rawal [1990] KLR 275* the Learned Judge stated thus:*

*“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.”*

67. It is clear, and I am prepared to follow the principle, that the concept of transitional justice in special circumstances has a grip on the Kenyan jurisprudence. The need not to rush and dismiss suits on the basis of the doctrine of laches is there. The claimant is to be given the benefit of the doubt where the claimant may explain the delay and also where there is evidently no prejudice fetched on the Respondent by reason of evidence having been lost.

68. I am prepared to find and I so find and hold that the dictates of transitional justice would not allow the Petitioners’ claim pegged on the Constitution to be disallowed without venturing on the merits.

69. I also hold the view that the Respondents would not be prejudiced as most of the background facts are not in controversy. It is not a controversy that there was an attempted coup in August 1982. It is also not in controversy that the Petitioners were all service-men and that they were all dismissed following their arrest, detention and court martial appearance in certain cases. The August 1982 was one of its kind in Kenya. The treatment meted out to both civilians and servicemen is generally well documented. It is for each individual to their zero-in his case and be specific, but claims arising from the August 1982 ought to

be accepted on a case by case basis. In the instant case there was delay but I find that no prejudice would be occasioned to the Respondent in terms of evidence as the burden does not shift until the Petitioners make out a case for the violation of their rights.

70. I would consequently not disallow the Petitioner safety on the basis of limitation.

### *One half fails*

71. The Petition is one of two-halves.

72. There is the issue of fundamental rights and freedoms being violated. Then there is the other half where the Petitioners claim their terminal benefits and pensions.

73. The latter half of the Petitioners claim in my view has to fail without much analysis. Even if it is accepted as has been that the Petitioners were employees of the Kenya Airforce, that would rank to be a purely employment matter when it comes to terminal benefits and pensions. Statute bars such claims after a specified period of time. The Public Authorities Limitation of Action Act Cap 39 at would bar such claims. It is not a matter of the court exercising its discretion. It is a claim that is statute barred.

74. I hasten to also quickly add that servicemen in the armed forces hold a special place in the pedestal of employment. When their services are not needed their dismissal is summary, at times honourably and at times dishonourably.

75. The Petitioners herein were dismissed dishonourably. Section 176(g) of the Armed Forces Act (Cap 199) now repealed allowed for the dismissal and discharge of a serviceman if his services were no longer necessary. I see no reason why the dismissal and discharge of the Petitioners may be christened unlawful or illegal. And if the services were no longer necessary I also see no reason why the state should pay for services which were not necessary and which indeed were actually not even rendered. I would consequently at this stage dispense with, by way of dismissal, the claim by the Petitioners for terminal benefits and pensions for the remaining period of their working lives which they all stated was to run up to the age of 60 years.

### ***Violation of Constitutional rights***

76. The burden of proving violation of a right or freedom enshrined in the Constitution rests on the person alleging the violation: see **Matiba vs. Attorney General [1990] KLR 666**. Such burden is to be discharged on a balance of probabilities by the Petitioner showing that the right existed and that it has been violated and the manner of such violation.

77. The Petitioners' claim was three-fold with regard to alleged violation of the Constitution. First, the Petitioners all claimed to have been humiliated and treated in an undignified manner. They then alleged that they had been illegally detained incommunicado for periods roughly between three and eight months. The Petitioners, thirdly, also claimed that they had been tortured.

78. With regard to torture, both the retired Constitution as well as the Constitution 2010 sought and seek to ensure the protection of physical integrity of the individual. Article 29(d) provides for the right not to be subjected to torture in any manner, whether physical or psychological. Section 74(1) of the retired Constitution was essentially to like effect. The United Nations Universal Declaration of Human Rights (UDHR) also provides under Article 5 that "*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*". The UDHR was adopted on 10<sup>th</sup> December 1948. Since, several statutes and international covenants and treaties have prohibited torture which is basically, an infliction of physical suffering or threat to inflict such suffering.

79. All the Petitioners claimed that they were upon arrest on 1<sup>st</sup> August 1982 subjected to threats of infliction of pain. That they were searched and stripped naked in the full glare of the public. That whilst in custody they were subjected to physical pain as well as degrading conditions like being in prison cells

filled with water and being held in solitary confinement. The Respondents retort was that all these were mere allegations and nothing more.

80. A quick review of the evidence would however reveal that the Petitioners did not exactly state that where they were arrested was in public places. I am not satisfied that at the time of the Petitioners arrest they were subjected to such inhuman and tortuous treatment. The evidence was simply not convincing.

81. With regard to infliction of physical pain whilst in detention, even though the Petitioners testified that this happened there was once again not adequate evidence to show and demonstrate that the Petitioners were tortured. The Petitioners attempted to prove this by availing medical reports prepared in 2009. The reports did not however show that the Petitioners had sustained any injury rather they all appeared to give the Petitioners clean bills of health. One may blame it on lapse of time but yet again the burden was on the Petitioners. I am unable to find that the Petitioners right to freedom from torture was violated for lack of evidence.

82. The Petitioners also variously complained of having been held incommunicado before either being released without trial or being arraigned before the court martial.

83. The retired Constitution at Section 72 guaranteed each individual personal liberty. The Section provided as follows:

***“(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.***

***A person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.***

***(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) Where a person is brought before a court in execution of the order of a court in any proceedings or upon suspicion of his having committed or being about to commit an offence, he shall not be thereafter further held in custody in connexion with those proceedings or that offence save upon the order of a court.***

***(5) If a person arrested or detained as mentioned in subsection (3)***

***(b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall, unless he is charged with an offence punishable by death, be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.***

***(6) A person who is unlawfully arrested or detained by another person shall be entitled to compensation therefor from that other person. ”***

84. The 1<sup>st</sup> Petitioner testified that he was held in detention for a period of 6 months between 5<sup>th</sup> August 1982 and 10<sup>th</sup> February 1983 before being released. He was not court martial or charged. He was simply released. All the while he communicated with nobody.

85. The 2<sup>nd</sup> Petitioner was held in custody between 1<sup>st</sup> August 1982 and 22<sup>nd</sup> March 1983; a period of nearly 8 months. He was not arraigned before any court or the court martial.

86. The 3<sup>rd</sup> Petitioner was detained for a period of 74 days following his arrest on 1<sup>st</sup> August 1982. He was ultimately court martialled and jailed.

87. The 4<sup>th</sup> Petitioner on the other hand was detained for eight months before being released without any trial or court martial.

88. The 5<sup>th</sup> Petitioner was also detained between 1<sup>st</sup> August 1982 and 28<sup>th</sup> February 1983; a period of 7 months. He was not court martialled or arraigned before any court.

89. Finally, the 5<sup>th</sup> Petitioner was arrested on 1<sup>st</sup> August 1982. He was detained and later court martialled and jailed. Prior to being arraigned before the court martial he was detained incommunicado for 3 months.

90. All the Petitioners testified on oath. I observed them as they testified. Their demeanor as they spoke of their respective detention and periods of detention did not let them down. They appeared bitter at the detention without trial but sounded helpless. They also appeared to honestly testify. I have no reason to doubt this aspect of their testimony.

91. It is certainly clear that both under the retired Constitution and the current Constitution a person's liberty cannot be taken away without sufficient reason. If a person is arrested upon reasonable suspicion of having committed a crime the constitutional provision is that he must be arraigned before the court as soon as practicable. The threshold is twenty-four hours. Anything to the contrary would be illegal. It was therefore unlawful and a clear violation of Constitutional provisions to hold the Petitioners for the extended periods. As was held in **Albanus Mwasia Mutua –v- Republic Criminal Appeal No. 120 of 2004**, the burden of proving that a person has been arrested and brought before a court as soon as is reasonably practicable rests upon the person who alleges that the Constitutional provisions have been complied with. The Respondent however tendered no evidence to controvert the Petitioners testimonies.

92. I must oblige and return the finding that all the Petitioners were deprived of their liberty in a manner not contemplated by the Constitution.

93. The periods of the Petitioners' detention were long and, in my view, unnecessary so given that some of the Petitioners were not arraigned before the court martial. It matters little that the Petitioners were servicemen; allegations against them ought to have been investigated and dealt with expeditiously. Additionally, the Petitioners were not being disciplined or under any disciplinary process of the Armed forces to take them out of the ambit of the constitutional provisions. Holding the Petitioners for periods of six months and above was certainly unnecessary. There was an unnecessary delay which naturally infringed on the Petitioners' constitutional rights.

94. I return the verdict that the Petitioners' rights were violated in so far as they were detained for long periods without being arraigned before a court martial or a court.

## **Reliefs**

95. The Petitioners would be entitled to some reliefs in the circumstances.

96. An award of damages may not necessarily give back to the Petitioners their Constitutional rights and freedoms taken away and abused so many years ago. It will however serve some comfort. They will be vindicated. It is compensatory in one way or the other.

97. In arriving at a compensatory award, I take note of the fact that the Petitioners only proved that their right to or freedom of liberty was taken away. The Petitioners did not prove any other violation.

98. Considering the circumstances of the case and period of the unlawful detention which ranged between five months and eight months, I am of the view that an appropriate amount would be a global sum of Kshs. 2,000,000/= for each Petitioner.

99. I consequently award the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Petitioner, Kshs. 2,000,000/= each to be paid by the Respondent. Interest will accrue from the date of judgment until full payment.

100. I am inclined to deny the Petitioners costs in the circumstances of this case. They were lax in bringing their claim. Each party will however bear its own costs of the Petition.

101. Judgment is accordingly entered against the Respondent.

Dated, signed and delivered at Nairobi this 19<sup>th</sup> day of August, 2016

*J.L.ONGUTO*

JUDGE