REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 180 OF 2011

BETWEEN

JAMES KANYIITA NDERITU ..... PETITIONER

AND

THE ATTORNEY GENERAL ..... 1ST RESPONDENT

THE DIRECTOR OF

PUBLIC PROSECUTION ..... 2ND RESPONDENT

JUDGMENT

Introduction and background

1. This case concerns events that took place almost 27 years ago. The petitioner seeks to vindicate his fundamental rights and freedoms following his arrest, trial and conviction and subsequent acquittal by the appellate court.

2. At the time material to this case, the petitioner was an international businessman. He claims that on or about 28th May 1985, he was arrested by police officers from the Exchange Control Investigations Branch based at Central Bank. He was detained in several Police Stations in Nairobi and his business premises at Wilson Airport and Kenya Continental Hotel Westlands, and his family residence in Karen searched. He states that he was threatened, humiliated, psychologically tortured and thereafter charged. The petitioner was eventually arraigned in Court on 21st June 1985 and charged with 31 counts of obtaining money by false pretenses contrary to **section 313** of the ***Penal Code*** in ***Nairobi Criminal case No. 1716 of 1985***.

3. The charges preferred against the petitioner were not the first. He had been charged in an earlier case – ***Nairobi Criminal Case No. 3253 of 1984*** with forgery. The charges were withdrawn and fresh charges instituted in ***Nairobi Criminal Case No. 4139 of 1984.*** That case was later consolidated with ***Nairobi Criminal Case No. 1716 of 1985*** which initially had 14 counts but increased to 31 counts.

4. ***Criminal Case No. 1716 of 1985*** proceeded for hearing a pace from 21st June 1985. The

petitioner was convicted on 22nd April 1988. He then lodged an appeal to wit; ***High Court Criminal Appeal No. 539 of 1988.*** The appeal was duly heard and the entire conviction was quashed on 30th April 1992.

5. The basic facts outlined above are not disputed. The petitioner's case is that during this period his rights were violated and as a consequence he seeks relief from this Court. The petitioner relies on and has made submissions based on the Constitution. However, the facts of this case occurred before the promulgation of the new Constitution and must therefore be assessed in light of the former Constitution as the Constitution is not retrospective. **(**See ***Samuel Kamau Macharia v Kenya Commercial Bank Ltd,* SCK Application No. 2 of 2011 [2012] eKLR, *Charo Karisa Thoya v Republic* Mombasa Court of Appeal Criminal Appeal No. 274 of 2002 (Unreported), *John Githinji Wang'ondu and Others v Coffee Board of Kenya and Another* Nairobi Petition No. 255 of 2011 (Unreported)** and ***Du Plessis and Others v De Klerk and Another* (CCT 8/95) [1996] ZACC 10**). For purpose of this judgment, reference to the Constitution is therefore reference to the former Constitution. The Constitution shall be referred to as the Constitution, 2010.

Petitioner's Case

6. The petitioner avers that his arrest and detention for a period of 24 days in different police stations within Nairobi prior to his arraignment in court violated his rights. During this time the petitioner avers that he did not have access to his family or lawyers. Police officers searched his house in Karen and offices at Wilson Airport and Kenya Continental Hotel – Westlands and carried away his business and personal documents. The petitioner states that he was treated in a cruel and inhuman manner in full glare of his family members and staff. He was paraded before his bankers and Customs and Excise Department Officers as a common criminal. He was arraigned in Court on 21st June 1985 duly charged.

7. The petitioner contends that his rights were also violated as he was never informed of the reasons for his arrest or given an opportunity to obtain any assistance, legal or otherwise necessary for him to mount any action to challenge the unlawful arrest, detention and search. The petitioner also avers that the officers conducting the investigation based at the Central Bank carried away all his business and personal documents including his passport and records of his businesses from his office and residence in an illegal search without any warrants. No copies of the documents were given to him to enable him prepare his defence thus resulting in an unfair prosecution, trial and conviction.

8. The petitioner states that there was no complainant in the case against him. He avers that the Customs and Excise Department officials from whom he was alleged to have obtained money in Export Compensation payments never made any report to the Police and that the entire prosecution was conducted for ulterior motives as there was no reason to believe an offence has been committed without the existence of a complaint. According to the petitioner, the report to the Exchange Control Investigations Branch based at Central Bank was made by employees of Westlands Branch of the Standard Chartered Bank and these persons were not named in the Charge sheets and they had no legitimate interest in the funds paid to the petitioner and his companies by the Customs and Excise Department. The petitioner avers that their actions were malicious as they were neither officers of the Customs Department nor the paying Bank and they made the report without any instigation, provocation or justifiable cause.

9. The petitioner maintains that the respondents failed to exercise their powers under the Constitution to ensure that proper investigations were done by the Police before giving consent to prosecute a case without any factual or legal basis. The petitioner avers that the Investigating Officers admitted in Court that they were subjected to pressure by undisclosed parties to prefer charges against him when there was no evidence of any criminal conduct. Consequently the respondents failed in their constitutional duty to safeguard the proper and lawful use and exercise of the constitutional powers conferred by **section 26** of the Constitution.

10. The petitioner avers that during the criminal case, officers from Customs and Excise Department gave evidence confirming that payment of export compensation to him and his companies were valid and that no complaint had ever been lodged against him. The petitioner avers that had the respondents analysed these statements and the entire police investigation file, the respondents would not have taken any steps to prefer the charges against him.

11. The petitioner avers that during the trial, officers from Kenya Commercial Bank which was the paying Bank for all the cheques issued to the petitioner and his companies testified that the payments to the petitioner's companies were genuine and had no defects such as to raise any suspicion to warrant a criminal investigations or action. The petitioner alleges that bank officials were threatened and intimidated by the CID officials from Central Bank in the presence of the petitioner to give evidence against him or face sacking just like the Customs Department Officers. He avers that documents were falsified and the originals were never traced or produced in court.

12. The petitioner avers that he was treated in a cruel, degrading and inhuman manner in the face of his family, friends and staff in the manner the arrest, search and detention was carried out. He avers that he was threatened with torture and cruelty.

13. In the petition dated 3rd October 2011, the petitioner seeks the following prayers;

a. *A declaration that the arrest, detention, search, threats, cruel treatment, humiliation, charge and consequent prosecution of the petitioner in Chief Magistrates – Criminal Case No. 1716 of 1995 was in violation, contravention, infringement and denial of the petitioner's fundamental rights and freedoms under Articles 25(a) and (c), 28, 31, 40, 47, 49, 50 and 51 of the Constitution of Kenya 2010 and hitherto enshrined in Chapter V of the Old Constitution of Kenya.*
b. *A declaration that the respondent violated and/or failed, refused and neglected to properly exercise their powers under the provisions of section 26 of the old Constitution and Article 157 of the New Constitution of the Republic of Kenya this rendering such powers to misuse and Abuse in relation to the petitioner and violation of the petitioner's constitutional rights.*
c. *An order for compensation by way of general and exemplary damages as sought in paragraph 29 of the petition to be assessed by this Honourable Court bases on the extent of loss suffered herein by the petitioner.*
d. *Such further declarations, orders, remedies and/or reliefs as the Court may deem just and fit to grant in the unique circumstances of the case.*

14. The petitioner's case is supported by the petitioner's affidavit sworn on 29th September 2011, and supplementary affidavit sworn on 11th October 2012. The petitioner also relies on written submissions filed on 23rd October 2012 and supplementary submissions filed on 4th December 2012. Counsel for the petitioner, Mr K'opere, assisted by Ms Kilonzo made extensive submissions to support the petitioner's case.

Respondents' Case

15. The 1st respondent opposed the petition based on the grounds of opposition dated 15th November 2012 and written submissions dated 17th November 2012. The 2nd respondent also opposed the petition and filed grounds of opposition dated 21st May 2012 and a replying affidavit sworn on 8th November 2012 sworn by Jonathan Mwaluko, a Chief Inspector serving in the Police Service and attached to the Banking Fraud Investigations Unit.

16. The respondents oppose the petition on two broad grounds. First, the respondents deny the allegations of breach of the petitioner's fundamental rights or freedoms. The respondents contend that the matters raised concern the accuracy and correctness of the evidence and facts gathered during the investigation and these can only be challenged and were indeed challenged during the trial and that this Court should not proceed with an inquiry into what was within the province of the trial court.

17. Second, the respondents contend that this case has been brought after inordinate delay. Inspector Mwaluko depones that the records subject of the case were destroyed according to the Police Service procedures and in view of the lapse of time, other documents could not be traced. Furthermore, officers involved in the matter have retired from the Police Service and are difficult to trace.

18. In the circumstances the respondents state that their defence is prejudiced after a delay of 26 years in lodging the claim. The 2nd respondent submitted that it is a well-established principle of law that violations of fundamental rights must be raised at the earliest opportunity, in this case, the violations should have been raised at the trial or in the appellate court but the petitioner failed to do so. The 2nd respondent described this matter as an afterthought which ought to be dismissed.

19. The 2nd respondent raised the objection that the mandate of the office of Director of Public Prosecutions ("DPP") was to prosecute criminal offences under **Article 157(6)** of the Constitution. Ms Obuo, counsel for the DPP, submitted that the office of the DPP was created under **Article 157(6)** and when this matter was being prosecuted, the office of the DPP was a Department and under the direction the office of the Attorney General under **section 26** of the former Constitution. Under **section 26(5),** the power of the Attorney General was exercised by the DPP under his general instructions and therefore the prosecuting authority at the material time was under the office of the Attorney General. In the circumstances, it was argued the DPP is not a proper party to these proceedings.

Determination

20. I have considered the petition, depositions and submissions and I have identified two issues for determination as follows;

i. Whether there is misjoinder of parties to the suit.
ii. Whether there is violation of the petitioner's rights and fundamental freedoms as alleged or at all.

Whether there is misjoinder of parties

21. The 2nd respondent raised the argument that it was not a proper party to the suit. I heard the objection on 29th October 2012 and I declined to remove the DPP from these proceedings at that stage. I stated that I would give reasons in the judgment.

22. Under **section 26** of the Constitution, the Attorney General acted as the repository of prosecutorial powers under the former regime. With the Constitution, 2010 these powers were severed from that office and vested in the with the newly created independent office of the DPP under **Article 157**.

23. **Section 31(5)** of the **Sixth Schedule** to the Constitution provides that ***"The functions of the Director of Public Prosecutions shall be performed by the Attorney General until a Director of Public Prosecutions is appointed under this Constitution."*** **Section 33** of the **Sixth schedule** goes further to provide for succession of institutions and offices in the following terms, "***An office or institution established under this Constitution is the legal successor of the corresponding office or institution, established under the former Constitution or by an Act of Parliament in force immediately before the effective date, whether known by the same or a new name."***

24. But in this case, the corresponding office that discharged the roles of the present Office of the DPP is that of the Attorney General then established under **section 26** of the former Constitution. To my mind, the liabilities then vesting in the corresponding functions then carried on by the office of the Attorney General would necessarily be carried over in the new proceedings until establishment of the office of the DPP. The facts relating to this case took place prior to the establishment of the office of the DPP as an independent office under **Article 157**.

25. In order to do justice in the case, I did not think that any prejudice would have been suffered by maintaining the 2nd respondent as a party to these proceedings, as the office of the DPP is now responsible for the matters that are subject of challenge under the Constitution. Although I stated in the beginning that this matter is brought under the former Constitution and it is therefore applicable, the present matter was filed under the new regime. In my view the petitioner should not be prejudiced in any way in prosecuting this case that straddled two legal regimes.

Whether the petitioner's fundamental rights and freedoms were violated.

26. The case against the petitioner is clearly documented in the proceedings that took place before the Nairobi Chief Magistrates Court and in the resultant appeal in the High Court. The petitioner alleges breach of his rights during the investigation, incarceration and trial process which he says caused him injustice and violated his fundamental rights and freedoms.

27. As I have outlined above, the petitioner has made grievances concerning the manner in which the investigation was conducted by the police, the nature of charges that were brought, prosecutorial misconduct, the nature of evidence proffered during the trial, the testimony of the witness and the overall fairness of the trial. These matters were all intimately connected with the trial and conviction.

28. For example, the confiscation of the petitioner's business and personal documents to the extent that he was unable to prepare a proper defence was a clear violation of **section 77(c)** of the Constitution. However, the trial proceeded a pace resulting in a conviction. This issue was not taken up at the trial. Ordinarily, the relief for such a breach lies in the trial process itself where for example, the court would give the defendant time to prepare the defence. Where the accused is unable to resort to evidence as a result of police misconduct, the trial court, would be entitled to draw adverse inference on the prosecution case. If the violation was in the failure of the prosecution to provide witness statements and evidence before the trial, then the remedy would be to seek a court order directed to the prosecution to provide such evidence. This was the position in the cases cited by the petitioner to support his case. In both ***Thomas Patrick Cholmondeley v Republic*** **CA Criminal Appeal No. 116 of 2007 [2008] eKLR** and ***George Ngodhe and Others v Attorney General*** **Nairobi HC Criminal Application No. 345 of 2001 (Unreported)** the issue of whether an accused person is entitled to witness statements and evidence from the prosecution was dealt with during the trial. Both the High Court and Court of Appeal in exercise of their jurisdiction to enforce fundamental rights and freedoms issued orders to enforcing the right during the trial itself.

29. Likewise the complaints that the petitioner was not informed of the charges soon enough or that the charge was defective or that the petitioner was denied the services of an advocate or was not afforded a fair hearing are all violations of **sections 77 (b)** and **(d).** They are the kind of complaints that ought to have been raised at the trial as they are capable of remedy during trial or at the appellate stage. The conviction, which the petitioner asserts was tainted was quashed therefore the issues raised by the petitioner merged into the judgment of the High Court and are consequently rendered moot.

30. Like in the applicants in the case of ***George Ngodhe and Others v Attorney General*** **(above)**, the petitioner had an opportunity to exercise his right to move the High Court under **section 84(3)** of the Constitution in proceedings before the subordinate court for determination of these matters by the High Court. Unfortunately he failed to do so. **Section 84(3)** provides that, "*If in proceedings in a subordinate court a question arises as to the contravention of any of the provisions of sections 70 to 83(inclusive), the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to High court unless, in his opinion, the raising of the question is merely frivolous and vexatious."*

31. It is also well settled that allegations of violations of the bill of rights ought to be raised at the earliest opportunity during the trial process. Where the claims arise from investigations or ongoing

proceedings, a party ought to raise the issue of the allegation before the presiding judge in the course of the proceedings before it. In the case of ***Julius Kamau Mbugua v Republic*** **Nairobi Criminal Appeal No. 50 of 2008 [2010] eKLR**, the Court of Appeal noted that, "*[T]he violation of the right should be raised at the earliest possible stage in the proceedings to enable the court to give an effective remedy otherwise the right may be defeated by the doctrine of waiver where applicable."* (See ***Dominic Mutie Mwalimu*****, Criminal Appeal No. 127 of 2005 (Unreported),** ***JK v Republic,*** **Eldoret High Court Criminal Case No. 83 of 2003 (Unreported),** and ***Murithi Mugo v Republic Criminal Application*** **No. 286 of 2006(Unreported)**.

32. The petitioner avers that he did not receive a fair trial. In the case of ***Methodist Church in Kenya Registered Trustees & Another v Rev. Jeremiah Muku and Another*** **CA, Civil Appeal No. 233 of 2008 (Unreported),** where the Court of Appeal observed, *"As the Privy Council said, it is only in rare cases that an error in the judgment or order of a court can constitute a breach of human right or fundamental freedoms. It is also clear from the quotation that ordinary errors made in the course of adjudication by courts of law should be cured by invoking the mechanism and procedures prescribed by the ordinary law for correction of errors such as appeal or review."* The quotation the Court of Appeal referred to was in the case of ***Maharaj v Attorney General of Trinidad and Tobago*** **(No. 2) [1979] AC 385, 399** where the Privy Council held at that,"*In the first place, no human right or fundamental freedom recognized by Chapter I 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 none can say that there was an 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 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. Their Lordships do not believe that this can be anything but a very rare event…"*

33. The petitioner lodged an appeal to correct the errors in the trial and he was indeed successful when the conviction was set aside. I must emphasize that although the right to fair trial applies when a person has been charged with an offence, the right to fair trial is not a one off event but the chain of events after the person has been charged with an offence; from the preparation for trial, the actual trial, judgment and sentencing. Apart from the trial process, there are matters occurring prior to arraignment that would affect the trial and it may be difficult in some cases to sever the pre-trial stage with the trial process as all the facts and events are intricately connected.

34. Delving into the allegations surrounding the trial is a round-about way of reviewing the subordinate court's conviction and the subsequent decision of the High Court sitting on appeal. The petitioner's conviction was reversed by High Court and therefore to proceed with such an inquiry would be re-evaluating the process and providing a further avenue for appeal through the guise of enforcing fundamental rights and freedoms. This course is not permitted and if any authorities were needed, the following cases are instructive; ***Peter Ng'ang'a Muiruri v Credit Bank Ltd and Others,*** **Nairobi Civil Appeal No. 203 of 2006 [2008] eKLR**, ***John Githongo and Another v Harun Mwau and Others*** **Nairobi Petition No. 44 of 2012 [2012]eKLR** and ***Chokolingo v Attorney General of Trinidad and Tobago*** **[1981] WLR 108**.

35. My conclusion therefore is that all trial related matters which were dealt with or could have been dealt with either by the trial court or the High Court, exercising its appellate jurisdiction cannot be open for further examination through a petition filed to enforce fundamental rights and freedoms and I decline to entertain such an inquiry. Moreover, as the appeal was successful and the conviction quashed, the matters in issue are now moot. It is for this reason that prayer (a) of the petition cannot be granted.

36. This reasoning also applies to allegations of misuse of prosecutorial power made against the respondents which is the subject of prayer (b) of the petition. These allegations relate directly to

the trial, conviction and acquittal on appeal. Although the appellate court acquitted the petitioner, the petitioner was convicted after a long trial implying that there was reasonable basis to commence the prosecution. I say no more on this subject.

37. My finding regarding violations relating to the trial does not end the matter as there are allegations that may be severed from the trial itself. In this respect, the law was clarified in the case of ***Julius Kamau Mbugua v Republic*** **(above)** where the appellant case involved allegation of violations of **section 72** and **77** of the Constitution during the trial and where the Court of Appeal had to deal with the nature of relief granted for violations occurring during the trial and outside the trial process. The Court held that the provisions of **section 72 deal with the protection of the right to personal liberty and are** intended to ensure that a person or a suspect is not unreasonably deprived of his personal liberty either before or after he is taken to court. The rationale for the strict protection of the personal liberty of a suspect is that there is a presumption of innocence under **section 77 (2)(a)** until he is proved or has pleaded guilty. On the other hand, Court noted that the provisions of **section 77 set out provisions** intended to secure the protection of the law in the administration of criminal justice. As I have held the violation of rights within the trial merged with the judgment of the High Court which quashed the conviction.

38. The petitioner complains that his arrest for a period of 24 days from 28th May 1985 and 21st June 1985 was contrary to **section 72(3)** of the Constitution. He also complaints that he was subjected to humiliation, torture and inhuman treatment contrary to **section 74(1)** of the Constitution.

39. Torture and cruel, inhuman and degrading treatment are terms that have acquired a specific meaning in law. They do not refer to general discomfort or inconvenience caused by the violations of any other right or fundamental freedom. In other words, the mere fact that someone has been detained beyond the time permitted by the law does not of itself constitute torture, cruel and inhuman and degrading treatment. In the case of ***Republic v Minister for Home Affairs and Others ex parte Sitamze*** **Nairobi HCCC NO. 1652 OF 2004 [2008] 2 EA 323,** Justice Nyamu, state that, ***'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 elicit, matters 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."*** **(See also *Harun Thungu Wakaba v Attorney General* (Nairobi HC Misc. Appl. 1411 of 2009(OS)) I have scrutinized the pleadings and depositions filed by the petitioner and I do not think they disclose any torture, cruel or inhuman treatment in the manner contemplated by the Constitution.**

40. This leaves the issue of pre-trial detention, which violates the provisions of **section 72(3)** of the Constitution and provides;

72(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.

41. In the case of ***Dominic Mutie v Republic*** **Nairobi Criminal Appeal No. 217 of 2005 (Unreported)**, the Court of Appeal construed the provisions of **section 72(3)** as follows, *"A plain reading of that provision of the Constitution as a whole shows that the provision requires that a person arrested upon reasonable suspicion of having committed or about to commit a criminal offence, among other things, has to be brought before the court as soon as is reasonably practicable (emphasis ours). The section further provides that where such a person is not taken to court within either the twenty-four hours for non-capital offence or fourteen days for capital offence as stipulated by law, then the burden of proving that such a person has been brought to court as soon as is reasonably practicable rests on the person who alleges that the Constitution has been complied with. Thus, where an accused person charged with a non-capital offence brought before the court after twenty-four hours or after fourteen days where he is charged with a capital offence complains that the provisions of the Constitution has not been complied with, the prosecution can still prove that he was brought to court as soon as is reasonably practicable notwithstanding, that he was not brought to court within the time stipulated by the Constitution. In our view, the mere fact that an accused person is brought to court either after the twenty-four hours or the fourteen days, as the case may be, stipulated in the Constitution does not ipso facto prove a breach of the Constitution. The wording of section 72 (3) above is in our view clear that each case has to be considered on the basis of its peculiar facts and circumstances. In deciding whether there has been a breach of the above provision the Court must act on evidence. Additionally, a careful reading of section 84 (1) of the Constitution clearly suggests that there has to be an allegation of breach before the Court can be called upon to make a determination of the issue which allegation has to be raised within the earliest opportunity."*

42. The reason why an understanding of **section 72(3)** of the Constitution is important is that the State may avoid liability by demonstrating that the detention of a person detained beyond the time limits specified was reasonable in the circumstances. The respondents are therefore entitled to make the case that the delay of 26 years is inordinate and that they are denied the ability to make their case to avoid liability.

43. The 2nd respondent's response to the petitioner's allegations of pre-trial detention is set out in Jonathan Mwaluko's replying affidavit where he states that;

[7] THAT the date of arrest has not been established because we have not traced the said police file we are therefore not able to explain why or whether the petitioner was kept in custody for over 3 weeks.

[8] THAT I visited Central Police Station on 25th October 2012 and I established that the Occurrence Book was kept upto 2009, the rest have been destroyed after 5 years as stipulated in the Police Standing Orders.

[9] THAT it has been a challenge to trace the officer's who had led the matter, because all have retire from the Police, they are Mr Githiri (SP), CI Makokha, IP Chai, IP Oyamo and OP Bundi.

[10] THAT it is 27 years since, and we are not above to respond effectively and appropriately due to lapse of time and destruction of documents and even death of some of the officers. We are substantially prejudiced in terms of responding to the Petition.

44. Mr K'Opere, counsel for the petitioner, argued that the petitioner's averments were not controverted and that the allegations in the affidavit of Mr Mwaluko did not set out the basis on which the averments are made. Counsel noted that all the evidence available was set out in the proceedings as well documents presented during the trial and the testimony of SP Githiri, CI

Makokha, IP Chai, IP Oyamo and OP Bundi who gave evidence in the civil case involving the petitioner's companies. Counsel submitted that the respondents cannot argue that these persons cannot be traced. Mr K'opere emphasized that the law of limitation cannot be used to defeat claims based on the enforcement of fundamental rights and freedoms.

45. Before I consider the facts as presented, I must state that it is well established the law concerning limitation of actions cannot be used to shield the State or any person from claims of enforcement of fundamental rights and freedoms protected under the Bill of Rights (See ***Dominic Arony Amolo v Attorney General*** **Nairobi HC Misc. 494 of 2003 (Unreported)*, Wachira Waheire v Attorney General*** **Nairobi HC Misc. Civil Case no. 1184 of 2003 (OS) [2010]eKLR*, Otieno Mak'onyango v Attorney General and Another*** **Nairobi HCCC No. 845 of 2003 (Unreported)**). Although there is no limitation period for filing proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under **section 84** of the Constitution, is entitled to consider whether there has been inordinate delay in lodging the claim. The Court is obliged to consider whether justice will be served by permitting a respondent, whether an individual or the State in any of its manifestations, should be vexed by an otherwise stale claim. Just as a petitioner is entitled to enforce its fundamental rights and freedoms, a respondent must have a reasonable expectation that such claims are prosecuted within a reasonable time. The words of Didcott J. in ***Mohlomi v Minister of Defence*** **[1996] ZACC 20, 1997 (1) SA 124**, **129** are apposite in this regard, *"Inordinate delays in litigating damage the interests of justice. They protract the disputes over rights and obligations sought to be enforced, prolong the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of those whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken."* (See also ***Kenya Bus Service Limited and Another v Minister for Transport and Others*** **HCCC No. 504 of 2008 [2012]eKLR**).

46. Whether such a claim should be permitted is a question of fact dependent on the circumstances of each case. In the matter of ***Lt. Col. Peter Ngari Kagume & Others v Attorney General***, **Nairobi Constitutional Application No. 128 of 2006 [2009] eKLR** where Nyamu J. considering the issue of delay in filing a suit for the enforcement of fundamental rights and freedoms stated observed that, *"The petitioner had all the time to file their claim under the ordinary law and the jurisdiction of the court but they never did and are now counting on the constitution. None of the petitioners has given any explanation as to the delay for 24 years. In my view the petitioners are guilty of inordinate delay and in the absence of any explanation on the delay; this instant petition is a gross abuse of the court process …. In view of the specified time limitation in other jurisdictions the court is in a position to determine what a reasonable period would be for an applicant to file a constitutional application to enforce his or her violated fundamental rights. I do not wish to give a specific time frame but in my mind, there can be no justification for the petitioners delay for 24 years. A person whose constitutional rights have been infringed should have some zeal and motivation to enforce his or her rights. In litigation of any kind, time is essential as evidence may be lost or destroyed and that is possibly the wisdom of time limitation in filing cases."*

47. The petitioner has held his grievance about his arrest and detention since 1985. These facts were known to him throughout the trial and appeal from the conviction. I also note that during the time the petitioner was fighting criminal proceedings, he was also pursuing litigation through his companies in ***Intercom Services Ltd, Interstate Communications and Services Ltd, Swiftair (K) Ltd, Kenya Continental Hotel Ltd and James Kanyiita Nderitu v Standard Chartered Bank Kenya Limited Nairobi HCCC No. 761 of 1985 (***See ***Standard Chartered Bank Ltd v Intercom Limited and Others CA Civil Appeal No. 37 of 2003*** [**2004] eKLR** which determined the matter). I have perused the pleadings in that case which have been amended several times. In the further re-amended plaint 26th September 2000, the plaintiffs aver at paragraph 14, ***"As a result of the said breach, the 5th plaintiff in his official capacity as the managing director of the 1st, 2nd , 3rd and 4th Plaintiffs was arrested, charged and prosecuted in the Chief Magistrate's Court at***

Nairobi Criminal Case No. 1716 of 1985. The accused (5th plaintiff) was subsequently acquitted on appeal."

48. The reason I have cited a part of the plaint in ***HCCC No. 761 of 1985*** is that even at the time the suit was filed, the petitioner as the 5th plaintiff was clearly aware of the facts relating to his complaint. I do not think the petitioner has justified why he waited to lodge this claim after 26 years. In other cases where the period has been excused, the parties have justified the reasons why the case could not be filed for a long period of time. For example, in ***Wachira Waheire v Attorney General*** (**above**), wherein the plaintiff had brought his action about 16 years after the alleged contravention, the Court accepted the position that the claim could not be brought sooner due to the existing political situation. Other cases of this nature have been allowed because the petitioner has given an explanation as to why there has been inordinate delay in lodging the claim or that the respondent has failed to provide evidence of its prejudice or inability to defend the claim in face of the petitioner's assertions. (See ***Harun Thungu Wakaba & Others v Attorney General*** **(above),** ***Rumba Kinuthia & Others v Attorney General,*** **Nairobi HC Misc. Appl. No. 1408 of 2004 (Unreported),** ***Cornelius Akelo Onyango & Others v Attorney General*** **Nairobi HC Misc. 233 of 2009 (Unreported).*)***

49. Considering the deposition filed on behalf of the respondents and whose material parts I have set out at paragraph 43 above, it is clear that because of the lapse of time, the respondents have been denied the opportunity to clearly put forward evidence or justify the reasons for the pre-trial detention in terms of **section 72(3)** of the Constitution. The **Police Standing Orders, 7th Edition (2009)** entitle the respondent to destroy certain records from time to time and the Occurrence Book which contains the primary evidence of arrest and related documents would ordinarily be destroyed after five years. The Police Service is not expected to keep records in perpetuity. I do not find the facts asserted by the 2nd respondent to resist the claim that its right to fair hearing will be compromised unreasonable in the circumstances.

50. The evidence given by the police officers at the trial may not be useful to the respondents' in this regard as the matter in issue at the time was proof of the offence with which the petitioner was charged and not whether the petitioner's arrest was lawful. The respondent is entitled to consider what evidence it is entitled to call and this case requires an evaluation of the circumstances of the arrest and detention of the accused twenty six years ago.

51. In the case of ***Durity v Attorney General of Trinidad and Tobago*** **[2003] 1 AC 405** at **para 35**, the Privy Council, observed, *"In this context the Board consider it may be helpful if they make certain general observations. When a court is exercising its jurisdiction under section 14 of the Constitution and has to consider whether there has been delay such as would render the proceedings an abuse or would disentitle the claimant to relief, it will usually be important to consider whether the impugned decision or conduct was susceptible of adequate redress by a timely application to the court under its ordinary, non-constitutional jurisdiction. If it was, and if such an application was not made and would now be out of time, then, failing a cogent explanation the court may readily conclude that the claimant's constitutional motion is a misuse of the court's constitutional jurisdiction. This principle is well established. On this it is sufficient to refer to the much repeated cautionary words of Lord Diplock in* ***Harrikissoon v Attorney General of Trinidad and Tobago [1980] AC 265, 268****. An application made under section 14 solely for the purpose of avoiding the need to apply in the normal way for the appropriate judicial remedy for unlawful administrative action is an abuse of process."*

52. I have scrutinized the petition and the petitioner's affidavits and there is no explanation as to why he had to wait twenty six years to file this petition. If the petitioner chose to pursue his claim through a normal action in tort, such a claim would have been time barred at least within three years. Taking the evidence as a whole, I am in agreement with the respondents that the period of twenty six years, in the circumstances of this case, is an inordinately long time for the petitioner to have sat on his rights and then sprung up to assert violations of the Bill of Rights. I also find that that the respondents' defence would be prejudiced by the lapse of time.

Disposition

53. While I sympathise with the petitioner's cause, I am constrained to dismiss the petition for the reasons set out above. I will not award costs.

54. On 29th October 2012, I ordered the 1st respondent to pay to the petitioner the sum of Kshs. 150,000/00 being costs occasioned by adjournment of the hearing. As the sum has not been settled, I enter judgment for the petitioner against the 1st respondent for the sum of Kshs. 150,000.00.

55. I thank the counsel for their industry and helpful submissions.

DATED and **DELIVERED** at **NAIROBI** this 25th day of March 2013.

D.S. MAJANJA

JUDGE

Mr K'Opere with him Ms Kilonzo instructed by T. O. K'Opere and Company Advocates for the petitioner.

Mr Ojwang', Litigation Counsel with him Mr Opondo, Litigation Counsel, instructed by the State Law Office for the 1st respondent.

Ms Obuo, Senior Principal Prosecution Counsel, instructed by the Director of Public Prosecutions for the 2nd respondent.