



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

PETITION NO.231 OF 2014

BETWEEN

PIUS MOSETI NYAMORA.....1ST PETITIONER

LOYCE AGEYO NYAMORA.....2ND PETITIONER

NYAMORA COMMUNICATIONS LTD.....3RD PETITIONER

AND

THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

Introduction

1. The 1st and 2nd Petitioners are husband and wife as well as Directors of Nyamora Communications Ltd, the 3rd Petitioner. In their Petition dated 12th May 2014, they claim that their right to protection of fundamental rights and freedoms of liberty, protection of property, protection against arbitrary search and entry, right to fair hearing, freedom of expression, freedom of movement, freedom of assembly and association were contravened and violated by Kenya Police and CID officers, prison warders and other Government employees at different times in the years 1992, 1993 and 1994. The details thereof shall be given later in this judgment.

2. They also claim that those fundamental rights and freedoms were largely violated at the offices of Nyamora Communications Ltd where the 1st Petitioner was a publisher and Editor- in -chief of a magazine known as ‘Society’ and at their homes in Nairobi as well as in various places within Nairobi and Mombasa.

3. In their Petition, they therefore seek the following orders;

“(1) There be a declaration that the Petitioner’s fundamental rights and freedoms under Articles 28, 29, 31, 33(1), 34(2), 37, 39 and 40(1) of the Constitution of Kenya and the similar provisions which were provided under Sections 72(1), 72(2), 72(3), 72(5), 77(1), 77(2), 79(1) and 81(1) of the Repealed Constitution of Kenya at all material times had been and were repeatedly contravened and grossly violated by the police, the CID, NSIS (formerly Special Branch), Prison warders and other Kenyan Government servants, agents, employees and Institutions, on numerous dates at various police stations in Nairobi city and Mombasa and in Shimo La Tewa

GK Prison.

(2) A declaration that the Petitioners are entitled to the payment of damages and compensation for the destruction of 45,000 copies among others that the 1st and 2nd Petitioner cannot really remember of the SOCIETY newsmagazine directly impounded by the Kenya police and CID officers amounting to millions in addition to damages and compensation for gross violations and contravention .of their fundamental rights and freedoms under the aforementioned provisions of the Constitution.

(3) General damages, exemplary damages under Article 23(3) of the Constitution of Kenya 2010, (previously under Section 84(2) of the Repealed Constitution) for the unconstitutional conduct of the Government of Kenya, and its agents and/or servants.

(4) Any further orders, writs, directions as this Honourable Court may consider appropriate.

(5) Costs of the Petition.

(6) Interest.”

The Petitioners’ Case

4. The 1st and 2nd Petitioners have set out their joint case in their respective affidavits sworn on 27th March 2014. The content of the two affidavits are largely the same and I will therefore summarize them as hereunder;

5. The 1st Petitioner, Pius Moseki Nyamora, was a director of the 3rd Petitioner which was incorporated on 17th September, 1987 in Nairobi and the Editor-in-Chief of “the Society” newsmagazine. The 2nd Petitioner was a director of the 3rd Respondent. “The Society” newsmagazine was first published in 1988 as a monthly publication and later in November of 1991, it became a weekly publication. In 1993, the newsmagazine was shut down due to financial strains and it closed down completely in 1994 as the 1st and 2nd Petitioners had to flee the Country for alleged fear of persecution. They sought and were granted political asylum in the United States of America.

6. On 5th January, 1992 at 5.00 am over 50 armed policemen raided and seized 30,000 copies and artwork of the newsmagazine. On the same day, the police obtained injunctive orders restraining the 3rd Respondent from publishing, distributing or selling the newsmagazine allegedly for the reason that the newsmagazine had published a photo of retired President Daniel Arap Moi with the caption; ‘The cost of killing Ouko’ below it. Inside the magazine, there was allegedly a story with a headline reading; ‘Moi knows Ouko’s killer’. They claim that the said operation occasioned a loss of Kshs.500,000 and denied its readers very vital information.

7. Six months later, the Government allegedly seized 10,000 copies of the newsmagazine whose lead article was on the “Shifita” menace in Northern Kenya and in February 1993, heavily armed policemen confiscated thousands of copies of the newsmagazine from its vendors. The lead article was titled ‘Arrow of God’ and in the said edition, there was an article touching on the outbreak of yellow fever in parts of Rift Valley Province.

8. The Petitioners were allegedly, throughout the above periods, put under heavy surveillance by the police, CID and Special Branch police officers and they were watched and followed everywhere including at their home in Mountain View in Nairobi. Their home and offices at Tumaini House were also repeatedly and arbitrarily searched. They claim that being watched menacingly by unfriendly characters, ready to arrest and incarcerate them was torturous, intimidating and highly stressing and curtailed their professional lives especially that of the 1st Petitioner, a journalist and as a consequence, their lives and that of their family were devastated.

9. It is the Petitioners' other contention that they lost their livelihood as a result of the unlawful raids of the 3rd Respondent's premises by the police since thousands of copies of various issues of the newsmagazine and printers were arbitrarily and unlawfully impounded.
10. In addition to the above, the 1st Petitioner was allegedly arrested in the morning of 16th April 1992 outside Nyayo House where he had visited to the Immigration Department to pick up his passport so that he could travel to Zambia on 20th April, 1992 where he had been invited to give two lectures at a course organized for Zambia News Agency Reporters. The 2nd Petitioner was also arrested on the same day and taken to Kiambu Police Station where she was kept in incommunicado.
11. The Petitioners were thereafter repeatedly arrested in 1992, manhandled and imprisoned on alleged sedition charges. They were arrested on several occasions together with some of their staff members, including Mwenda Njoka, Laban Gitau and Mukalo wa Kwayera. They were remanded in various police cells in Nairobi, Kiambu and Mombasa and finally incarcerated at Shimo La Tewa Prison. During those ordeals, they were repeatedly denied their constitutional right to bail and even when they were granted bail, it was after weeks of incarceration and the terms were deliberately prohibitive to ensure non-compliance.
12. On 21st April, 1992, they were specifically charged at the Mombasa Law Court on the allegation of publishing seditious material which included; 'The crying scandal' published on 16th December 1991, 'Tight rope' published on 2nd December 1991, 'Stones too heavy' and 'Nyayo's special torture squads' published on 23rd December 1991, 'Voice from jail', published on 24th February 1992, 'Moi wants Anyona' published on 9th March 1992, 'Moi Secret Funds' published on 13th April 1992, 'Moi bounces', 'KANU's pirated music' and 'Averting civil war' published on 13th April 1992, and the 'Clinging to power' published on 20th April 1992. They were found innocent and were released later on but prior to release, they were held incommunicado and their daughter Margaret, and mother, Prisca, were not allowed to visit them at Shimo La Tewa Prison where they were being held.
13. They claim that they were denied the right to a fair trial as they were continuously denied bail, arrested without being told the reason for the arrest and arrested without a warrant. The 1st Petitioner's cases were also conducted in camera as opposed to being in open Court.
14. Further, that on 23rd June 1992, there was an explosion in their offices which caused extensive damage as it burnt down the newsroom and equipment used for publishing the newsmagazine. They also lost their telecommunication equipment in the fire,
15. In September 1993 while coming from Church via Red Hill Road, they were robbed of their new "Honda" motor vehicle at gunpoint near Gigiri Police Station but efforts to have the incident documented were in vain and they were instructed to leave the police station without the robbery being recorded.
16. They stated that as a result of the above incidences, they suffered physically, psychologically, mentally, economically, politically, socially and their recreational life was seriously harmed. They blame the State and claimed that it was punishing them for their efforts of advocating for media freedom through the "Society" newsmagazine.
17. In submissions, their advocate added that the Respondents' agents violated their right to personal liberty as was provided for under **Section 72(1)** of the **Repealed Constitution** and that the Respondents arrested and detained them severally between 1992 and 1994 for long periods while incommunicado without taking them to any Court of law to be charged and tried. They also claimed that they were confined in police cells and remand prisons unlawfully and their freedom of liberty was thereby violated. They also allege that they were arrested and detained and released whimsically by the Government. It is therefore their case that the State violated their right to be brought to Court within a reasonable time as was the right to conditional release.

18. Counsel further submitted that they were subjected to torture and degrading punishment by State agencies in violation of **Section 74(1) of the Repealed Constitution**. That they were forced to spend long periods of time in cold and inhuman conditions in various police cells and remand prisons and their physical, mental and financial loss amounted to torture because they were denied an opportunity to make a living; the Government shut down their news magazine, their children had difficulties attending school due to lack of finances, they lost their home in Runda which had been mortgaged and was repossessed for non-payment of the mortgage facility. They therefore claim that they suffered due to the ill treatment meted on them and for the regular persecution by Special Branch and other Police officers.

19. It was the Petitioner's further contention that they were subjected to arbitrary search and entry of their office in Tumaini House where the police officers raided their computers and printers in violation of **Section 76(1) of the Repealed Constitution**.

20. It was their additional submission that their right to fair hearing provided under **Section 77 (2) of the Repealed Constitution** was violated and that Special Branch Police Officers assumed the role of arresting officers, prosecutor, magistrate and prison authorities by arresting the 1st and 2nd Petitioners, trying them and sentencing them by holding them in detention for days without taking them to Court.

21. They also submitted that their freedom of expression as was provided for under **Section 79(1) of the Repealed Constitution** was violated. That they were also severally tortured, detained in custody for days and for the mere reason that they were associating and sharing ideas and opinions believed to be anti-Government.

22. It is therefore the Petitioners' submission that they are entitled to compensation by way of damages since their constitutional rights were violated by the Respondents as a result of which they suffered psychological torture. They relied on the case of *James Orengo vs Attorney General & Another Civil Suit No.207 of 2002* in that regard.

The Respondent's case

23. The Respondent, the Attorney General, opposed the Petition through the Grounds of Opposition dated 23rd July 2014 which read as follows;

“(1) That the Petition is unmeritorious due to non-disclosure of constitutional violations in a precise and specific manner.

(2) That the Petition is extremely out of time and the same cannot be excused by this Honourable Court.

(3) That the Petition is an abuse of Court process and the same should be dismissed with costs.”

24. While the Respondent called no evidence to rebut the facts as set out above, in his submissions, he claimed that the Petitioners failed to set out with some degree of precision how their constitutional rights were violated. In that regard, he relied on the case of *Annarita Karimi Njeru vs Republic (1976-1980) KLR 1272* where it was held that a party alleging constitutional violation must plead with a reasonable degree of precision which constitutional rights were violated and the manner in which they were violated.

25. He further submitted that the burden of proof lies on the Petitioners and that they had failed to prove that they were arrested and severely tortured as they have alleged. He added that it was trite law that he who alleges must prove the allegations and he relied on the case of *Kirugi and Another vs Kabiya and 3 Others (1987) KLR 347* where the Court of Appeal held that the burden of proof was on the Plaintiff. It was also his case that the Petitioners had failed to prove any financial loss incurred by the 3rd Petitioner and concluded on the issue of standard of proof that the Petitioners had not discharged the said burden .

26. It was also the Respondent's submission that the Petitioners were not denied their right to liberty as they were arrested lawfully and remanded pursuant to a Court order and therefore concluded that no

human right or fundamental freedom can be violated by the execution of a judgment or a Court order. He relied on the case of *Maharaj vs Attorney General of Trinidad and Tobago (1979) 385* for that submission.

27. On the issue of damages, he submitted that special and general damages must be pleaded with precision and strictly proved which the Petitioners had failed to do. He relied on the case of *Zacharia Waweru Thumbi vs Samuel Njoroge Civil Appeal No.445 of 2003* for that submission.

28. The Respondent, for the above reasons, urged the Court to dismiss the Petition for being misconceived and misguided.

Determination

29. Having set out the facts and the Parties' submissions as above, I am of the view that there are two issues for determination in this Petition. First, whether the matters set out in the Petition and the facts as pleaded, disclose any violation of the Petitioners' rights and freedoms. Second, if the answer to that question is in the affirmative, I shall then determine the appropriate remedy for the Petitioners and if not, the matter ends there and the Petition must be one for dismissal.

Right to liberty

30. The Petitioners claimed that their rights under **Section 72(1), (2) and (3)** of the **Repealed Constitution** were violated. This Section 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.

31. In the instant Petition, the Petitioners claim that they were arrested and detained variously between 1992 through 1994 for long periods and held incommunicado before being taken to any Court of law to be charged and tried. That they were also confined in police cells at Parklands Police Station, Athi River Police Station, Kilindini Police Station and in some remand prisons, unlawfully, in violation of their right to liberty. However from their affidavits, the specific details of their arrest and charging in Court are scanty and unclear but elsewhere above I have cited instances where they were allegedly arrested and charged.

32. In that context, it is the law that in constitutional litigation, a party claiming violations has the burden of pleading with precision the manner in which the Constitution has been violated. Such a party must state the Article/provision of the Constitution that has been infringed and provide the manner in which it has been infringed. It is therefore not enough to state that the Constitution has been violated and fail to provide the particulars thereof- See *Annarita Karimi Njeru vs Republic (supra)*, *Matiba vs Attorney General HCC MISC APPLIC No.666 of 1990*, *Kenya Bus Services Ltd & 2 Others v Attorney General & 2 Others (2005) e KLR* and *Cyprian Kubai vs Stanley Kanyonga Mwenda HC MISC Applic No. 602 of 2002*). This position has been affirmed by the Court of Appeal in the case of *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others, Civil Appeal No.290 of 2012* and where it elaborated the importance of precision in constitutional litigation as follows;

“However, our analysis cannot end at that level of generality. It was the High Court’s observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (Cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.”

33. I am guided and applying the above principle to the Petition before me, although the Petitioners stated that they were arrested and held incommunicado on many occasions, it is not clear on what dates they were arrested and what on dates they released. In their testimony in Court however, they testified that they were arrested on 16th April 1992 outside Nyayo House and the 1st Petitioner was later arraigned at Mombasa Law Courts while the 2nd Petitioner was arraigned at Kiambu Law Courts. The dates upon which they were arraigned in Court are not provided to make easier for the Court to determine whether they were produced in Court within the stipulated constitutional time limits. They also failed to produce the charge sheet in the criminal case in which they were charged although they referred to the same in their Affidavits and oral testimony in Court. The Charge sheet would have at least corroborated the Petitioners’ evidence and would have been enough to establish their allegations against the Respondent. Without such evidence, I cannot find a violation of their fundamental rights to liberty in the manner they have alleged.

Protection from torture and other cruel and degrading treatment

34. The Petitioners allege 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.

35. 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.”

In addition, **Article 1** of the **United Nations Convention Against Torture and other Cruel Inhuman And Degrading Treatment** defines torture as follows;

“Torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtained from him or a third person, information or confession punishing him for an act he or the third person, or for any reason based on discrimination of any kind. When such pain or suffering is inflicted by or at the instigation of or with consent or acquiescence of a public official or other person acting in an

official capacity. It does not include paid or suffering arising only from inherent in or incidental to lawful sanctions.”

Further, In the case of *Republic vs Minister For Home Affairs and Others ex parte Sitamze Nairobi HCCC NO, 1652 of 2004 (2008) 2 EA 323* Nyamu, J. 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."

36. In the above context, the Petitioners claim that they are now suffering physical and mental health problems due to the ill treatment meted on them. I am therefore constrained to ask, what is the ill treatment that was meted on the Petitioners? Were they beaten? Were they ordered to do acts that are demeaning to a human being? I do not have the answers to these questions and as I stated earlier, it was upon them to provide the details and particulars of the ill treatment meted upon them and not to leave the same to the imagination of the Court- See *Annarita Karimi vs Republic (supra)*.

37. In the premise, I am constrained not to find in favour of the Petitioners on their claim that they were subjected to acts of torture and other inhuman and degrading treatment.

Protection against arbitrary search or entry

38. It was the Petitioners' claim that their office at Tumaini House Nairobi and home at Mountain View in Nairobi were arbitrarily searched without warrants and computers, printers and the "Society" newsmagazine impounded on several occasions.

39. In that regard, **Section 76(1)** of the **Repealed Constitution** provided thus;

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

40. The issue is straightforward and the Respondent did not controvert this allegation. He also failed to provide search warrants to that effect. Accordingly, I find that the Petitioners rights under **Section 76(1)** of the **Repealed Constitution** were violated.

Right to fair hearing

41. It was the Petitioners' contention that Special Branch police officers violated their right to fair hearing because they detained them without access to their lawyers while in police cells. Further, that they were charged with eleven counts of sedition in Mombasa Law Courts some 500 kilometers from where they allegedly published the seditious magazine. That the Court ordered them to appear for mention every two weeks and report to a police station every other week thereby incurring untold huge expenses.

42. **Section 77 (2)** of the **Repealed Constitution** provided for the right to fair trial as follows;

“(1) ...

(2) *Every person who is charged with a criminal offence –*

a. shall be presumed to be innocent until he is proved or has pleaded guilty;

b. shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged;

c. shall be given adequate time and facilities for the preparation of his defence;

d. shall be permitted to defend himself before the court in person or by a legal representative of his own choice;

e. shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and

f. shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge, and except with his own consent the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence.

43. In that context The 1st Petitioner testified that while being held at Athi River Police Station, his lawyer, Mr. Paul Muite visited him but he was not allowed to see him. **Section 77(2) (d)** of the **Repealed Constitution** entitled the Petitioners to the right to legal representation during trial. It is unclear as to whether they were allowed services of a Counsel during their sedition trial at Mombasa Law Courts but it is undoubted that they were released on conditional bond. The terms of the bond were that they were supposed to report for the mention of their case every two weeks and report to Central Police Station every week. In that context, it is my understanding that no order or judgment of a Court can amount to a violation of Constitutional rights. In *Maharaj vs Attorney General or Trinidad and Tobago the Court (supra)* held as follows;

“In the first place, no human right or fundamental freedom recognized by Chapter 1 of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person’s serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher Court. Where there is no higher Court to appeal to then one can say that there was error. The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by Section 1(a); and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice.”

44. I am in agreement and it is difficult in the circumstances to find a violation of the right to fair trial as alleged.

Freedom of Expression

45. It is the Petitioners’ claim that their freedom of expression was violated through the various raids and impoundment of the “Society” by the Respondent’s agents.

46. Freedom of expression was provided for under **Section 79(1)** of the **Repealed Constitution** in the following manner;

79(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom

of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person of class of persons) and freedom from interference with his correspondence.

47. I will spend little time on this aspect of the Petition because it is not disputed by the Respondent that copies of the Petitioners' newsmagazine were confiscated and printing equipment, plates and films were destroyed to prevent printing of the newsmagazine. The Respondent failed to specifically deny why the business of a newsmagazine had to be destroyed and yet press freedom is one of the tenets of freedom of expression. It follows certainly that the Petitioners freedom of expression was violated in the manner alleged.

Remedies

48. Having found a violation of the Petitioners' rights under **Sections 76(1) and 79 (1) of the Repealed Constitution**, this Court must award the Petitioner an appropriate remedy.

49. In that regard, in prayer (b) of the Petition, the Petitioners sought an award of damages and compensation for the destruction of 45,000 copies among others that they could not remember of the 'The Society' newsmagazine directly impounded by the Respondent's agents. They further claimed that their losses amounted to millions of shillings including cash that they allegedly lost plus more money which was held in an undisclosed bank account at Barclays Bank, a house in Runda that they had mortgaged but was sold for failure to repay the loan advanced by the said bank. All these are losses in the nature of special damages.

50. As regards compensation and award of special damages, it is trite law that such special damages must be pleaded and strictly proven. That is why in *Zacharia Waweru Thumbi vs Samuel Njoroge (supra)* the Court held as follows;

"... The law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Law Reports and Text Books on torts are replete with authorities on this, which need not be reproduced here. Suffice it to quote from the decision of our Court of Appeal in Hahn vs Singh, Civil Appel No.42 of 1983 [1985] KLR 716, at P.717, and 721 where the learned judges of Appeal – Kneller, Nyarangi JJA, ad Cheson Ag. JA – held: "special damages must not only be specifically claimed (pleaded) but also strictly proved ... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The decree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves." ...If I were to explain, or define, special damages to a layman, I would say "they are a reimbursement to the Plaintiff/Victim of the tort, for what he has actually spent as a consequence of the tortuous act(s) complaint of." This point cannot be overstressed: that the claimant of special damages must not only plead the claim, but also go further and strictly prove, usually by documentary evidenced, that he has actually spent the sum claimed. In medical claims the claimant must produce receipts to support his claim for special damages.

The Court went on to state as follows;

"In my view, given the requirement of strict proof, I would further hold that an invoice would not suffice. Only a receipt, for the payment, will meet the test... I now turn to the last ground of appeal, which is on the adequacy of the special and general damages awarded by the lower court. The award has been challenged as too low under the circumstances. I begin by emphatically stating that special damages can't be too high, or too low, since they are a reimbursement for what has actually been spent. Further, special damages are not assessable by the Court. The Court simply awards what has been pleaded and proved"

Similarly, in *Mawenzi Investments Ltd vs Top Finance Co. Ltd & Anor HCCS No. 02 of 2013* it was

held as follows;

“...Special damages do not only have to be specifically pleaded, they are also strictly proved. According to Halsbury’s Laws of England, 4th ED Vol.12(1) at paragraph 812, special damages is those damages which are capable of calculation in financial terms and must be proved. In the case of Kyambadde vs Mpigi District Administration [1983] HCB 44, it was held that special damages must be specially pleaded and strictly proved, but does not have to be supported by documentary evidence in all cases. Special damages, on the other hand, are such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character, and, therefore, they must be claimed specially and proven strictly...”

The Court then differentiated between special and general damages as follows;

“ Assessment for general damages is based on the principle of restitutio in integrum according to East African Court of Appeal in the case of Sharamshi vs Karsan [1974] 1 EA 41. The principle means that the plaintiff has to be restored as nearly as possible to a position he or she would have been in had the injury complained of not occurred. According to Halsbury’s laws of England Fourth Edition (reissue) volume 12(1) and paragraph 802 thereof, damages are defined as the pecuniary recompense given by the process of law to a person for the actionable wrong that another has done him or her. Damages may, on occasion, be awarded to a plaintiff who has suffered no ascertainable damage and damage may be presumed. General damages are those damages which will be presumed to be the natural or probable consequence of the wrong complained of; with the result that the Plaintiff is required only to assert that such damage has been suffered ...”(see also Robert Cuossens vs Attorney General Civil Appeal No.8 of 1999)

Lastly, in *Haji Asuman Mutekanga vs Equator Growers Ltd Civil Appeal No. 7 of 1995* the Court stated;

“...Again, it is trite law that special damages and loss of profit must be specifically pleaded, as it was done in the instant case. They must also be proved exactly, that is to say, on the balance of probability. This rule applies where a suit proceeds inter parties or ex parte. It follows that even where as in the instant case, the defendant neither enters appearance nor files a defence, the plaintiff bears the burden to prove his case to the required standard. The burden and standard of proof does not become any less. As the learned author stated in MC Gregor on Damages, 4 Edition, page 1028, the evidence in special damages must show the same particularity as is necessary from its pleading. It should therefore, normally consist of evidence of particular losses such as the loss of specific customers or specific contracts. However with the proof as with pleadings, the courts are realistic and accept that the particularity must be tailored to the facts ... General damages consist, in all, items of normal loss which the plaintiff is not required to specify in his pleading in order to permit proof in respect of them at the trial. Its distinction from special damages was defined by Lord Wright in Monarch S.S Co. vs Karlshanus Oliefabriker (1949) AC, 196 at 221 as being; “damages arising naturally (which means in the normal course of things) and cases where there were special and extra ordinary circumstances beyond the reasonable provision of the parties. In the latter event it is laid down that the special fact must be communicated by and between the parties.”

51. I am in agreement with the exposition of the law above and while all the cases relate to civil disputes, I dare add that the same principles apply in constitutional matters and i know no legal authority to the contrary. In that context, the Petitioner’s claim is that they had a business of publishing the “Society” newsmagazine and the same was severally impounded by the officers and/or agents of the Respondent and eventually they had to flee the Country and left everything behind they had. They however failed to plead or put anything before the Court that would guide it in awarding them compensation in the form of special damages and that is all that I need to say on that matter – See also **Gitobu Imanyara & 2 Others vs AG Petition No.78 of 2010.**

52. The Petitioners also sought exemplary damages for the violation of their constitutional rights. In that regard, I note that the High Court has been reluctant in awarding exemplary damages for reasons that they are not awardable in changed political circumstances and in a Petition such as the one before me – See the cases of **Dominic Arony vs Attorney General Misc. Appl.494 of 200**, **Benedict Munene Kariuki and 14 others -v- the Attorney General High Court Petition No.722 of 2009**, and **Jennifer Muthoni Njoroge and 10 others vs Attorney General Petition No. 340 to 350 of 2009**. Although that approach has been contested in the Supreme court upon a ruling by the Court of appeal in the case of **Koigi wa Wamwere vs Attorney General (Civil Application No.Sup.4 of 2015)**, I do not see any good reason to warrant a departure from that reasoning.

53. From my findings above, it means that the Petitioners are only entitled to certain declarations and an award of general damages for the violation of their constitutional rights to protection from arbitrary search and freedom of expression.

54. In the circumstances therefore I award each of the Petitioners Kshs.2,500,000.00 as general damages. I see no reason to award the 3rd Petitioner damages as the 1st and 2nd Petitioners are claiming on its behalf.

55. I also note that a large part of the Petitioners' claim was predicated on economic losses and events surrounding their alleged harassment, incarceration and arraignment in Court.

56. Sadly, their Petition was generalized and many of its more serious allegations have not succeeded for lack of detail, particulars and evidence. Nevertheless I observed the 1st and 2nd Petitioners in Court, and while I have nothing but empathy for them as they obviously appeared as people who have suffered extremely due to their courage to publish the "Society" against the then Government of the day, they pegged their claims on generalization and if they had therefore anticipated a huge award in damages (special, general and exemplary), sadly, neither the facts of their case as presented nor argued would have swayed this Court's opinion. Their Petition as drafted and argued could not have placed them in the same category as **Gitobu Imanyara and Njeru Gatabaki case (supra)** and I have stated why. I digress.

57. The final orders to be made in the circumstances are therefore that Judgment is entered in favour of the Petitioners against the Respondent in the following terms;

a. A declaration is hereby issued that the Petitioners' fundamental rights and freedoms under Section 76(1) and 79(1) of the Repealed Constitution were contravened and violated by agents of the Kenya Government in circumstances set out in this judgment..

b. The 1st and 2nd Petitioners are jointly awarded general damages in the sum of Kshs.5,000,000.00 for the said violations and contraventions.

c. The Petitioners shall have costs of the Petition plus interest on both the general damages and costs from the date of this judgment until payment in full.

58. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 13TH DAY OF NOVEMBER, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Mr. Gitonga for Petitioner

Mr. Mohamed for Respondent

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE