



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 587 OF 2012

BETWEEN

GERALD JUMA GICHOHI.....1ST PETITIONER
HUMPHREY KALAMA SHUME.....2ND PETITIONER
PETER MWANGI KARIUKI.....3RD PETITIONER
JAMES GITAU THANDI.....4TH PETITIONER
DAVID GIKUNJU MWANGI.....5TH PETITIONER
FRANCIS NGARI KUWONA.....6TH PETITIONER
OBADIAH MAZA MWAMBONU.....7TH PETITIONER
PLACIDE MWAKISACHI EDWARD.....8TH PETITIONER
JOHN PHINEHAZ THAIRU.....9TH PETITIONER
LAWRENCE KEARIE WARUKIRA.....10TH PETITIONER

AND

THE ATTORNEY GENERAL..... RESPONDENT

JUDGMENT

Introduction

1. In their Petition dated 21st December 2012, the Petitioners claim that they are ex-service officers of the Kenya Air Force (hereinafter ‘KAF’) in the Armed Forces of Kenya. They have filed this Petition seeking to enforce their fundamental rights and freedoms as contained in **Sections 70(a), 72(1), (3), 74 (1) and 77** of the **Repealed Constitution** which was allegedly violated by the officers of the Kenya Army and Kenya Police on diverse dates in August 1982 and 1983 on suspicion of participating in the 1982

attempted *coup d'etat* on account of them being officers of the Kenya Air Force.

2. They claim that in the cause of and immediately after the said arrest all the Petitioners were subjected to untold torture, cruel, inhuman and degrading treatment by officers of the Kenya Army and Prison Warders. That they were stripped naked in public, were made to walk on the concrete floors, were whipped, kicked around, bludgeoned all over their bodies, insulted and moved into custody in military trucks whilst naked and in full view of the public in violation of their fundamental right to human dignity, protection of the law and protection from cruel, inhuman and degrading treatment.

3. That following the alleged brutal arrest they claimed that they were placed in various military, police and prison custody where the said torture, cruel, inhuman and degrading treatment and brutality continued.

4. They also alleged that they were frequently moved from one place of detention to another while detained incommunicado. That they were held in pre-arraignment detention in civilian prisons for periods between 61 and 143 days before arraignment at the Court Martial and were later on dismissed from the Kenya Air Force without a hearing and without any dues in violation of their fundamental right to human dignity, protection of the law, personal liberty, freedom from torture, cruel, inhuman and degrading treatment and right to fair trial.

5. In their Petition they have therefore sought the following orders;

(i) A declaration that the brutal arrest, the cruel, inhuman and degrading treatment inflicted on the Petitioners upon being taken into custody, the violence, brutalities and the extreme, harsh and inhuman conditions that the Petitioners were subjected to in the various military, police and prison custody constituted violations of the fundamental rights and freedoms of the Petitioners as to human dignity, protection of the law, prohibition against torture, cruel, inhuman and/or degrading treatment or punishment guaranteed by Sections 70(a) and 74(1) of the former Constitution (now Articles 27(1), (2), 28 and 29(a), (c), (d), (f) of the Constitution of Kenya, 2010).

(ii) A declaration that the pre-arraignment incommunicado detention of the respective Petitioners of between 61 and 143 days in military, police and prison custody and the period of between 3½ and 16 months of continued imprisonment in unlawful deprivation of remission of sentence constituted periods of arbitrary and unlawful detention in violation of the fundamental rights of the Petitioners as to human dignity, personal liberty, freedom from cruel, inhuman and degrading treatment and/or punishment and the protection of law including right to a fair trial guaranteed by sections 70(a), 72(1), (3), 74(1) and 77 of the former Constitution (now Articles 27(1), (2), 29(a) 49(1) (f) and 50(2) of the Constitution of Kenya, 20110).

(iii) General, exemplary, aggravated and punitive damages consequential to the declarations of violations of the fundamental rights and freedoms of the Petitioners in prayers (i) and (ii) above as shall be assessed by this Honourable Court.

(iv) Costs of the Petition.

(v) Interest on all monetary awards.

The 1st Petitioner's Case

6. The 1st Petitioner, Gerald Juma Gichohi in his Affidavit sworn on 21st December 2012 stated that he was enlisted in the Kenya Air Force on 3rd March 1978 under Service No.023062, he rose to the rank of Corporal and his last posting was at Nanyuki Air Base. He stated that on 1st August 1982, he was asleep in the Canadian Tent when he was startled from bed by shouts and screams of soldiers dressed in full combat uniform that had stormed his tent and loudly ordered everybody to dress up and rush to the

armory at once. He obliged and while at the armory he was ordered to arm himself and instructed to wait further instructions but none came forth. At lunch time he alleged heard an announcement on the radio that the coup had been crushed and the Government restored to the then President Daniel Arap Moi.

7. Thereafter at around 3.00pm, he claimed that Kenya Army soldiers stormed into the Nanyuki Air Base and ordered all Kenya Air Force officers including the 1st Petitioner to surrender and they were then disarmed, arrested and stripped naked while being beaten using fists, kicks and gun butts. They were locked up in a makeshift cell in the Supplies Block without enough ventilation and were fed on one meal a day until 8th August, 1982 when he was transferred to Nairobi. That between the 1st and 8th August 1982 together with others he was daily frog-marched from the cell and ordered to lie down on scorching runway tarmac with his face down as he was being interrogated on the events leading to the failed coup.

8. He claimed that on 8th August, 1982 while still half-naked, he was escorted from Nanyuki to Eastleigh Air Base in Nairobi while randomly and severely being beaten with kicks, slaps and gun butts. On his arrival, he was frog marched to the guardroom where he was locked up and was starved for a whole day without any food or drinking water.

9. On 9th August 1982, he claimed that he was bundled into a prison truck and escorted to Kamiti Medium Prison while being beaten up all the way. While at Kamiti, he alleged that he was, continuously beaten, denied food, drinking or bathing water for the first two days and was also denied medical treatment for his injuries. He was allegedly detained in Kamiti for four months in a dark, filthy overcrowded cell which had a permanent foul smell; infested with lice that made sleeping impossible; without adequate ventilation, lighting, blankets or beddings and was therefore forced to sleep on the concrete floor for the whole period.

10. After four months, he was allegedly transferred to Naivasha Maximum Security Prison where for the first 3 days, he was locked up in solitary confinement in a black painted, filthy, waterlogged cell without any lighting and was denied food, drinking or bathing water. He claimed that he was subjected to numerous interrogations by Kenya Army and Special Branch officers and that he was forced to sign a prepared statement whose contents he did not know. After one month, he was on 11th November 1982 transferred to Kamiti Maximum Prison and detained in a overcrowded cell in Block G for one week.

11. He further stated that on 21st December, 1982 he was given a pair of filthy worn out clothes and escorted from Kamiti to the Court Martial at Langata Barracks where he was charged with the offence of failure to suppress a mutiny and subsequently sentenced to 3 months imprisonment. He was detained at Industrial Area Prison. After one month of solitary confinement in Industrial Area he was transferred to Shimo La Tewa Prison where he was also placed in solitary confinement until 23rd March 1983 when he was released from prison. Upon release from prison, he was informed that he had been dismissed from the armed forces with effect from 1st August 1982 and was ordered not to appear anywhere near a military establishment again.

The 2nd Petitioner's Case

12. The 2nd Petitioner, Humphrey Kalama Shume, in his Affidavit sworn on 21st December, 2012 claimed that he was enlisted in the Kenya Air Force on 12th September 1979 under Service No.024480. After his military training, he was posted to Eastleigh Air Base where he was further trained as an Aircraft Frames and Engines Technician Grade II and rose to the rank of Senior Private.

13. He alleged that on 31st August 1982, after finishing his daily duties in Hanger 4 at Eastleigh Air Base, he went out of the base to Buru Buru Shopping Center for a party with friends and relatives. At 2.00 a.m. he claimed that word filtered into the party that all was not well at the Base and he immediately left for the Base. On arrival, he met an officer at the main gate with full uniform who ordered him to quickly put on his uniform and report to the armory for issuance of a gun and ammunition. Together with others, he was deployed to the runway where he was to wait further orders which he never came. At around 1.00

p.m., he heard an announcement on the radio that the military coup had been terminated and Government restored to the civilians under President Daniel Arap Moi.

14. At around 3.00 p.m. word came round that Eastleigh Air Base was under an imminent attack from the Kenya Army and General Service Unit (GSU). Fearful, he claimed that he returned his firearm and sneaked through the fence into his cousin's house in Buru Buru where he spent the night. The next morning, he heard an announcement directing all Kenya Air Force officers to report to the nearest military base or police station, and in obedience he proceeded to the Eastleigh Base. On arrival, he was arrested by Kenya Army soldiers and was ordered to strip naked, walk on his knees on the concrete pavement up to the guardroom as he was severely beaten all over his bodies with kicks, fists and gun butts.

15. He claimed that on the evening of 2nd August, 1982 he was escorted to Kamiti Maximum Prison still half naked as he continued being beaten. On arrival at Kamiti, he alleged he was subjected to more severe beatings by prison warders using kicks, slaps, fists and buttons before being locked up in a filthy, overcrowded cell with a permanent foul odour, without any beddings or blanket while still half naked and denied food and drinking water for 3 days. He claimed that he was detained at Kamiti Maximum Prison for two more weeks and was later escorted while half-naked to Naivasha Maximum Security Prison where he was locked up in solitary confinement in a dark cold, waterlogged cell without lighting and denied drinking and bathing water, food and access to toilets. He said that he was fearful of dying from starvation and pneumonia and as a result he signed a pre-pared confession whose contents he did not know.

16. He was detained at Naivasha Maximum Security Prison until sometime early December 1982 when he was transferred at night while blindfolded and, half-naked to a place he later discovered to be the Industrial Area Prison where he was detained for two weeks. On 16th December 1982, he was taken to the Court Martial at Langata Barracks and charged with two offences of having unlawfully armed himself and obeying unlawful orders from junior officers. He pleaded guilty as charged and was sentenced to two years imprisonment. He was thereafter escorted to Industrial Area Prison and later transferred to Shimo La Tewa Maximum Prison. He stated that he appealed against his conviction and sentence at the High Court and his sentence was reduced to a one year jail term. He was released from Shimo La Tewa on 16th December 1983. He claimed that upon his release he was informed that he had since been discharged from the armed forces since 1st August 1982.

17. He claimed that throughout his detention of 139 days he was denied any medical attention to relieve his excruciating pain and to treat the injuries he had sustained from the brutalities inflicted upon him.

The 3rd Petitioner's Case

18. The 3rd Petitioner, Peter Mwangi Kariuki, in his Affidavit sworn on 21st December 2012 stated that he was enlisted in the Kenya Air Force on 8th August 1981 as a Cadet Officer under Service No.025432. That in early 1982 he was examined by the Military Commission Board and successfully passed the examination becoming eligible for a Commission for the rank of 2nd Lieutenant and he was thereafter posted to Eastleigh Base where he undertook a course as a flight Cadet until end of July 1982. He claimed that after the flying course he was given time off duty and he went to Kiambu town to visit his cousin.

19. He claimed that early on the morning of 1st August 1982 while still in Kiambu, his cousin woke him up informing him that there was a coup. He immediately went to Eastleigh Air Base where on arrival he found Kenya Air Force vehicles moving in and out of the base with armed excited soldiers dressed in full uniform. He went straight to the Flight Cadet Officer's Mess whereupon some armed officers came in and ordered everybody to go to the armory where they were all issued with rifles and ammunitions. After being armed, they were ordered for deployment to different sites in the city and he boarded a military truck heading towards Juja Road. On reaching Pangani, the trucks run out of fuel and he sensed something was wrong as orders were being given by junior officers contrary to the rule in the military. He

therefore decided to go back to Eastleigh Air Base and stayed at the Cadet Officer's Mess and while there, he heard on the radio that the coup had been crushed and the Government restored to civilians under President Moi.

20. He further alleged that at around 2.00pm of the same day, officers of the Kenya Army stormed the Eastleigh Base and detained him and others in the flight cadet officer's mess incommunicado for two weeks in overcrowded conditions, without adequate food, drinking or bathing water. That during those two weeks, he was beaten up using kicks, slaps, fists and gun butts.

21. That on 13th August 1982, together with several other officers, he was stripped naked and bundled into military trucks and escorted to Kamiti Medium Security Prison while being beaten up all over his body. He was detained at Kamiti in a dark filthy cell, without adequate ventilation, lighting, beddings or toilet facilities and was forced to sleep on concrete floor for 2 months. Thereafter he was allegedly escorted to Naivasha Maximum Prison where he was locked up for five days in solitary confinement in a black painted cell, without lighting, food, drinking or bathing water or toilet facilities. That he would be called out of the cell for one hour a day for interrogation and basking.

22. He claimed that after one month of detention in Naivasha, on 1st November 1982, he was transferred to Kamiti Maximum Prison where he was locked up in an overcrowded, filthy, lice infested cell in Block G that also housed insane prisoners who were yelling and making it impossible for him to sleep at any time. After one month of detention at Kamiti, he was taken to Langata Barracks where he was arraigned before the Court Martial and charged with the offence of mutiny. He pleaded guilty and was sentenced to 15 years' imprisonment and immediately taken to Kamiti Maximum Prison to serve his sentence.

23. That at Kamiti, he claimed that he was placed in solitary confinement for three weeks and later on transferred to Kodiaga Prison in Kisumu, where he was imprisoned for 6 months and later transferred to Naivasha Maximum Prison. While at Naivasha he was informed that the Military Review Board had reviewed his sentence from 15 years to 3 years' imprisonment. He was released on 19th November 1985 and was informed that he had already been discharged from the Armed Forces with effect from 1st August 1982.

24. He claimed that throughout his pre-arraignment detention of 122 days, he was denied medical attention for the excruciating pain and injuries sustained from the brutalities inflicted upon him by Kenya Army officers and prison warders. And that he was not paid any dues including for the 122 days he was held in solitary confinement.

The 4th Petitioner's Case

25. The 4th Petitioner, James Gitau Thandi, in his Affidavit sworn on 21st December 2012 and in oral evidence before this Court, state that he was enlisted in the Kenya Air Force on 2nd September, 1977 under Service No.022893 and rose to the rank of Senior Private. That he did his basic military training in Lanet, Nakuru and was later posted to Eastleigh Air Base where he undertook and completed a Crash and Rescue Operator Course which he completed at Nanyuki Air force Base.

26. He alleged that on 1st August 1982, he was asleep in the Air force barracks at Nanyuki when he was startled by shouts and screams from soldiers dressed in full uniform who stormed the barracks and announced that the armed forces had overthrown the Government and ordered all officers to dress up in full uniform and rush to the armory at once. At the armory, he was ordered to jump over the counter and get himself 60 rounds of ammunition. He did so.

27. He further claimed that at about 1.00 p.m. while in the Privates' Mess and before any clear orders from senior officers had been received, he heard an announcement in the radio that the coup had been crushed and the Government restored to the then President Daniel Arap Moi.

28. Thereafter at around 3.00 p.m., he claimed that Kenya Army soldiers stormed into the Nanyuki base

and ordered all the Kenya Air Force officers to surrender and after they did so, were disarmed, arrested and stripped naked while being beaten using fists, kicks and gun butts. They were locked up in a makeshift cell in the Supplies Block without enough ventilation and on one meal a day. That in the last days of the detention, he would be ordered to lie on his back on the runway tarmac in the scorching sun for a whole day as army and police officers interrogated him in turns concerning the failed coup.

29. He claimed that on 12th August, 1982 while still half-naked, he was escorted from Nanyuki Air Base to Kamiti Medium Prison while being randomly and severely beaten with kicks, slaps and gun butts on his way. On his arrival, he was subjected to more beatings all over his body while being led to a cell as he was being insulted as being part of 'educated rubbish' and was denied food, drinking and bathing water for the first three days and was also denied medical treatment for his injuries. He was allegedly detained in a dark, filthy, overcrowded cell with a permanent foul smell, fully infested with lice that made sleeping impossible, without adequate ventilation, lighting, blankets or beddings and was therefore forced to sleep on the concrete floor.

30. After two months of detention, he was allegedly transferred to Naivasha Maximum Security Prison where for the first 3 days, he was locked up in solitary confinement in a black painted, filthy, waterlogged cell without any lighting and was denied food, drinking or bathing water. After the 3 days in solitary confinement, he was transferred to a filthy overcrowded cell without proper ventilation, and without beddings,; with lights permanently on day and night and he would be let out of the cell for only 1 hour a day for interrogation and basking.

31. He claimed that during that period, he was subjected to numerous interrogations by Kenya Army and C.I.D officers and he alleged that he was later forced to sign a prepared statement whose contents he did not know. After one month, on 11th November 1982 he was transferred to Kamiti Maximum Prison and detained in an overcrowded cell in Block G where sleeping was impossible because of the full time yelling and screams from insane prisoners on death row.

32. On 30th November, 1982, he was given a pair of filthy worn out clothes and escorted from Kamiti to the Court Martial at Langata Barracks where he was charged with the offence of mutiny and he pleaded guilty to the said charge before he was sentenced to 8 years' imprisonment. He was detained at Industrial Area Prison.

33. At Industrial Area Prison, he claimed that he was detained incommunicado in a cell, alone, for one month and later transferred to Kodiago Prison Kisumu where he was also placed incommunicado until June 1983.

34. In September 1983, while still at Kodiago Prison, he was informed that the Military Review Board had reviewed his sentence from 8 years to 4 years imprisonment. He was released on 29th November 1986. He claimed that he had illegally been denied remission. Upon release from prison, he was informed that he had been dismissed from the armed forces with effect from 1st August 1982.

35. He stated that throughout his pre-arraignment detention of 122 days, he was denied medical attention for the excruciating pain and injuries he had sustained from the brutalities inflicted upon him by Kenya Army officers and prison warders. That he was not given a hearing before dismissal nor paid any dues including for the 122 days that he was held in pre-arraignment detention.

The 5th Petitioner's case

36. The 5th Petitioner, David Gikunju Mwangi, in his Affidavit sworn on 21st December, 2012 and in evidence before this Court claimed that he was enlisted in the Kenya Air Force on 7th February 1979 under Service No.02394 and rose to the rank of Senior Private. After his military training, he was posted to Eastleigh Air Base where he undertook a Suppliers Group 'X' Course attaining Class 1.

37. He alleged that on 1st August 1982, he was startled from bed at the Eastleigh Airforce Base by sirens,

shouting and screaming by soldiers dressed in full uniform who banged the barracks' door, stormed in and loudly ordered everybody to dress up and rush to the armory. Upon reaching the armory, he was informed that the Government of Kenya had been overthrown by armed forces, forcibly issued with a rifle and several rounds of ammunition and ordered to await further orders. That at around 1.00 p.m. an announcement on the radio was made that the coup had been terminated and the Government had been restored to the civilians under President Daniel Arap Moi.

38. That at around 3.00 p.m., the base was attacked by soldiers of the Kenya Army to whom he surrendered and they immediately disarmed and arrested him, pushed him into the back of an army land rover where he found several other Airforce officers already under arrest. He was ordered to lie face down and he was stepped on the back severally before being escorted to Langata Barracks. Upon arrival, he was ordered to strip naked, was insulted 'educated rubbish' beaten all over his bodies with kicks, fists and gun butts and frog-matched walk on his knee to the guardroom where he joined many more Kenya Air Force officers who had been detained. He stated that he was detained in the guardroom at Langata Barracks for two days without food, drinking or bathing water and on the evening of 3rd August 1982, together with other Kenya Air Force officers and while still naked, he was bundled into a waiting army truck and escorted to Kamiti Maximum Prison while being beaten all the way.

39. On arrival at Kamiti, he alleged that he was subjected to more and severe beatings by prison warders using kicks, slaps, fists and buttons before being locked up in a filthy, overcrowded cell with a permanent foul odor, without any beddings while still half naked and was also denied food and drinking water for 2 days. He claimed that he was detained at Kamiti Maximum Prison for one month while half-naked, and footed in a dark, filthy overcrowded cell with hardly any space to lie down, with a pungent odor, infested with lice that made sleeping impossible.

40. That after one month, he was transferred to Naivasha Maximum Security Prison where he was beaten, locked up in solitary confinement in a waterlogged, dark and cold cell without lighting and was denied drinking and bathing water, food and access to a toilet. He claimed to have been subjected to numerous interrogations by army and Special Branch officers who threatened to return him to the waterlogged water logged cell and in solitary confinement unless he confessed to his involvement in the planning of the failed coup. That fearful of dying from starvation and pneumonia and as a result of the threats made, he signed a prepared confession statement whose contents he did not know of.

41. He claimed that he was detained in Naivasha Maximum Security Prison for one and a half months before being transferred back to Kamiti Maximum prison and detained in Block G in a crowded cell for two weeks where sleeping was impossible because of screams from insane inmates on death row who were also imprisoned in the same block.

42. On 3rd December 1982, he was taken to the Court Martial at Langata Barracks and charged with the offence of mutiny. He allegedly pleaded guilty as advised by his handlers and was sentenced to twenty two years' imprisonment. He was allegedly thereafter held in solitary confinement for two days then transferred to Shimo La Tewa Maximum Prison where he was also placed in solitary confinement for six months and later transferred to Naivasha Maximum Security Prison. In June 1985, he was informed that the Military Review Board had reviewed his sentence from 22 years to 5 years' imprisonment and was eventually released on 29th June 1987. Upon his release he was informed that he had since been discharged from the Armed Forces since 1st August 1982.

43. He claimed that throughout his detention of 95 days, he was denied any medical attention to relieve his excruciating pain and to treat the injuries he had sustained from the brutalities inflicted upon him.

The 6th Petitioner's Case

44. The 6th Petitioner, Francis Ngure Kuwona in his Affidavit sworn on 21st December 2012 and in evidence before the Court that he was enlisted in the Kenya Air Force on 2nd September, 1977 under Service No.022620 and rose to the rank of Senior Private. He claimed that he did his basic military

training in Lanet, Nakuru and he further trained as an Armament Technician Grade 1. He was posted to Nanyuki Air Base after his training.

45. He alleged that on 1st August 1982, he was asleep in the barracks at Nanyuki Airforce Base when he was startled from bed by shouts and screams from soldiers dressed in full uniform who stormed the barracks and announced that the Armed Forces had overthrown the Government and ordered all officers to dress up in full uniform and rush to the armory at once. At the armory, he was ordered to jump over the counter and get himself some rounds of ammunition.

46. He claimed that at about 1.00 p.m. while in the Privates' Mess and before any clear orders from senior officers had been received, he heard an advertisement in the radio that the coup had been crushed and the Government restored to President Daniel Arap Moi.

47. Thereafter at around 3.00 p.m., he claimed that Kenya Army soldiers stormed into the Nanyuki Base and ordered all Kenya Air Force officers to surrender and they were disarmed, arrested and stripped naked while being beaten using fists, kicks and gun butts. They were locked up in a makeshift cell in the Supplies Block without enough ventilation and on one meal a day until 14th August, 1982. That in the last days of the detention, he would be ordered to lay on his back on the runway tarmac in the scorching sun for a whole day as army and police officers interrogated him in turns concerning the failed coup.

48. He claimed that on 14th August, 1982 he was escorted from Nanyuki Air Base to Kamiti Medium Prison while being randomly and severely beaten with kicks, slaps and gun butts on his way. On his arrival, he was subjected to more beatings all over his body while being led to the cell as he was being insulted, 'educated rubbish' and denied food, drinking and bathing water for the first three days and was also denied medical treatment for his injuries. He was allegedly detained for two weeks in a dark, filthy, overcrowded cell with a permanent foul smell, infested with lice that made sleeping impossible, without adequate ventilation, lighting, blankets or beddings and was therefore forced to sleep on the concrete floor.

49. After two weeks of detention, he was allegedly transferred to Naivasha Maximum Security Prison where he was locked up in solitary confinement in a black painted, filthy, waterlogged cell without any lighting and was denied food, drinking or bathing water. After 3 days in solitary confinement, he was transferred to a filthy overcrowded cell without proper ventilation, and beddings, with lights permanently on day and night and he would be let out of the cell for only 1 hour a day for interrogation and basking.

50. He claimed that he was subjected to numerous interrogations by Kenya Army and Special Branch officers and was forced to sign a prepared statement whose contents he did not know of. After one and a half months, he was transferred to Kamiti Maximum Prison and detained in a overcrowded cell in Block G where sleeping was impossible from the full time yelling and screams from insane prisoners on death row.

51. He stated that on 14th October, 1982, he was given a pair of filthy worn out clothes and escorted from Kamiti to Court Martial at Langata Barracks. He was allegedly charged with the offence of mutiny and he pleaded guilty to the charge and was sentenced to 4 years' imprisonment and was initially detained at Industrial Area Prison.

52. At Industrial Area Prison, he claimed that he was detained incommunicado in a cell, alone, for two weeks and later transferred to Kodiago G.K Prison Kisumu where he was also held incommunicado until June 1983 when he was transferred to an overcrowded cell before he was released on 14th October 1986. Upon release from prison, he was informed that he had been dismissed from the Armed Forces with effect from 1st August 1982.

53. He claimed that throughout his pre-arraignment detention of 74 days, he was denied medical attention for the excruciating pain and injuries he had sustained from the brutalities inflicted upon him by Kenya Army officers and prison warders and that he was not given a hearing before dismissal nor paid any dues

including for the 74 days that he was held in pre-arraignment detention.

The 7th Petitioner's case

54. The 7th Petitioner, Obadiah Maza Mwambonu, in his Affidavit sworn on 21st December, 2012 and in evidence before this Court claimed that he was enlisted in the Kenya Air Force on 29th March 1973 under Service No.021578 and rose to the rank of Senior Sergeant. After his military training, he was posted to the Eastleigh Airforce Base where he undertook a Suppliers Group 'X' Course attaining Class 1.

55. He alleged that on 1st August 1982, he was startled from sleep while at Eastleigh Base by sirens, shouting and screaming by soldiers dressed in full uniform who banged the barracks' door, stormed in and loudly ordered everybody to dress up and rush to the armory. Upon reaching the armory, he was informed that the Government had been overthrown by armed forces, forcibly issued with a rifle and several rounds of ammunition and ordered to board a military Land Rover for deployment to the City Center where he found other soldiers roaming around without any clear command. After about two hours of aimless patrol and sensing that there was no clear chain of command in the deployment, he decided to go back to the Base at KAF to find out exactly what was happening. On his way, he discovered that the alleged coup was not an affair of the entire military but only the Kenya Airforce whose officers were by then being hunted down and even shot dead in the city by officers of the Kenya Army and Kenya Police forces.

56. That because the situation was very dangerous he hid in a destroyed building in Ngara the whole afternoon and that night. In the morning of 2nd August 1982, as he tried to find his way around the chaos, he heard an announcement on radio giving a stern order that all Airforce officers were to report to the nearest military barracks or police station and he immediately came out of hiding and surrendered to a group of army officers who were on patrol in the City. Upon surrendering, he was immediately disarmed, arrested and bundled into an army land rover where he found several Airforce officers already under arrest. He was ordered to lie face down and was stepped on the back and escorted to the Department of Defence (DoD) headquarters. Upon arrival, he was ordered to strip naked, beaten all over his body with kicks, fists and gun butts and forced to walk on his knees to the guardroom where he joined many more Air Force officers who had been detained in an open field holding their clothes in their hands, injured and bleeding while writhing in pain up to 7 pm. From DoD he was ordered to dress up, frog marched to a military truck and escorted to Kamiti Maximum Security Prison.

57. On arrival at Kamiti, he alleged that he was subjected to more severe beatings by prison warders using kicks, slaps, fists and buttons before being locked up in a filthy, overcrowded cell with a permanent foul odor, without any beddings or blanket while still half naked and was denied food and drinking water for 3 days. On the 4th day, he was given very small quantities of sugarless porridge and one small meal of a little ugali and a few cabbage leaves a day for the rest of the time he remained detained. He claimed that he was held at Kamiti Maximum Prison for one month while being interrogated. In early September 1982, while still half-naked, he was transferred to Naivasha Maximum Security Prison where he was beaten, locked up in solitary confinement in a dark cell, cold, waterlogged without lighting and denied drinking and bathing water, food and access to toilets. He claimed to have been subjected to numerous interrogations by army and CID officers who threatened to return him to the water clogged cell in solitary confinement unless he confessed involvement in the planning of the failed coup. That fearful of dying from starvation and pneumonia and as a result of the threats, he signed a prepared confession statement whose contents he did not know.

58. He claimed that he was detained in Naivasha Maximum Security Prison for one month before being transferred back to Kamiti Maximum prison and detained in Block G in a crowded cell for two weeks where sleeping was impossible because of screams from insane inmates on death row who were also imprisoned in the same block.

59. On 12th October 1982, he was taken to the Court Martial at Langata Barracks and charged with the offence of mutiny. He allegedly pleaded guilty as advised by his handlers and was sentenced to eighteen

years imprisonment. He was escorted to Industrial Area Prison where he was allegedly held in solitary confinement for two weeks before being transferred to Naivasha Maximum Security Prison. In December 1983, he was informed that the Military Review Board had reviewed his sentence from 18 years to 5 years' imprisonment. He was eventually released on 20th June 1987. Upon his release he was informed that he had since been discharged from the armed forces with effect from 1st August 1982.

60. He claimed that throughout his detention of 71 days he was denied any medical attention to relieve his excruciating pain and to treat the injuries he had sustained from the brutalities inflicted upon him.

The 8th Petitioner's case

61. The 8th Petitioner, Placide Mwakisachi Edward, in his Affidavit sworn on 21st December 1982 and in oral evidence stated that he was enlisted in the Kenya Air Force on 24th April 1980 under Service No.024712 and attained the rank of Junior Private. After his training at the Armed Forces Training College in Lanet, Nakuru, he was posted to the Kenya Airforce Headquarters in Eastleigh, Nairobi.

62. He alleged that on 31st July 1982, he was in the Barracks when at about midnight he woke up to the sound of gunfire and sirens and soldiers dressed in full uniform who banged the barracks' door, stormed in and loudly ordered everybody to dress up and rush to the armory. Upon reaching the armory, he was ordered by an officer of the rank of Captain to arm himself with a G3 rifle and ammunition and board a military land rover for deployment in the City Center. He did as ordered.

63. That at crack of dawn, he decided, together with his colleague, Armogast Aurelius Maganga, with whom he had been deployed to the Parliament Building, to go back to Eastleigh and get information from senior officers. On reaching near the Nairobi Fire Station, he claimed that he was shot on his left arm by an unknown person and he was carried by his colleague to Eastleigh Airforce Base. On arrival, the medical officer advised his colleague to take him to Aga Khan Hospital for further medical attention where he was treated and discharged. As he was coming from the hospital, he ran into a platoon of the Kenya Army and he was arrested, beaten up with gun butts, slaps, fists and kicks and was stripped half-naked as he was being escorted to Kahawa Barracks.

64. On arrival at the main gate of Kahawa Barracks, he was forced to walk on his knees on the concrete road up to an open field inside the Barracks as army soldiers beat him up and insulted him as 'educated rubbish'. He was then detained in an open field at Kahawa Barracks still half-naked and bleeding from the bruised knees as the brutal beatings continued while families of the army soldiers were watching from the Married Quarters. In the evening, he claimed he was escorted to Kamiti Maximum Prison while still being beaten all over the body.

65. On arrival at Kamiti Maximum Prison, he alleged that he was subjected to more severe beatings by prison warders using kicks, slaps, fists and buttons before being locked up in a filthy, overcrowded cell with a permanent foul odor, without any beddings or blanket while still half naked and he was denied food and drinking water for two weeks.

66. On 13th August 1982, he claimed that he was transferred to Naivasha Maximum Security Prison where he was beaten, locked up in solitary confinement in a dark cold and waterlogged cell without lighting and denied drinking and bathing water, food and access to a toilet. He was transferred back to Kamiti Maximum Security Prison on 4th October 1982 where he was detained while half-naked in an overcrowded cell without beddings and on one meal a day until 6th October 1982 when he was arraigned before the Court Martial at the Langata Army Barracks. He was charged with the offence of mutiny and he pleaded guilty as allegedly advised by his handlers and was sentenced to thirteen years' imprisonment. He was escorted to Industrial Area Prison where he was allegedly held in solitary confinement for six months until 10th May 1983 when he was transferred to Kamiti Maximum Prison where he was allegedly held in Block G where insane inmates were also detained.

67. In August 1984, he appealed against his conviction and sentence vide High Court (Nairobi) Criminal

Appeal No.134 of 1984 and on 28th January 1985, Judgment was delivered and his sentence was reduced to 5 years' imprisonment. He was eventually released on 24th June 1987. Upon his release he was informed that he had been discharged from the armed forces with effect from 1st August 1982.

68. He claimed that throughout his unlawful detention of 67 days he was denied any medical attention to relieve his excruciating pain and to treat the injuries he had sustained from the brutalities inflicted upon him. He was also not given a hearing before dismissal as an officer nor was he paid any dues including for the 67 days that he had been held in pre-arraignment detention.

The 9th Petitioner's Case

69. The 9th Petitioner, John Phinehaz Thairu, in his Affidavit sworn on 21st December, 2012 and in evidence before the Court claimed that he was enlisted in the Kenya Air Force on 3rd March 1978 under Service No.023098 and rose to the rank of Senior Private. After his military training, he was posted to Eastleigh Air Base where he trained as a fighter control operator and an Aircraft Frames and Engines Technician and completed his course at the end of July 1982.

70. He alleged that on the wee hours of 1st August 1982, he was startled from bed at Kenya Airforce Base, Eastleigh by sirens, shouting and screaming by soldiers dressed in full uniform who banged the Barracks' door, stormed in and loudly ordered everybody to dress up and rush to the armory. Upon reaching the armory, he was informed that the Government had been overthrown by armed forces, forcibly issued with a rifle and several rounds of ammunition and ordered into a waiting Airforce truck and deployed to the City Center and upon being dropped off at the Uhuru Highway-Bunyala Road Roundabout, he found several soldiers roaming around without a clear command. After two hours of aimless patrol and sensing that there was no clear chain of command in deployment he decided to go back to Eastleigh Airforce Base. On arrival at the base, he heard rumours that the Base could be bombed at any time by Kenya Army soldiers. He fled to the Mathare Mental Hospital Staff Quarters where a friend of his aunt received him and helped with change of clothes from his military uniform. While at Mathare, he heard an announcement on the radio that the coup had been crushed and the Government had been restored to civilians under President Daniel Arap Moi.

71. He thereafter left for Thindigwa in Kiambu and on the morning of 2nd August 1982, he heard an announcement on radio that all Kenya Air Force officers should report at the nearest military barracks or police station. That he immediately went to Kiambu Police Station where he was handed over to officers of the Kenya Army who stripped him naked, insulted him as 'educated rubbish,' beaten all over his body with kicks, fists and gun butts. He was then bundled into an army truck and escorted to Kamiti Maximum Prison while still being beaten.

72. On arrival at Kamiti, he alleged that he was subjected to more severe beatings by prison warders using kicks, slaps, fists and buttons before being locked up in a filthy, overcrowded cell with a permanent foul odor, without any beddings or blanket while still half naked and denied food and drinking water for 2 days. He claimed that he was detained at Kamiti Maximum Prison for seven days in a dark, overcrowded cell with a pungent odour, infested with lice that made sleeping impossible. He was therefore forced to sleep on the concrete floor without beddings.

73. He was thereafter transferred to Naivasha Maximum Security Prison still half naked where for the first five days he was beaten, locked up in solitary confinement in a dark cell, cold, waterlogged without lighting and denied drinking and bathing water, food and access to toilets. He claimed to have been subjected to numerous interrogations by army and CID officers who threatened to return him to the water clogged cell and in solitary confinement unless he confessed to his involvement in the planning of the failed coup. That fearful of dying from starvation and pneumonia and as a result thereof, he signed and prepared confession whose contents he did not know.

74. He claimed that he was detained at the Naivasha Maximum Security Prison until 12th September 1982 when he was transferred back to Kamiti Maximum Prison. On 14th September, 1982, he was taken to the

Court Martial at Langata Barracks and charged with the offence of mutiny. He pleaded guilty as advised by his handlers and was sentenced to twenty years' imprisonment. He was escorted to Nyeri G.K Prison-King'ong'o where he was also placed in solitary confinement and later on transferred to Naivasha Maximum Security Prison. In May 1983, he was informed that the Military Review Board had reviewed his sentence from 22 years to 10 years' imprisonment and on or about June 1984, he was informed that the Military Review Board had reviewed his sentence from 10 years to 2 years imprisonment. He was subsequently released on 14th September 1984 and was informed that he had since been discharged from the armed forces with effect from 1st August 1982.

75. He claimed that throughout his unlawful detention of 44 days, he was denied any medical attention to relieve his excruciating pain and to treat the injuries he had sustained from the brutalities inflicted upon him. And he was not paid any dues including for the 44 days he was illegally held.

The 10th Petitioner's Case

76. The 10th Petitioner, Lawrence Kiarie Warukira in his Affidavit sworn on 21st December 2012 and in evidence before this Court claimed that he attended the Armed Forces Training College in Lanet, Nakuru for training and later, was further trained the United Kingdom before he was he was commissioned in the Kenya Air Force on 18th July 1970 under Service No.270274 and rose through the ranks to the rank of Major on 27th June 1982. His last posting was at Eastleigh Airbase as a Staff Officer, Grade II.

77. He claimed that early in the morning of 1st August 1982, he was at his home with his family at Nkoro Village, Ngong, Kajiado County when his neighbor and colleague, the Late Sergeant Wakapa visited him dressed in uniform with the surprising information that he had heard on radio that the Government of Kenya had been overthrown by the military at night and all soldiers were required to report on duty immediately. That he immediately put on his military uniform and together with the late Sergeant Wakapa drove in his car toward the Kenya Airforce headquarters in Eastleigh. While driving along Langata Road, they found a road block manned by a group of about 30 infantry officers from Langata Barracks who were stopping and searching motorists and pedestrians. When he stopped his car, they were ordered at gunpoint to get out were stripped naked in the full view of passerbys' and residents of the nearby estate while being beaten with kicks, fists, slaps and gun butts. He then realized that something was wrong since the officers who were ordering them around were his junior officers. They were forced to walk on their knees on the rough tarmac from the main gate of Langata Barracks for about a kilometer to the guardroom as the soldiers continued to kick them with their boots and hit them with gun butts on the legs and genitals. At the guardroom, he claimed that he was further assaulted by the officers who were guarding the guardroom. When the door opened, he found other Airforce junior officers locked up most of them with open wounds and crying in pain. He remained in the guardroom for four days, injured without medical attention, food or water.

78. On 5th August 1982, he was removed from the guardroom at Langata, given a dirty military coat and forced to record a statement with officers of the Military Intelligence Corps before being escorted to the Eastleigh Airforce Base. On arrival, he was frog-marched to the Officer's mess and found many of his senior officers detained and he too was informed that he was under arrest. He alleged that he was detained in the Officers' Mess the whole of August 1982 incommunicado, dressed only in the army coat, without beddings or blankets, sleeping on a dusty carpet and without being informed of the offence he had committed. He was in September 1982 interrogated on numerous times while being insulted as 'educated rubbish' and assaulted with slaps, kicks, fists, batons and gun butts.

79. He claimed that on 30th September 1982, he was informed by a senior army officer that upon investigation being conducted, it had been confirmed that he was innocent. He was released from custody without charge, given a new Service No.020519, a pair of uniform, redeployed on light duties between Eastleigh Airbase and Embakasi Ground Air Defence Unit. On 15th October 1982, while at KAF Eastleigh, he was summoned by a senior army officer who informed him that he had been dismissed from the Armed Forces with effect from 9th September 1982 and warned never to be seen anywhere near a

military installation.

80. He claimed that throughout his detention at Langata Barracks and in the Officers Mess for 61 days, he was denied medical attention for his excruciating pain and injuries inflicted upon him by the army, Military Intelligence Corps and police officers. He was not paid dues for the 62 days and for the 15 days that he worked on deployment. He claimed that since his ordeal, he suffers persistent leg and back pains and uses a crutch to aid his walking.

The Petitioners' Submissions

81. The Petitioners in their written submissions submitted that their arrest was brutal and inhuman; that they were beaten up and stripped in public upon arrest and transported to prisons while naked or semi-naked. On arrival in the named prisons, they were thoroughly beaten up before being held *incommunicado* in filthy, overcrowded cells in the same block with noisy insane death row prisoners or in solitary confinement in filthy waterlogged cells, or in filthy dark cells or filthy permanently lit cells. They were all denied basic needs i.e. food, drinking and bathing water, sleep and medical attention so as to coerce them to breakdown and admit participating in the 1982 attempted coup. They were frequently transferred from one detention facility to another whilst naked and were also subjected to endless brutal interrogations accompanied by physical and mental assaults as they were encouraged to confess "guilt" in planning the coup. They alleged that these acts were in violation of **Sections 70(a) and 74 of the Repealed Constitution**. On that point, they relied on the authority of *Harun Thungu Wakaba v Attorney General Misc Applic No. 1411 of 2014*.

82. The Petitioners further submitted that their detention for long periods without charge or trial was a violation of the Petitioners rights under **Sections 72(3), 74(1) and 77 of the Repealed Constitution**. They relied on the cases of *Ann Njogu & 5 Others v Republic (2007) e KLR*, *Alnabus Mwasi Mutua v Republic (2006) e KLR* and *David Gitau Njau & Others v Attorney General (2013) e KLR* in that regard and on the basis that none of them was arraigned before the Court Martial within the 24 hours stipulated by **Section 72 of the Repealed Constitution**. That there has not been any explanation offered by the Respondent for the detention without trial or for the inordinate prolonged pre-arraignment detention of the Petitioners.

83. They also submitted that there was mass victimization in the arrests and that there is no evidence that the coup plotters and those issuing mutinous orders were isolated from officers who were simply obeying orders. That those officers who did not take to the streets like those in the Nanyuki Airforce and those who were not even in the base on the material day were arrested and detained and tortured. They therefore claimed that the imperatives of carrying out investigations before arrests and the right to be presumed innocent were abandoned as the crackdown took the path of 'presumption of collective guilt' for the entire Kenya Air Force, therefore violating **Section 72 of the Armed Forces Act and Section 77 of the Repealed Constitution**. They also claimed that the members of Armed Forces are entitled to the protection of their fundamental rights and freedoms like any other person. They relied on the case of *Peter M. Kariuki v The Attorney General Civil Appeal No. 79 of 2012 (2014) e KLR* where the Court of Appeal held that the Armed Forces Act and its enforcement before the Court Martial did not entail blanket derogation from guaranteed constitutional rights.

84. It was the Petitioners' further submission that they were denied, arbitrarily, without reasons and hearing, their statutory right to remission of sentence and unlawfully deprived of their personal liberty for the respective periods that they served in deprivation of remission, contrary to **Section 46 of the Prisons Act, Rules 95(1) and 96 and 97 of the Prison Rules** which provides for the right to remission of sentence. That denial of remission amounts to an unlawful detention of prisoners which violated their right to liberty as provided for under **Section 72 of the Repealed Constitution**.

85. The Petitioners, extrapolating on award of damages in various torture cases by the High Court, including *(Dominic Arony Amolo (supra), Jenniffer Muthoni Njoroge and 10 Others v Attorney General Petition No. 340 to 350 of 2009, Odhiambo Olel v Attorney General Civil Case No.366 of 1995, Peter Kariuki v Attorney General Petition No. 233 of 2009* submitted that a lump sum award of

general damages of Kshs.8,000,000.00 (for 1st, 2nd, and 10th Petitioners), Kshs.9,500,000.00 (for the 9th Petitioner) and Kshs.11,000,000.00(for 3rd, 4th, 5th, 6th, 7th and 8th Petitioners) would be fair and reasonable compensation for the deprivation of personal liberty, human dignity, physical and psychological torture, cruel, inhuman and degrading treatment, deprivation of the fundamental right to the protection of the law and fair trial and for unlawful detention and denial of remission all which amounts to gross for the constitutional violations. They also claimed costs of the Petition and interest on all monetary awards.

The Respondent's case

86. The Respondent opposed the Petition. He filed Replying Affidavits sworn on 3rd May 2013 by Philip Ndolo, the Deputy Director of Operations in the Kenya Police Service at the Police Headquarters; and by Lieutenant Colonel Paul Mwangemi Kindochimu, the Staff Officer at Kenya Defence Headquarters, sworn on 27th March 2013.

87. Mr. Ndolo deponed that from the records at the Department of Police, the Petitioners have never been arrested, detained or subjected to torture of any form by the Kenya Police. That the Petitioners have failed to produce evidence to the effect that the Criminal Investigation Department Officers or General Service Officers were involved in the alleged violations of their rights. He thus claimed that the matter was a matter of the Department of Defence and the Police were not involved and are indeed strangers to the allegations made by the Petitioners.

88. On his part, Lieutenant Colonel Kindochimu denied that the Petitioners were arrested by Kenya Army Officers as alleged and further that is such arrest ever happened, they were as a result of commission of actual crimes by the Petitioners. That therefore the reliefs sought by the Petitioners are unjustified and baseless and should be dismissed for lacking merits. That if they were indeed convicted for their crimes, the Petitioners did so after pleading guilty in the Courts Martial. That the Petitioners in their Affidavits in support admitted to participating in the 1982 coup attempt and obeying illegal orders and arming themselves against a lawful, constitutional and civilian Government authority.

89. As to whether they are entitled to any dues, Lieutenant Colonel Kindochimu claimed that having been dismissed from the service, the Petitioners are not entitled to any payment of terminal dues.

90. He also stated that the Petitioners are guilty of laches and inordinate delay in filing their claims which was done about three decades after the alleged events of the 1982 coup. That the said inordinate delay has not been explained and such a delay is prejudicial to the Respondent's case.

91. From the record, there is no evidence that Respondent filed written submissions in support of his case.

Determination

92. The first issue to determine in this Petition is whether the Petition can be barred by the doctrine of laches. Over the last four or so years, this Court has been confronted with the submission by the Attorney General that claims arising from alleged violations of fundamental rights and freedoms that occurred in the 1990s and before should not be entertained by our Courts. Not a single authority has been cited in the present cases to justify a finding in his favour on that issue. On my part, I know of no law that places a limitation of time on a claim for enforcement of fundamental rights and freedoms and therefore barring a party from filing a Petition for enforcement of the provisions of the Bill of Rights. The law as I know it is well stipulated in the case of *Dominic Arony Amolo v the Attorney General HC Misc. Applic No.494 of 2003* that a claim for enforcement of the Bill of Rights does not fall within any known a cause of action as known to the Limitation of Actions Act (Cap 22 Laws of Kenya). I am also alive to the decision of *Peter Ngari Kagume & Others v Attorney General Const. Application No. 128 of 2006* where the Court stated that even if the doctrine of laches does not apply in the enforcement of the Bill for Rights, a party must justify why it has taken long before filing such a claim.

93. My opinion above notwithstanding, in this case, the Petitioners explained that they could not file their cases prior to the change of regime in 2003 because President Daniel Arap Moi was in power and they did not have faith that their cases would be administered with justice in the circumstances. In that regard, this Court in *Harun Thungu Wakaba v Attorney General Misc Applic No. 1411 of 2004*, Okwengu J (as she then was) stated thus;

***“I take note of the fact that there are a series of similar cases of alleged breaches of fundamental rights and freedoms, committed prior to the year 2002, before the change in Government. The explanation that the environment of the fundamental rights and freedoms has been accepted. In that regard, I would borrow the following passage form Wachira Waheire vs the Attorney General (supra): “The elections held in the year 2002 and the consequent wave of change in this County are a historical fact. The explanation given by the Plaintiff is therefore not unreasonable. In coming to this conclusion, we bear in mind many cases which came up after that change, such as Dominic Arony Amolo vs the Attorney General I which the Plaintiff’s claim filed in the year 2003 which was more than 20 years after the cause of action arose was allowed. We are therefore not persuaded that the Plaintiff’s claim should be defeated because of the delay in filing his claim.”*”**

94. I completely agree with the learned Judge and would add that the history of this Country would lead a reasonable man to state that it was almost impossible a few years ago to sue the regime and get away with it especially on matters of human rights. In that regard, the recent public apology by President Uhuru Kenyatta for violations of human rights by past regimes is an affirmation of that fact. In the same breathe, it was also the Petitioners’ claim that the Judiciary has affirmed that it is vindicating past violations of fundamental rights and freedoms in order to secure the Country’s future. In submitting on that point, reference was made to the case of *Cholmondely v Republic (2008) e KLR*, where the the Court of Appeal while admitting the failing of the Court in the past stated as follows;

“The Court must now and enforce against the State the fundamental rights and freedoms of the individual guaranteed by the Constitution”.

95. In *Jennifer Muthoni Njoroge & 10 Others v The Attorney General Petition No.340 to 350 of 2009*, I expressed myself as follows;

“Having held as above, I can only conclude by stating that each Petitioner has shown that they suffered in the past for the mere fact that they may have held political and other opinions that were not popular with the government of the day. As the new Constitutional dawn continues to unravel its mysteries, one lesson is clear; the Kenyan Courts may have failed the people in the past but today it can be said with Mwendwa CJ in Okunda vs. Republic [1970] E.A 454 that like Dicey said of England, the supremacy of the Constitution rather than any organ of government is what guides the Courts and especially the High Court in executing its mandate under Article 165 of the Constitution, 2010. The Judiciary must therefore never slumber and should not fall into the obvious ignoring of the past.”

I reiterate my sentiments above and would add that it is true that the State today in a reconfigured Kenya, cannot shut its eyes from the failings of the past neither can it claim innocence for the excess of past regimes. It must pay, the price for its historical faults and 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 the **Constitution 2010**. Time is ripe for addressing past injustices that included gross violations of fundamental rights and freedoms as witnessed in the past and the citizenry must not fault the Courts for doing justice, albeit belatedly because delayed justice is indeed justice denied.

96. Having said so, I now turn to each of the allegations of the violation of fundamental rights and freedoms as claimed by the Petitioners. In so doing I will determine whether the alleged arrest, detention and discharge from service of the Petitioners was a violation of their rights to liberty, protection from torture and other inhuman and degrading treatment and/or right to fair trial.

97. Before I do so and although not raised by the Respondent, the cut and paste language of the Affidavits by each Petitioner caused me great discomfort. I will lay blame at the door of their lawyers and would not hold it against the Petitioners. Let lessons be learn from that clear statement.

Right to liberty

98. The Petitioners claimed that their right to liberty was violated on two fronts; First, that they were held in custody for between 39 and 142 days in military, police and prison custody without charge or arraignment in any Court within the stipulated time of 24 hours. In response to this allegation, the Respondent, through the Affidavit of Lieutenant Colonel Kindochimu denied that the Petitioners were arrested by the Kenya Army and stated that if at all they were arrested such arrests were as a result of commission of actual crimes by then. Mr. Ndolo on his part also denied any arrest of the Petitioners and stated that they were not held in any police station in Kenya as he had perused occurrence books reports for the alleged period and they did not have any reports in respect to the Petitioners.

99. On the issue as to whether the Petitioners were ever arrested by the army officers, I have read each of their Affidavits and their averments are reproduced elsewhere above. They all testified in Court and admitted that they did not have any evidence of their arrest since they claimed they were secluded in custody. I have also seen letters from the Officer-in-Charge of Naivasha Maximum Security Prison an office in the Office of the Vice-President and Ministry of Home Affairs clarifying that the 3rd, 5th, 6th, 7th and 8th Petitioners were held at Naivasha Maximum Prison during diverse dates and produced as annexures ‘GJGA2’, ‘GJGA3’, ‘GJGA4’, ‘GJGA5’, ‘GJGA6’ and ‘GJGA7’, in the Further Affidavit sworn by the 1st Petitioner on 24th October 2013. I have also seen a certificate of imprisonment for the 8th Petitioner issued by the Officer- in -Charge Kamiti Maximum Prison and produced as an annexure ‘PME 2’ in the Affidavit sworn by the 8th Petitioner on 21st December 2012. I have in addition seen certificates of service issued to each of the Petitioner by the Kenya Airforce. In that regard, I have no doubt in mind that the Petitioners were officers of Kenya Airforce. I also believe that they were arrested and detained for the periods that they allege. I say so because I had the benefit of seeing each of the Petitioners in Court before and during their oral testimony. Each of them was discharged from the Airforce either after serving a prison sentence or except in the case of the 10th Petitioner. The Respondents’ base denial that there were no arrests or incarceration is not borne out by the totality of the evidence before me. Most of the Petitioners were convicted in Court Martials in October, November and December 1982. It cannot be plausible that between August and these months, they were comfortably working as Kenya Airforce officers.

100. Having so said, I am alive to the provisions of **Section 72(1), (2) and (3)** of the **Repealed Constitution** which provided for the right to personal liberty as follows;

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

Section 72 (2) and (3) provided as follows;

“(2) 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.”

101. The law as set out above is very clear and requires no more than the meaning on it that a person arrested on suspicion of having committed a misdemeanor, like the Petitioners, must be produced in Court within 24 hours of arrest. In the instant Petition, the Petitioners claimed that they were arrested and arraigned in Court Martials between 39 and 142 days of their arrest save one of them. In the case of ***Albanus Mwasia Mutua v Republic Criminal Appeal No. 120 of 2004***, it was held in line with **Section 72(3)(b)** that where an accused person is not arraigned in Court within 24 hours of his arrest, the burden of proving that such a person arrested has been brought before a Court as soon as is reasonably practicable, rests upon any person alleging that the provisions of the section have been complied with.

102. In the instant Petition, Lieutenant Colonel Kindochimu averred on oath and in an alternative deposition that the detention, arrest and confinement of the Petitioners was lawfully done by State Security Organs as the Petitioners had been involved in the failed coup of the 1st August 1982. In that regard I have in mind the provision of **Section 86(2)** of the **Repealed Constitution** which provided that;

“In relation to a person who is a member of a disciplined force raised under any law in force in Kenya, nothing contained in or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in contravention of any of the provisions of this Chapter other than Sections 71, 73 and 74 of the Constitution.”

That provision of the law is clear that disciplined forces were never to abrogate from the provisions of **Sections 71, 73 and 74** of the **Repealed Constitution** – See also ***Peter M. Kariuki v Attorney General, Civil Appeal No. 79 of 2012***.

103. It is therefore against this understanding that I heard Lieutenant Colonel Paul Mwangemi to claim in his evidence that the Petitioners could not claim a right to liberty since they were undergoing a military disciplinary process. That fact notwithstanding and even if the Petitioners had actually been involved in the 1982 Coup, such that they had to undergo the disciplinary process, I still believe that such a process had to be within the laws governing The Armed Forces. In that regard, **Section 72(2) and (3)** of the **Armed Forces Act (Cap 109; now repealed)** and which was the law in force at the time, provided that;

“(1) The allegations against a person arrested under Section 70 or Section 71 shall be investigated without unnecessary delay, and as soon as practicable thereafter either proceedings shall be taken to deal with the allegations or he shall be released from arrest.

(2) Wherever any person subject to this Act is arrested and remains in custody for more than eight days without his being tried by Court Martial or dealt with summarily-

(a) a special report on the necessity for further delay shall be made by his commanding officer to the prescribed authority in the prescribed manner; and

(b) a similar report shall be made to the prescribed authority and in the prescribed manner every eight days until a court martial sits or the offence is dealt with summarily or he is released from arrest.”

104. The law above is clear that a person arrested for suspicion of having committed an offence under the **Armed Forces Act** ought to have been investigated without unnecessary delay. The Respondent did not even provide any valid answer or explanation as to why the Petitioners were kept in custody for up to 143 days without being charged in any Court of law including a Court Martial. The Respondent breached its own law and it is for that reason alone that I find that the Petitioners right to liberty was violated only for

the period before they were arraigned before the Courts Martial and in the case of the 10th Petitioner, on the day he was released from custody.

105. Secondly, I also heard the Petitioners to be saying that denial and deprivation of remission of sentence constituted periods of arbitrary and unlawful detention in violation of their right to personal liberty. The question I must answer now is whether denial of remission amounted to a violation of **Section 72 of the Repealed Constitution**.

106. **Section 46 of the Prisons Act** provided for the right of prisoners to remission of sentence thus;

“(1) Convicted criminal prisoners sentenced to imprisonment whether by one sentence or consecutive sentences, for a period exceeding one month, may by industry and good conduct earn a remission of one-third of their sentence or sentences. Provided that in no case shall-

(i) Any remission granted result in the release of a prisoner until he has served one calendar month,

(ii) Any remission be granted to a prisoner sentenced to imprisonment for life or for an offence under Section 296(1) or 297(1) of the Penal Code (Cap 63) or to be detained during the President’s pleasure.

(2) For the purpose of giving effect to the provisions of subsection (1) of this Section, each prisoner on admission shall be credited with the full amount of remission to which he would be entitled at the end of his sentence if he lost no remission of sentence.

(3) A prisoner may lose remission as a result of its forfeiture for an offence against prison discipline, and shall not earn any remission in respect of any period –

(a) spent in hospital through his own fault or while malingering; or

(b) while undergoing confinement as a punishment in a separate cell.

(3A) A prisoner may be deprived of remission –

(a) Where the rehabilitation of the prisoner,

(b) Where the Minister for the time being responsible for internal security considers that it is in the interests of public security or public order.

(4) Notwithstanding the provisions of subsection (1) of this Section, on the recommendation of the commissioner, the Minister may grant a further remission on the grounds of exceptional merit, permanent ill-health or other special grounds.

(5) The Minister shall have power to restore forfeited remission in whole or in part”

Similarly **Rules 95(1), 96 and 97 of the Prisons Rules** provide as follows;

“95.(1) A prisoner shall be entitled to release on the day after he has completed the period of his sentence less any remission which he has earned ...

96. The officer in charge shall ensure that the remission system is explained to all prisoners on admission, and, when for any reason remission is forfeited, the officer in charge shall ensure that a prisoner is made fully aware of such forfeiture.

97. A record shall be kept for each prisoner earning remission showing the sentence, the remission allowed and any forfeiture of remission. The earliest possible date of release shall be

recorded as well as the latest possible date of discharge.”

107. In the above context, it was the Petitioners’ claim that a denial of remission is a violation of the Constitutional right to liberty. I have reproduced the provisions of **Section 72** of the **Repealed Constitution** which provided for the right to liberty. My findings on that issue are as follows;

108. Firstly, the **Repealed Constitution** did not provide for right to remission in execution of sentences authorized by law and in pursuant to a Court order. Secondly, remission is not absolute and as can be seen from the provisions of **Sections 46** of the **Prisons Act**, it is not absolute nor is it automatic. It is subject to a prisoner’s industry and good character and is also at the discretion of the Commissioner for Prisons and may be denied if it is in interests of public security or public order to do so. Thirdly, as explained by the Petitioners in their written submissions, execution of sentence of a Court of law is governed by the **Prisons Act** and that being so, refusal to grant a remission would actually not amount to a violation of right to liberty. However, I do not believe that lack of being given remission would actually amount to unlawful detention therefore a deprivation of right to liberty. I started by reproducing the provisions of **Section 72** of the **Repealed Constitution** elsewhere in this judgment on right to liberty; I do not therefore see how exercising that discretion would violate the right to liberty as provided for under **Section 72** of the **Repealed Constitution**.

Protection from torture and other cruel and degrading treatment

109. The Petitioners alleged that their right not to be subjected to torture and other cruel and degrading treatment protected under **Section 74(1)** of the **Repealed Constitution** was violated for the duration they were held in various prisons in the country and also at various Kenya Army and Kenya Air Force bases. In that regard, **Section 74(1)** of the **Repealed Constitution** provided that:

No person shall be subject to torture or to inhuman or degrading punishment or other treatment.

110. The Petitioners claimed that following their arrests they were subjected to untold torture, cruel, inhuman and degrading treatment by officers of the Kenya Army and the CID. They averred that they were stripped naked in public, made to walk on their knees on concrete floors, were whipped, kicked around, bludgeoned all over their bodies, being insulted as ‘*educated rubbish*’ and were moved into custody in military trucks while naked and in full view of the public.

111. At the various civilian prisons they also claimed that they were locked up naked, in overcrowded, lice infested, filthy cells with insane yelling intimates, in solitary confinement in tiny pitch dark or permanently waterlogged cells. They were also beaten with buttons, gun butts, whips, kicks and slaps all over their bodies and deprived of sleep, rest, food, drinking and bathing water, use of toilet facilities and were continuously interrogated for days.

112. On this issue, I have already held that the Petitioners were arrested and held for periods ranging between 39 and 142 days. The Respondent denied this claim and I have said that I believe the Petitioners and not the Respondent. Similarly, although the claims by the Petitioners in their Affidavits was a cut and paste affair, I still believe, from my own assessment of the Petitioners in Court that they underwent torture in manner described by them. Whether they exaggerated that torture is of no consequence save in terms of the damages to be awarded. Torture of any kind and magnitude is deplorable and I believe the Petitioners as I also see no credible answer by the Respondent.

113. The law on protection against torture and other degrading and inhuman treatment are all prohibited under international human rights law. **Article 5** of the **United Nations Universal Declaration of Human Rights (“UDHR”)** states that “**No one shall be subjected to torture or to cruel, in-human or degrading treatment or punishment.**” Since the adoption of the UDHR on December 10, 1948, this provision has been reproduced in several other international human rights instruments. For example, **Article 7** of the **International Covenant on Civil and Political Rights (“ICCPR”)** includes the provision of the UDHR, specifying that “**in particular, no one shall be subjected without his free consent to medical or scientific experimentation.**” Other international instruments includes; The

Convention Against Torture (CAT), The International Covenant on Civil and Political Rights (ICCPR), The European Convention on Human Rights (ECHR), The American Convention on Human Rights (AmCHR), the Inter-American Convention to Prevent and Punish Torture¹ and the African Charter on Human and Peoples Rights (Banjul Charter).

114. It is obvious therefore from the above that torture is prohibited in all its forms and indeed, there can never be a justification for torture in any circumstances. **Section 86(2)** of the **Repealed Constitution** also recognized that fact and provided that the protection against torture is one of those rights that could not be abrogated from by the disciplined forces. The Constitution 2010, has in the same spirit expressly provided under **Article 25** that protection from torture is one of the fundamental rights and freedoms that cannot be limited.

115. The issue of what amounts to torture and cruel, degrading treatment has been the subject of judicial adjudication before this court in several cases. In the case of **Republic v Minister For Home Affairs and Others ex parte Sitamze Nairobi HCC NO, 1652 OF 2004 120081 2 EA 323** the Court stated as follows with regard to torture:

"The provisions of section 74(1) of the Constitution of Kenya are echoed in Article 7 of the International Covenant on Civil and Political Rights, 1966, (ICCPR) which states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Torture means 'infliction of intense pain to the body or mind; to punish, to extract a confession or information or to obtain sadistic pleasure. It means infliction of physically founded suffering or the threat to immediately inflict it, where such infliction or threat is intended to elicit or such infliction is incidental to means adopted to illicit, matter of intelligence or forensic proof and the motive is one of military, civic or ecclesiastical interest It is a deliberate inhuman treatment causing very serious and cruel suffering'. "Inhuman treatment" is physical or mental cruelty so severe that it endangers life or health. It is an intentional act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity."

116. I agree and I am clear in my mind that the acts that the Petitioners were subjected to upon the Petitioners upon arrest by army officers in various barracks was in violation of their right to protection from torture and other inhuman treatment.

117. That being my first finding on this aspect of the Petition, I also recall that the Petitioners claimed that they were subjected to torture in the various civilian prisons they claimed to have been locked up. *Inter alia* they stated that they were locked up naked, in overcrowded, lice infested, filthy cells with insane full time yelling intimates, in solitary confinement in tiny pitch dark or permanently waterlogged cells. They were also beaten with buttons, gun butts, whips, kicks and slaps all over their bodies and deprived of sleep, rest, food, drinking and bathing water, use of toilet facilities and were continuously interrogated for days.

118. In **Blanchard vs Minister of Justice, Legal and Parliamentary Affairs and Another [2000] 1 LRC 671 at 679** it was held that;

"The same complaint was raised in Le Maire vs Maas (1990) 745 F Supp 623 The Plaintiff, a convicted murderer, serving a life sentence, objected that the twenty four hour continuous lighting in his cell disturbed his sleep and caused other psychological effects. It amounted, so he contended, to cruel and unusual punishment in breach of the eighth Amendment. The defendant, the Prison Superintendent, justified the constant illuminations as a security measure so the disciplinary segregation unit could see into the cell. There was no evidence, however, that there was need to see the cell for twenty-four hours per day. No reason was offered why the cell could not have a switch outside so that guards could see into it when they needed to. Panner CJ held (1990) 745 F Supp 623 at 630, "there is no legitimate penological justification for requiring the Plaintiff to suffer physical and psychological harm by living in constant illumination. The practice is unconstitutional."

119. The American case above represents the ideal situation that ought to be in prison. However, in ***Koigi Wamwere v Attorney General (2012) e KLR***, Mumbi Ngugi recognised the fact and took judicial notice of past notorious conditions in Kenyan prisons and stated as follows with regard to the claim of violation of the Petitioners rights while held in prison;

“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 against 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.”

The Judge concluded thus;

“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.”

120. I agree with the reasoning of the learned judge and I also take judicial notice of the fact that prison conditions were not pleasant at all in the past and may still be especially as they related to diet, beddings and sanitation. This Court also recently stated in ***Hon. Gitobu Imanyara & 2 Others v Attorney General, Petition No. 78 of 2010***, as follows in that regard;

“Connected with this issue is the condition under which the Petitioners were held together with insane prisoners and sometimes in solitary confinement, the conditions of our prisons were and may still be appalling. Each inmate, to that extent suffered terribly under those conditions and to isolate the Petitioners case and pay them separately for their pain may well amount to discrimination.”

I have found no reason to change my views on that subject.

121. However, and having so said, I am alive to the rule that nothing can justify torture. Because of the submissions made by the Petitioners that they were subjected to brutal beatings with buttons, gun butts, whips, kicks and slaps all over their bodies as they were continuously being interrogated, that they were locked up naked, in overcrowded cells with insane full time yelling intimates, in solitary confinement, in tiny pitch dark and permanently waterlogged cells, I will regard those matters as constituting torture. I say so because beatings, being locked up naked in dark, waterlogged cells and solitary confinement and at times with insane prisoners are personal and have nothing to do with general conditions obtaining in prisons.

122. Indeed, the High Court has previously held that beatings, interrogation and confinement in dark cells of those arrested and held in the now infamous Nyayo House amounted to torture and cruel degrading treatment. I need not repeat the findings of the Court in such cases as ***Harun Thungu Wakaba & Others v The Attorney General (supra)***; ***Wachira Waheire v The Attorney General Nairobi HC Misc. 1184 of 2003(OS)***, ***Rumba Kinuthia & Others v The Attorney General, Nairobi HC Misc. Appl. No.1408 of 2004*** and ***Cornelius Akelo Onyango & Others v The Attorney General Nairobi HC Misc.233 of 2009*** to make that point.

123. In the circumstances, and based on my opinions above, I find and hold that the Petitioners were

subjected to torture, cruel and degrading treatment contrary to **Section 74(1)** of the **Repealed Constitution**.

Right to fair Trial

124. The Petitioners further alleged that their right under **Section 77(1)** of the **Repealed Constitution** were violated. **Section 77** of the **Repealed Constitution** provided for the right to a fair hearing and provided that when a person is charged with a criminal offence, he shall be afforded a fair hearing within a reasonable time by an independent and impartial Court. The Court of Appeal has held in the case of *Julius Kamau Mbugua v Republic Criminal Appeal No.50 of 2008* that **Section 77** of the **Repealed Constitution** protected rights in the course of a trial and not outside it and I am guided by that holding.

125. In the instant case, the Petitioners, (save for the 10th Petitioner who was never arraigned in Court) on being arraigned in Court pleaded guilty to charges read to them and were subsequently sentenced on their own plea of guilty. They admitted in cross examination in Court that the proceedings in Court were conducted in Kiswahili and they understood that language. They failed to produce any evidence that they were coerced into pleading guilty and even if they were, they had the time to change their plea. Indeed some of them appealed and their sentences reduced while others did not and for others had their sentences reviewed.

126. In light of the interpretation given by the Court of Appeal to the provisions of **Section 77** of the **Repealed Constitution**, and with the above facts in mind I do not find a violation of the Petitioners' right to a fair hearing under **Section 77** of the **Repealed Constitution**.

Dismissal from Service

127. The Petitioners' also claimed that they were dismissed from the Armed Forces without any benefits or pay for the days they were held in detention as serving officers. However, the Petitioners did not seek a relevant prayer for that allegation. In the circumstances, I cannot belabor it further as to do so would be in vain. Even if they had, this Court cannot determine the Petitioners' claim in that regard. Let the Petitioner canvass such issues in the Courts as established under **Article 162(2)** of the **Constitution** - See *Estate of Captain Kariuki Kingaru Murebu & 8 others v Attorney General, Industrial Court at Nairobi Petition No.49 of 2012*.

Remedies

128. Having found that the Petitioners' right to liberty as provided for under **Section 72** of the **Repealed Constitution** was violated as was the right to the protection from torture and other inhumane acts as provided for under **Section 74(1)** of the **Repealed Constitution** were violated, this Court must grant the Petitioners an appropriate remedy. In the Petition, the following prayers were sought;

(a) A declaration that the brutal arrest, the cruel, inhuman and degrading treatment inflicted on the Petitioners upon being taken into custody, the violence, brutalities and the extreme, harsh and inhuman conditions that the Petitioners were subjected to in the various military, police and prison custody constituted violations of the fundamental rights and freedoms of the Petitioners as to human dignity, protection of the law, prohibition against torture, cruel, inhuman and/or degrading treatment or punishment guaranteed by Sections 70(a) and 74(1) of the former Constitution (now Articles 27(1), (2), 28 and 29(a), (c), (d), (f) of the Constitution of Kenya, 2010).

(b) A declaration that the pre-arraignment incommunicado detention of the respective Petitioners of between 61 and 143 days in military, police and prison custody and the period of between 3½ and 16 months of continued imprisonment in unlawful deprivation of remission of sentence constituted periods of arbitrary and unlawful detention in violation of the fundamental rights of the Petitioners as to human dignity, personal liberty, freedom from cruel, inhuman and degrading treatment and/or punishment and the protection of law including right to a fair trial

guaranteed by sections 70(a), 72(1), (3), 74(1) and 77 of the former Constitution (now Articles 27(1), (2), 29(a) 49(1) (f) and 50(2) of the Constitution of Kenya, 20110).

(c) General, exemplary, aggravated and punitive damages consequential to the declarations of violations of the fundamental rights and freedoms of the Petitioners in prayers (i) and (ii) above as shall be assessed by this Honourable Court.

(d) Costs of the Petition.

(e) Interest on all monetary awards.”

Damages

129. While appropriate orders shall be made regarding the declarations sought based on my findings above, the Petitioners sought both general and aggravated/exemplary damages of between Kshs.8,000,000 and Kshs.11,000,000.

130. In *Jennifer Muthoni Njoroge & 10 Others (Supra)*, this Court articulated the criteria to be used in awarding damages in torture cases. I rendered myself as follows;

“In awarding damages therefore, I shall use the following criteria; (i) The torture inflicted on each Petitioner (ii) The length of time the Petitioners were held in unlawful custody (iii) The decided cases on the subject matter (iv) what is fair and reasonable in the circumstances of each case, and I have chosen to give a lump sum in each case.”

I will still use the same approach in the instant Petition - See also *Dominic Arony Amolo (supra)*.

131. In taking the above approach, I am also alive to the fact that the Petitioners have sought exemplary damages in addition to general damages for the violations of their rights by the State. The High Court has now settled the issue of exemplary damages in cases such as this one and has declined to grant exemplary damages for torture in past political regimes - See *Benedict Munene Kariuki and 14 Others v the Attorney General High Court Petition No. 722 of 2009, Samuel Waweru Kariuki (supra)*. I see no reason to depart from this reasoning in regard to exemplary damages and none has been given to me.

132. On the basis of the above principles, and bearing in mind that the violations of the Petitioners' rights as set out elsewhere above were part of the same transaction, I believe that a global award in respect of all violations would be sufficient to assuage their individual and common suffering.

133. In doing so, the periods of unlawful detention and the punishment unlawfully meted will be the principal factors that I shall take into account in awarding damages.

134. In the circumstances, I shall order as follows;

- (a) Gerald Juma Gichohi shall have an award of damages of **Kshs.3,500,000.00**
- (b) Humphrey Kalama Shume shall have an award of damages of **Kshs.3,450,000.00**
- (c) Peter Mwangi Kariuki shall have an award of damages of **Kshs.2,200,000.00**
- (d) James Gitau Thandi shall have an award of damages of **Kshs.2,200,000.00**
- (e) David Gikunju Mwangi shall have an award of damages of **Kshs.3,300,000.00**
- (f) Francis Ngure Kuwona shall have an award of damages of **Kshs.1,350,000.00**
- (g) Obadiah Maza Mwambonu shall have an award of damages of **Kshs.2,100,000.00**

(h) Placide Mwakisachi Edward shall have an award of damages of **Kshs.1,150,000.00**

(i) John Phinehaz Thairu shall have an award of damages of **Kshs.1,100,000.00**

(j) Lawrence Kiarie Warukira shall have an award of damages of **Kshs.850,000.00**

Final Orders

135. In the end, the final orders to be made are the following;

*(i) A declaration is hereby issued that the brutal arrest, the cruel, inhuman and degrading treatment inflicted on the Petitioners upon being taken into custody, the violence, brutalities and the extreme, harsh and inhuman conditions that the Petitioners were subjected to in the various military, police and prison custody constituted violations of the fundamental rights and freedoms of the Petitioners as to human dignity, protection of the law, prohibition against torture, cruel, inhuman and/or degrading treatment or punishment guaranteed by **Sections 70(a) and 74(1) of the Repealed Constitution (now Articles 27(1), (2), 28 and 29(a), (c), (d), (f) of the Constitution of Kenya, 2010).***

*(ii) A declaration is hereby issued that the pre-arraignment incommunicado detention of the respective Petitioners of between **39 and 142 days** in military, police and prison custody constituted periods of arbitrary and unlawful detention in violation of the fundamental rights of the Petitioners as to human dignity, personal liberty, freedom from cruel, inhuman and degrading treatment and/or punishment and the protection of law including right to a fair trial guaranteed by **Sections 70(a), 72(1), (3), 74(1) and 77 of the former Constitution (now Articles 27(1), (2), 29(a) 49(1) (f) and 50(2) of the Constitution of Kenya, 20110).***

(iii) General damages for the above violations are hereby awarded as follows;

(a) Gerald Juma Gichohi, a lump sum award of **Kshs. 3,500,000.00** in damages plus interest from the date of judgment until payment in full.

(b) Humprey Kalama Shume a lump sum award of **Kshs. 3,450,000.00** in damages plus interest from the date of judgment until payment in full.

(c) Peter Mwangi Kariuki a lump sum award of **Kshs.2,200,000.00** in damages plus interest from the date of judgment until payment in full.

(d) James Gitau Thandi a lump sum award of **Kshs. 2,200,000.00** in damages plus interest from the date of judgment until payment in full.

(e) David Gikunju Mwangi a lump sum award of **Kshs.2,300,000.00** in damages plus interest from the date of judgment until payment in full.

(f) Francis Ngure Kuwona shall have a lump sum award of **Kshs.1,350,000.00** in damages plus interest from the date of judgment until payment in full.

(g) Obadiah Maza Mwambonu a lump sum award of **Kshs.2,100,000.00** in damages plus interest from the date of judgment until payment in full.

(h) Placide Mwakisachi Edward a lump sum award of **Kshs.1,150,000.00** in damages plus interest from the date of judgment until payment in full.

(i) John Phinehaz Thairu a lump sum award of **Kshs.1,100,000.00** in damages plus interest from the date of judgment until payment in full.

(j) Lawrence Kiarie Warukira a lump sum award of **Kshs.850,000.00** in damages plus interest from the date of judgment until payment in full.

136. Each Petitioner shall have the costs of his Petition.

137. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29th DAY OF MAY, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

LENAOLA, J.

Miron- Court clerk

Mr. Mureithi for Petitioners

No appearance for Respondent

Order

Judgment duly delivered.

Copy to be supplied to Parties.

ISAAC LENAOLA

JUDGE

29/5/2015